THE HIGH COURT

[2021] IEHC 531

[2018 No. 172 CA]

BETWEEN

START MORTGAGES DAC

PLAINTIFF

– AND –

CHRISTOPHER CUSSEN AND ELIZABETH CUSSEN

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 27th July 2021.

I

Overview

1. This is in some ways an unfortunate case. When the defendants defaulted on their mortgage-secured loan, they owed arrears of in or about €15,000. While none of us would like to go home today and find that a bill for arrears of €15,000 had arrived in the post, as a sum of money it is an amount that should be repayable by many, if spread out over enough years so that the monthly payments are manageable. The court entertains no doubt that if the defendants had engaged properly with the mortgagee and engaged the services of a solicitor or paid an early visit to the Money Advice and Budgeting Service (MABS) some arrangement would have been arrived at to address the ongoing repayment of an outstanding loan of such a scale.

2. Regrettably, the defendants have thus far taken a stance *vis-à-vis* repayment of the moneys that they borrowed that is, with respect, most unwise. They have engaged in correspondence with the bank that was ill-advised. They have, since 2017, stopped making any effort at all to repay any of the monies that are outstanding. And while they have come up with all manner of complaints about the procedures and processes employed against them, they cannot get around the 'elephant in the room' which is that they freely borrowed money, they freely secured those borrowings on their home, those borrowings are contractually required to be repaid, and, regretfully, if they continue to refuse to pay back what is owing, they may yet lose their home.

3. The defendants should note that it was the very strong impression of the court at these proceedings that even now, if they will just 'play ball', *i.e.* engage properly with the mortgagee (which at all times has behaved properly and reasonably), engage properly with MABS, and perhaps also seek legal aid, there may still be a means of resolving matters without them losing their home. As a rule of thumb, there will likely be about 18-24 months before the possession order that the court will issue pursuant to this judgment will fall to be enforced. The defendants thus have a final window of opportunity to do as they ought to have done before now, which is to engage properly with the mortgagee, engage properly with MABS, and perhaps also seek legal aid. Though they are not assured of getting what they want if they proceed as just indicated the unattractive alternative, if they proceed in a manner akin to how they have thus far proceeded, is that, regretfully, they stand to lose their family home.

4. If the defendants engage with MABS or a solicitor or a financial advisor, they should let the mortgagee know that this is what they are doing. While Ms Cussen mentioned in court that she had made an approach to MABS and would also like to see if things could even now be resolved with the mortgagee, it was not clear that she had ever said any of this to the mortgagee, with the result that the mortgagee just did not know that there has been a possible 'change of heart' on the part of the defendants and that despite their past truculence, they may now wish to engage properly as regards the repayment of their debt.

II

Strange Documents

5. There is an aspect to this case which is troubling to the court. There are unregulated charlatans 'out there' who are not regulated professionals and who do not act for a State body such as MABS but who purport to 'assist' vulnerable people in debt, selling them a crock of nonsense that there is some 'trick of the legal loop' through which one can readily and simply avoid the repayment of lawfully incurred debts. Such people are fraudsters who, like all fraudsters, prey on the vulnerable. Here, the defendants, people whose indebtedness made them vulnerable, either fell into the clutches of such charlatans or else downloaded documents that one or more of these charlatans has drafted and/or uploaded to the internet for the vulnerable to use. The court gives below some examples of the oddities that these documents include:

(i) **document-headings stating "*NOTICE TO AGENT IS, NOTICE TO PRINCAPLE IS, NOTICE TO AGENT*".** This mis-spelled statement seems designed to look official but makes no sense: who is the agent/principal of whom mention is made and what on earth is the purpose of the notice?

(ii) **purporting to require court officials to answer questions within a stated timeframe; otherwise the court official is stated to agree with whatever idea is being advanced.** There are at least two problems with this line of action. First, it is not for court officials to offer a view on jurisdiction; that is a matter for the trial judge. Second, in real-life, it is simply not possible to bind a State official by writing a letter offering a point of view and say 'Unless you answer my questions by X date, you will be taken [by whom?] to agree with my point of view'. Private persons do not enjoy such powers of coercion.

(iii) **making strange assertions such as "*The high court land registry act as our trustees in regard to folios*".** Presumably, this is intended as a reference to the Land Registry, which, in the registration of land parcels, does not

act as a trustee of a mortgagor of registered land. Here, in any event, the land in play is unregistered land.

(iv) **making strange assertions concerning one's person/living status, for example:**

> "[1] *We are living man & living woman*. [2] *We are not a 'commercial corporations';* [3] *Nor are we 'things' to be salvaged, nor are we a surety for either;* [4] *Thus we do not consent to this matter being heard in and under, statute/uniform commercial codified law 1933 format, and we do not consent to this matter being heard in and under maritime/ecclesiastical/canon law 1986 format.* [5] *As we are living and we are NOT dead – all title in our estates has been revested, with profits and interest – as per section IV of your cestui qui vie act of 1666*".

The just-quoted text is wanting in sense. As to [1], one cannot escape liability on a debt simply by dying. As to [2], no-one has ever claimed that any of the defendants is a company. As to [3], there is no suggestion that any of the defendants is a 'thing', and the court has no idea what the reference to salvage is supposed to convey. As to [4], the phrases "*uniform commercial codified law 1933 format*" and "*maritime/ecclesiastical/canon law 1986 format*" make no sense as a matter of Irish law. As to [5], the court is mystified by the reference to the Act of 1666. That was an Act enacted by the English Parliament in the reign of Charles II for England and Wales. (It was not until 1695 that the Irish Parliament adopted a similar measure by way of the Life Estates Act of that year). The preamble to

the Act of 1666 indicates that its enactment was prompted by the fact that there had been situations where tenants for life effectively disappeared, causing difficulties for the landlord and any reversioners. Unless it could be proved that the tenant was actually dead, the estate could end up in a form of legal limbo. To avoid these problems, the Act allowed life tenants to be declared dead if they went missing for seven years or more. Thereafter, a landlord or reversioner could launch an action to recover the estate. But under s.IV if the tenant subsequently turned up alive, they could regain the estate along with damages. Leaving aside the territorial application of the Act of 1666, quite what any of this has to do with enforcing the loan in issue in these proceedings is entirely unclear to the court: what seems to be at play is a misreading of s.IV divorced from its historical context, express wording, and jurisdictional application, in short a form of legal nonsense.

(v) **invoking irrelevant religious documentation,** *e.g.*, "*The MOTO PROPRIO of francis is in full force and you are not immune from the criminal sanctions associated with same*". A 'motu proprio' is a form of papal document and the current Catholic pontiff – presumably the 'Francis' to whom reference is made, albeit using a disrespectful small 'f' – may be an esteemed gentleman but he has nothing to do with the enforcement of debts owing under Irish contract law and no role in Irish criminal law or in Irish law more generally.

(vi) **engaging in direct correspondence with judges demanding that they answer questions.** This is improper, involving an attempt to interfere with the due, open, and impartial administration of justice.

6. The court could go on but will not. It would simply urge all borrowers (i) to avoid unregulated charlatans who offer false hope that repayment of lawfully incurred debts can be readily evaded through some 'trick of the legal loop', and (ii) to avoid sending correspondence containing fanciful assertions/propositions/text such as that considered above. What would any lender/mortgagee make of the above (and there is much more of the like before the court) but that (i) the defendants are not debtors who wish to engage seriously in terms of bringing some sort of resolution to a default scenario presenting, and (ii) the proceedings commenced against them are singularly unlikely to settle and will almost certainly proceed to judgment? If a borrower gets into financial difficulty the proper people to engage with are (a) the lender/mortgagee, (b) regulated professionals (such as solicitors, barristers, and accountants), and (c) State bodies such as MABS, the Citizens Advice Board, the Free Legal Aid Board, and the Financial Services and Pensions Ombudsman (these State bodies have the public interest at heart and are free to use). To proceed otherwise is to run the risk of otherwise potentially avoidable financial disaster.

7. If the idea of the blizzard of bewildering documentation unleashed by the defendants on Start Mortgages as part of these proceedings (what counsel for Start referred to at one point as "*litigation by filibuster*") was to create the impression of a level of dispute which required that matters should go to plenary hearing, matters do not go to plenary hearing when a mortgagee (as here) has all its proofs in order, establishes its case on the balance of probabilities, and defendants (as here) at no point properly engage with the mortgagee's case and have no good defence.

III

Facts

8. By letter dated 15th May 2007, Permanent TSB, the plaintiff's predecessor in title agreed to make a loan facility available to the defendants. This letter included, *inter alia,* the following express and/or implied terms, *viz.* that: (i) the term of loan facility was to be for a period of 15 years, (ii) repayment of the loan facility was to be made in the form of monthly instalments of principal and interest; (iii) interest would apply to the loan facility at a variable rate; and (iv) in the event that the defendants defaulted in the making of two monthly repayments for two months in the payment of any other moneys payable under the mortgage entered into by them

to secure the loan, the plaintiff's predecessor in title would be entitled to terminate the facility and demand immediate repayment of all sums outstanding under the loan. The plaintiff in the within proceedings has since been duly substituted for Permanent TSB, following on its acquisition of, *inter alia*, the said loan made by Permanent TSB to the defendants.

9. On or about 13th June 2007, the defendants acknowledged in writing their acceptance of Permanent TSB's letter of approval. Thereafter, on or about 20th July 2007, the sum of €24k was advanced by Permanent TSB to the defendants in pursuance of the letter of approval and the terms and conditions referred to therein. On or about 19th May 2009, 1st October 2009, and 22nd January 2010, and 11th May 2010, the sums of €20k, €23k, €20k and €8k respectively were advanced by the plaintiff to the defendants on like basis.

10. By way of security for the loan facility the defendants executed a mortgage in favour of Permanent TSB on 13th June 2007 over certain property in the south-east of the country (the 'Mortgaged Property'). The said mortgage, at clause 7, incorporates the plaintiff's Mortgage Conditions 2002. (Separately, there are General Mortgage Loan Approval Conditions, as referred to in the "*Acceptance of Loan Offer*" dated 13th July 2007, to which the court has also had regard, including when it considered matters from an unfair terms perspective).

11. The terms of the mortgage were duly accepted and signed by the defendants and, on or about 17th April 2012 the mortgage was duly registered with the Registry of Deeds.

12. In breach of the terms of the mortgage and of the letter of approval and of the General Mortgage Approval Conditions, (i) on or about 21st May 2011 and on various dates thereafter the defendants failed to make repayments of principal and/or interest as they fell due, (ii) the defendants defaulted in making payment of the monthly principal and/or interest, with the arrears accruing to twice the due monthly amount and continuing to be in arrears from 21st June 2011, (iii) despite written demand the defendants have failed to repay the secured monies. Permanent TSB's (and hence the plaintiff's) power to sell the mortgage property have arisen and become exercisable. (There was one payment made in 2015, no payment in 2016, one payment in 2017, and no payments thereafter).

13. In the Circuit Court, an order for possession was made against the defendants. They have appealed that order to the High Court. Ms Cussen has also brought a motion to adduce fresh

evidence on appeal. (There was no need to hear this motion as Start was satisfied for the relevant affidavit evidence to be admitted before the court; however it took issue with the substance of this affidavit evidence). There was also a motion before the court to adjourn this matter to plenary hearing. This motion was not necessary: if the court considered that this was a case that required a plenary hearing (it is not) it could have ordered that in any event. (The court could also have dismissed Start's case but that involves a high threshold before it can be done and this case is far removed from a case that might merit dismissal).

14. In passing, the court notes that (1) there was a typographical error in the original order for possession in that it referred to the plaintiff recovering from the "*Defendant*", as opposed to the 'Defendants'; however, a successful application to amend this error was brought before the Circuit Court and was granted, such that "*Defendant*" now reads "*Defendants*"; (2) there was an error made in the course of the Circuit Court proceedings wherein, following on the granting of the order of possession, application was made for the substitution of Start Mortgages for Permanent TSB *and also* for an order for execution; the order for execution could not be granted with this appeal pending and was not granted, so the fact that it was sought is of no real significance and in any event this issue has not been appealed to this Court (and would in any even have been held by the court to be a matter of no consequence).

15. At the appeal hearing the first-named defendant did not appear to defend himself. The second-named defendant appeared and represented herself.

IV

Some Arguments Made by the Defendants

16. The defendants have made a vast number of wide-ranging arguments in this case. The court has tried in this judgment to capture all the arguments made, though much of the documentation before the court is so unusual that at points it has been hard to follow. A striking feature of the arguments made by the defendants throughout the proceedings is the continuing effort never to engage with the substance of what must be engaged with, *viz.* their continuing default on their loan obligations. That is all that the mortgagee is concerned with, and that is what the defendants have never properly addressed.

Argument #1

That the Circuit Court did not have Jurisdiction.

17. Contrary to the assertion made by the defendants that there is no mention of any Act on the face of the civil bill, in fact para.14 of the Special Indorsement of Claim in the Civil Bill invokes the Land and Conveyancing Law Reform Act 2013. And it is also pleaded that the house is the principal private residence of the defendants (a point that is essentially confirmed by them in their own affidavit evidence). So no issue of jurisdiction presents.

Argument #2

That Sending Unanswered Letters to the Circuit Court President and the County Registrar Renders the Within Proceedings Deficient.

18. Once Circuit Court proceedings commence there are formal processes in place whereby parties file and exchange documents and proceed with their case. Order 5 of the Circuit Court Rules is relevant here. These formal processes exist to ensure maximum fairness (a 'level playing field') for all. It was not for the defendants to invent their own procedures, write letters setting timelines for the reply, and then claim that because their self-invented procedures were not complied with this somehow robbed the Circuit Court of jurisdiction. The defendants could, for example, have gone to FLAC or even read the rules for themselves and then complied with them. That they appear to have done neither is, with all respect, their responsibility.

Argument #3

That filing a standard financial statement was not a mortgage obligation.

19. A lender/mortgagee cannot help those who will not help themselves. As part of the Central Bank-inspired process whereby lenders/mortgagees treat with mortgagors in default, they seek a standard financial statement of defaulters. This document is sought to help mortgagors. It enables a bank to get a view of the financial position presenting in any one case. Yes, such a form is not required to be provided in the terms and conditions. But it is, with all respect, a most strange position for defaulting mortgagors to adopt that they should state in effect, 'Yes,

we borrowed money; yes, we have defaulted; but no, we won't give you a statement of my financial position so that you and we can discuss, like responsible adults, how best to proceed'. The tragedy of this particular case is that the amount owing when the defendants went into default is an amount of such a relatively small scale (at least when compared with some of the cases that the court sees) that one suspects the issue of default and the restructuring of repayment could quickly have been resolved by way of agreement between the parties, had the defendants simply 'played ball' with the mortgagee instead of refusing to provide sensible detail on the basis that the provision of such detail was not mandatory as a matter of law.

Argument #4

That the Defendants did not consent to the within proceedings.

20. Ms Cussen contends that because she has not consented to these proceedings they could not properly be brought. The proposition need only be stated to see that it is wrong. A courts-based system of justice is not a system of arbitration; court proceedings are not arbitration proceedings that proceed with the consent of all the parties thereto. The courts have been established by the People through the Constitution to ensure that law and order prevail over chaos in the State – and chaos there would be if, for example, one could borrow money of a lender but that lender could only sue for its monies if a borrower consented to being sued. For the truth is that no borrower would ever consent to being sued and no loaned monies would therefore be recoverable by way of court proceedings, with the result that the provision of credit in the State would quickly dry up and the national economic order would quickly descend into disorder.

Argument #5

*That the term "*principal private residence*" is not defined in the Act of 2013*

21. This contention is correct. The term "*principal private residence*" is not defined in the Act of 2013. But that does not mean that the term is without meaning. Rather, the term bears its ordinary English meaning. If authority is needed for this elementary proposition it is to be found in *Haven Mortgages Ltd v. Keogh* [2017] IEHC 601, at para.12, where Noonan J. states that "*The expression 'principal private residence' is not defined in the Act. However, the court*

must give it its natural and ordinary meaning". There is no doubt that the mortgaged property is the 'principal private residence' of the defendants. It is essentially acknowledged by them to be such in affidavit evidence that they have placed before the court.

Argument #6

That there has been a breach of the Unfair Terms in Consumer Contract Regulations

22. The court has read all the relevant documentation and is unable to see a single term that could properly be described as unfair in how it operates between the parties to these proceedings. This Court looked at the 2002 Conditions previously in *Kearney v. Permanent TSB Plc* [2018] IEHC 159 (see para.17) and likewise found that no issue presented. However, the court respectfully does not accept, as was, at least initially, posited by counsel for Start in these proceedings, that the court is necessarily bound by its decision in *Kearney* to reach the same conclusion here. For while the conditions may be the same, the parties, circumstances, and the moment in time at which the terms are considered are all different, with the result that a court could find itself bound but not necessarily so. Why so? Because, to borrow from Heraclitus, one cannot step into the same river twice: it is eminently possible that a situation could present in which (i) a term could be found to be an unfair term in how it operates between parties A and B even though it does not present an issue as regards parties A and X, or (ii) more likely perhaps, that as the understanding of certain clauses evolves, *e.g.*, following on the continuing work done by the Consumer Protection Cooperation Network, a clause considered at one point in time to be unobjectionable may come to be perceived as objectionable. The court is reassured in making the foregoing observations by those made by O'Malley J. last year in *Pepper Finance Corporation v. Cannon* [2020] IESC 2 (opining on this Court's judgment in *AIB v. Counihan* [2016] IEHC 752), where she observed as follows:

> "*115. I am not sure that the question posed by Barrett J. gives rise to any real difficulty – the findings of one court in respect of A, B and C will not bind a subsequent court dealing with X, Y and Z….*
>
> *116. It seems to me that a finding by a superior court that a particular term is fair or unfair* ***may*** *be binding. This will*

to some extent depend on the circumstances" [Emphasis added].

23. In passing, the court notes that the fairness of the contract before this Court in *Counihan* most certainly was assessed for fairness, as is expressly indicated in *Counihan*, at para.22. It just happened that this Court independently arrived at the same conclusion that had previously been volunteered by counsel for the Counihans. (Presumably a court undertaking this type of task is likely typically to find that its views will accord with the views of one or other side in the proceedings before it).

24. Here, in any event, the court has reached the same conclusion that it reached in *Kearney* so no issue as to (the court's own) precedent presents.

Argument #7

That the defendants have not had opportunity properly to defend these summary proceedings.

25. They have, both at Circuit Court level and again in the High Court.

Argument #8

That there have been breaches of human rights law and international instruments.

26. The defendants contend that the within proceedings contravene their rights under human rights law, under the European Social Charter, as revised. There is no specificity to the claim about human rights, the Social Charter does not yield rights directly under Irish law and, as to the European Convention on Human Rights, the judgment of McKechnie J. in *Launceston Property Finance Ltd v. Burke* (considered later below) is authority for the proposition that in a suit such as the within ECHR rights are not engaged in the manner contended for by the defendants.

27. It is important also to remember, amid all this mention of rights, that there is one right which has very clearly been breached here, which is the contractual right of Start Mortgages to be repaid monies that were lawfully loaned in a lawful transaction that the defendants lawfully

and freely participated in. A lawful contract enables the parties thereto to harness the state's powers of coercion for their own ends. A state which fails to enforce lawful contracts is a failed state, for it returns those whom that state is charged to protect to the original vulnerability of possession and transactional insecurity which present where there exists no common power set over all with right and force sufficient to compel due contractual performance.

Argument #9

That sight of original mortgage documents has been refused

28. What has been sought in this respect is, in effect, a form of discovery in the context of summary proceedings. The form of discovery was sought and refused at an earlier stage of these High Court proceedings and will not be revisited here. The court would but note in passing that there is no 'magic' to original documents: even if original loan/mortgage documents were lost or destroyed, a lending institution could proceed on copy documents (or on other evidence of a transaction): it would still but have to establish an outstanding contractual liability on the balance of probabilities.

Argument #10

That the Master made some comments favourable to the defendants

29. Out of kindness to the defendants, the Master, at an earlier stage of these proceedings, made some comments favourable to them. The court is not bound by those well-intentioned remarks. It notes that the Master, *inter alia*, rightly pointed to the order for possession being sought in this case over what, for an institutional mortgagee, is not the greatest sum of money; however, the court respectfully does not see how Start could have otherwise proceeded given the hostile and, frankly, perplexing nature of the response that it has received from the within defendants in terms of trying to resolve matters with them. The defendants have at no point engaged properly with Start and no institutional lender is lightly going to write off arrears liabilities that are currently 'north' of €60,000, thanks to the long years in which the defendants have failed to engage properly with Start (their failure in this regard continues), acted in a manner towards Start that was most unwise (it is not Start that has defaulted on its contractual obligations), and not paid a single cent since 2017, and all over a debt that started out at a level

which the court is eminently confident could have been the subject of some form of equitable private resolution as to repayment had the defendants but engaged as they ought to have done – and can still do.

30. The court notes that reference was made to a decision of the Master of 14th May 2019 in which the Master highlighted the importance of fairness of procedures. The court is not bound by decisions of the Master but has no difficulty with the proposition that there is a constitutional entitlement to fairness of procedures. Here, however, the defendants have benefitted from fairness of procedures. One might almost contend that they have been the beneficiaries of a surfeit of fairness, if such a thing is possible. And fairness of procedures is, of course, a two-way affair: a mortgagee is entitled to fairness of procedures also.

Argument #11

That the benefit of an order for possession cannot be assigned

31. It can. (See *Bank of Ireland Finance Ltd v. Browne* (considered later below)).

Argument #12

That the property (and the charge on same) has not been registered with the Land Registry

32. It has been registered at the Registry of Deeds.

Argument #13

That there was undue influence at play in taking out the credit and effecting the mortgage

33. This is mooted in an affidavit of Ms Cussen and it is not clear whether she means that she was unduly influenced by her husband or *vice versa*. However, the parties enjoyed the benefit of legal advice as regards the execution of the mortgage, so this argument does not stand up to scrutiny. Maybe the solicitor who dealt with the mortgage gave no advice on the related credit (the court does not know); however, there is no requirement that parties should have received legal advice for the issuance of a loan to be valid, and beyond the bald (and vague) averment

as to undue influence there is no evidence of such undue influence before the court. The court sees no such undue influence to have presented.

Argument #14

That there has been some (vaguely referenced) GDPR breach by Permanent TSB and/or Start

34. If so (and the court does not know if there has been such a breach) that is a matter for stand-alone complaint that does not impact on these proceedings.

Argument #15

That legal costs were added to the arrears outstanding

35. There was a historical practice of Permanent TSB to apply legal expenses to a mortgage account. Ms Cussen has taken issue as regards the exact sum of money due and owing by the defendants. However, this is an action for possession, not for summary judgment and so the focus of the court is on whether there have been no defaults in the making of the monthly repayments (there have been significantly more than two) and not the exact figure owing. Whether Permanent TSB was right or wrong to apply legal expenses in the manner that it did is, therefore, a matter that does not fall to be decided by the court at this time.

Argument #16

That there was a contretemps with a summons server

36. There appears to have been some form of contretemps with a summons server. However, an order for substituted service was later obtained and service was duly effected.

Argument #17

That there was non-compliance with the Code of Conduct on Mortgage Arrears

37. There is Supreme Court authority (*Irish Life v. Dunne* (considered later below)) to the effect that the only matter which arises for consideration in the High Court, when it comes to non-compliance with the Code of Conduct on Mortgage Arrears, is whether the time within which a financial institution may not institute proceedings (formerly the 'moratorium period') has been duly observed by the relevant institution: here the evidence before the court establishes that it was.

Argument #18

That Mr Cussen was handling matters with the mortgagee, not Ms Cussen

38. At all times correspondence was sent to Mr Cussen and also to Ms Cussen. So Ms Cussen was placed by the mortgagee in a position where she knew how matters were proceeding and could decide herself how best to proceed. Even at the hearing of the within proceedings Start continued, to use a colloquialism, 'to hold out the olive branch' that Ms Cussen could seek to engage with Start if she wished.

Argument #19

That Start is not the right plaintiff

39. The mortgage in this case was executed on 13th June 2007. The loan to which it relates was accepted by the defendants on 13th July 2007. The relevant mortgage conditions are the 2002 mortgage conditions. Notable in these conditions are cl.6.7 which provides, *inter alia*, that "*Permanent TSB may at any time (without the consent of the Mortgagor) transfer the benefit of the Mortgage to any person)…*" and cl.7 which provides, *inter alia*, that "*The Total Debt shall become immediately payable to Permanent TSB…*[i]*f the Mortgagor defaults in the making of two Monthly Repayments…*". When these proceedings started out, the plaintiff was known as Irish Life and Permanent plc. It then changed its name to Permanent TSB plc, and it was in this guise that the loan in issue issued. By deed of transfer of 1st February 2019, Permanent TSB plc transferred all its rights, etc. in a portfolio of loans that included the defendants' loan to Start Mortgages DAC. Pursuant to this arrangement, so-called 'goodbye' and 'hello' letters issued from Permanent TSB/Start on 1st and 7th February 2019 respectively to the defendants. Start has satisfied the court on the balance of probabilities (though in truth

there is no doubt at all) that there was due assignment by Permanent TSB plc to Start Mortgages DAC, due notice of that assignment, and that Start is the correct plaintiff in these proceedings.

Argument #20

That the mortgage pre-dates the acceptance of the loan

40. No monies were advanced prior to the acceptance. Even if the monies had been advanced that would not present an insurmountable issue in circumstances where the execution of the mortgage and the occurrence of the loan are all part of the one transaction. The court notes in passing that clause 2 of the deed of mortgage provides that it is security for all present and future advances by the Mortgagor.

Argument #21

That, up to 2017, some (in truth, notably limited) efforts at repayment were made post-default

41. For the purposes of the within application, the relevant point is that the requisite number of defaults occurred for the within proceedings to ensue. The problem for the defendants is that they never in any meaningful sense engaged with the mortgagee as regards the repayment of the outstanding arrears. There was suggestion by Ms Cussen that she did not know what was being said internally in the bank about its possibly holding off on proceedings such as the within if the arrears were repaid. (This has become known to her as a result of documentation later obtained from the mortgagee, it seems pursuant to a data protection request). There are two problems with this proposition. First, if (as here) a defaulting mortgagor does not engage meaningfully with a mortgagee, that mortgagor cannot know what the mortgagee's general thinking is (nor can the mortgagee know what the mortgagor's general thinking is). Second, as a matter of common-sense, if outstanding arrears are paid, or even well on the road to being repaid, obviously that will have potential implications for the prospects of mortgagee success in proceedings such as the within.

Argument #22

That the mortgagee engaged in reckless lending

42. There is no tort of reckless lending presently known to Irish law and it is not within the competence of the courts to invent such a tort: see *ICS Building Society v. Grant* [2010] IEHC 17, at para.6.[1]

Argument #23

That Ms Cussen gave some indication of wishing to speak with Start Mortgages

43. Ms Cussen gave this indication in correspondence with the bank, albeit that her willingness to engage properly may understandably have gone unappreciated (or not been entirely believed) by a lender/mortgagee which was confronted in the same (hostile) letter with questions about its reserving practices (which one would have thought was more a matter for the Central Bank) and whether it had engaged in reckless lending. In any event, as the court has now repeatedly stated, it was made expressly clear to Ms Cussen in court that she can still re-engage with Start: to this time she has elected not to do so.

Argument #24

That MABS indicated that it would only assist when the possession order was obtained

44. This was a point made by Ms Cussen in her submissions and is not supported by any evidence. MABS is not party to the proceedings and was not represented at the proceedings so the court has no idea where the truth of matters lies in this regard. What it does know is that even if this was said to Ms Cussen (and the court has no idea if it was), it has no impact on the within application.

Argument #25

[1] Such a tort could of course be invented by statute and, while this has not been done, there is longstanding academic commentary as to how and why it might be done. See, for example, Professor Countryman's "Improvident Credit Extension: A New Legal Concept Aborning?" (1975) 27(1) *Maine Law Review* 1, at pp.17-18. Judges, of course, must treat with the law as they find it, not as learned commentators suggest that it might be remade through statutory intervention, and the law as to the tort of reckless lending is as stated in *Grant, i.e.* there is no such tort presently known to Irish law and it is not within the competence of the courts to invent such a tort.

That Start has unfairly sought to avail of a fast-track procedure

45. The Civil Bill issued in September 2014. These proceedings have therefore been anything but 'fast-track'. At any time following on the issuance of that Civil Bill, the defendants could have sought to engage properly with the mortgagee, they could do so still, and yet they have failed to do so.

Argument #26

That the court should have regard to certain general observations of the ECB

46. ECB observations, though clearly emanating from an esteemed body, are not determinative of parties' rights in a possession application.

Argument #27

That Start may have difficulty exercising a right of way vis-à-vis the mortgaged property should it enter into possession of same

47. This is an issue for another day, not for these proceedings.

V

Some Legislation and Rules of Relevance

a. Supreme Court of Judicature Act 1877

48. Section 28(6) of the Act of 1877 makes provision as to how an assignment is effective. As is commonplace with 19th century statutes, the wording of the provision is notably dense, providing as follows:

> "*Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action,* ***of which express notice in writing shall have been***

given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law *(subject to all equities which would have been entitled to priority over the right of the assignee if this Act had been passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge foe the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other conflicting or opposing claims to such debt or chose in action, lie shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees*" [Emphasis added].

49. Is it possible to break this provision down into more comprehensible chunks? It is certainly worth trying:

– first, it is concerned with (a) an absolute assignment, (b) made in writing by an assignor, (c) of any debt or other legal chose in action, (d) where such assignment does not purport to be by way of charge only, and (e) express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action;

[It is this limb of s.28(6) that Finlay Geoghegan J. essentially paraphrases in *O'Rourke v. Considine* [2011] IEHC 191. The court has been referred to *LSREF III Stone Investments Ltd v. John Morrissey* [2015] IEHC 603, at para.24, where Costello J. refers to "*the four conditions to*

be met for an assignment to be valid under s.28(6)". The court respectfully does not see that s.28(6) is concerned with validity. It simply identifies the criteria necessary for that provision to apply. It is perfectly possible for an equitable assignment to present that is legally valid but which does not come within s.28(6).[2] The court notes that the s.28(6) criteria are met here and also (the point arose) that the signature/seal of the assignee is not required.]

– second, subject to all equities which would have been entitled to priority over the right of the assignee if the Act of 1877 had not been passed, all assignments which meet the just-described criteria are effective in law to pass and transfer (i) the legal right to such debt or chose in action from the date of such notice (not the date of assignment), (ii) and all legal and other remedies for same, and (iii) to give a good discharge for same, without the concurrence of the assignor.

– third, a proviso applies. That proviso is this: if (I) the debtor, trustee, or other person liable in respect of the assigned debt or chose in action (the 'Owing Party') has had notice that such assignment is disputed by the assignor or anyone claiming under the assignor, or of any other opposing or conflicting claims to such debt or chose in action [essentially (a) a thing recoverable or (b) a right claimable/enforceable by action], then (II) that Owing Party is entitled, if that Owing Party thinks fit, (A) to call upon the several persons making claim to the assigned debt or chose in action to interplead concerning same, *or* (B) to pay

[2] As is made clear by Lord Macnaghten in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co. Ltd* [1905] A.C. 454, at p.462, it is also prudent to ensure that notice of an equitable assignment is given to a third-party debtor. (The classic definition of what constitutes an equitable assignment over a debt remains that offered by Lord Wrenbury in *Palmer* v. *Carey* [1926] A.C. 703, at p.706, albeit that Lord Wrenbury really but echoes Lord Chancellor Truro in *Rodick* v. *Gandell* (1852) 42 E.R. 749 in this regard).

the amount that is the subject of the opposing or conflicting claims into court (in which case the Owing Party proceeds under and in conformity with the statutory provisions concerning the relief of trustees).

50. As is clear from the highlighted text in s.28(6), it is the giving of notice that makes good the assignment for the purposes of s.28(6). Here such notice was given by the 'goodbye' letter (and also by the 'hello' letter as it happens but the 'goodbye' letter sufficed for the purposes of s.28(6)).

a. Courts of Justice Act 1936

51. Section 37 of this Act provides for appeals from the Circuit Court to the High Court. Section 37(2) has the effect that the within proceedings received a *de novo* hearing before this Court. It provides as follows:

> "*Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made*…".

b. Land and Conveyancing Law Reform Act 2013

52. Section 3 of the Act of 2013 is the provision that saw these proceedings commence before the Circuit Court. It provides, *inter alia*, as follows:

> "*(1) This section applies to land which is the principal private residence of—*
> *(a) the mortgagor of the land concerned, or*
> *(b) a person without whose consent a conveyance of that land would be void by reason of—*
> *(i) the Family Home Protection Act 1976, or*
> *(ii) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010,*

and the mortgage concerned was created prior to 1 December 2009.
(2) Subject to subsection (4), proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates and which land is land to which this section applies shall be brought in the Circuit Court."

VI

Some Case-Law of Relevance

a. *Bank of Ireland Finance Ltd v. Browne*
(Unreported, High Court, Laffoy J., 24th June 1996)

53. This case is authority for the proposition that after an order for possession is granted, the party entitled to that order may transfer its entitlement to enforce to another party. In her judgment, Laffoy J. observes at p.2 of her judgment that "*The Defendants did not and could not seriously contend that an order should not be made under O.17, r.4.*" Here such an order was made at a previous stage of the within proceedings, substituting Start as the plaintiff.

54. Laffoy J. then moves on to observe as follows, at p.7:

> "*Under the terms of the Charge, the Plaintiff was entitled to transfer the security thereby constituted to a third party without the consent of the Defendants after its power of sale had become exercisable*",

further noting as follows, at p.8:

> "*It cannot be disputed that the interest of the Plaintiff under the Charge is now vested in the Applicant and that the Order for possession of 15 July, 1985 ensures for the benefit of the Applicant qua mortgagee. It is not disputed that the default which gave rise to the mortgagee's entitlement to an order for possession – the default in payment of the mortgage debt – has not been remedied.*"

55. It follows from the foregoing that if Mr and Ms Cussen had sought, following, say, on Ms Cussen's taking new employment, to engage properly with the mortgagee and address the arrears scenario, it would be very difficult to persuade any court to issue an order for possession. Counsel for the mortgagee indicated that such difficulty would present only if the arrears had been reduced to zero. However, it is not difficult to imagine a court reading into an agreement whereby an arrears correction process was agreed between mortgagee and mortgagor an understanding that (subject of course to the parties expressly agreeing the contrary) an understanding that provided that arrears correction process was complied with no order for possession would be sought.

b. *Anglo Irish Bank Corporation plc v. Fanning*
(Unreported, High Court, Dunne J., 29th January 2009)

56. This was a case where the defendants maintained that they had a defence/counterclaim to part of the debt claimed to be due and owing. The bank argued that this was not a defence to possession proceedings. In the course of her judgment, Dunne J. referred to *Birmingham Citizens Permanent Building Society v. Caunt* [1962] 1 Ch.883, observing, *inter alia*, as follows, at p.10:

> "*In the* Birmingham Citizens Permanent Building Society v. Caunt *case which is relied on by Mr Murphy, it was stated by Russell J. at p 891 as follows:*
>
> > *'There appears no trace, prior to 1936, of any right in any court to deny a mortgagee asserting or claiming his right to possession, the appropriate order – though to this a qualification has to be made in that a court in the exercise of its inherent jurisdiction for proper reason to postpone or adjourn a hearing might by adjournment for a short time afford the mortgagor a limited opportunity to find means to pay off the mortgagee'*"

57. In other words if a mortgagor can redeem the full mortgage, the court can adjourn the matter and not hear it. If the defendants were engaging properly with the mortgagee, even at

this late stage, the general approach of the Irish courts is to give time for that engagement to 'play out' rather than issue a possession order. But, again, the courts cannot help mortgagors who will not help themselves, and the defendants in this case, by their continuing non-engagement have done nothing to help themselves in terms of how they are positioned *vis-à-vis* the mortgagee.

58. Dunne J. moves on in her judgment to observe as follows, at p.11:

> "[I]*t is contended* [here] *that regardless of any dispute over the part of the loan attributed to the purchase of shares, there is a sum due in respect of the home-loan element of the borrowing. There is default in respect of that element of the loan and therefore the Plaintiff is entitled to possession.*
>
> *I find it difficult to disagree with the proposition.*"

59. In the within proceedings, there is default in the form of two missed payments (in truth there are multiple missed payments but two suffice); Permanent TSB were entitled to an order for possession, and Start Mortgages are entitled to same. Again, if there had been any meaningful engagement by the mortgagors with the mortgagee to resolve matters, they could have made a convincing case for an adjournment just to see if anything would come of those negotiations. Here, there has been no meaningful engagement.

c. *Irish Life and Permanent plc v. Dunne*
[2016] 1 I.R. 92

60. This case is of note for the observations of Clarke J., as he then was, in the Supreme Court as to what a court can consider by way of compliance with the predecessor Central Bank code of conduct to the Central Bank code of conduct on mortgage arrears that applies here. In the course of his judgment, Clarke J, observes as follows, at p.120:

> "[T]*he Code (being the version applicable to this case) does make some provision for the moratorium period being cut short (see step four of the MARP provisions) or not applying (see provision 48). I am, in this*

section of this judgment, dealing with a situation where an application for possession has been brought at a time when the Code precludes such action. Like consideration would apply to any similar provisions in the current or any future versions of the Code."

61. The above text is notable for extending even to future versions of the Code (presumably on the assumption that statute had not in the meantime intervened to alter the application of the Code). Here, the case is of somewhat limited relevance because the lender-mortgagee has not acted prematurely by reference to the current mortgage arrears code.

d. *Launceston Property Finance Ltd v. Burke*
[2017] 2 I.R. 798

62. Here, an order for possession was granted to Launceston against Mr and Ms Burke. Launceston being a fund that had purchased the original asset. In his judgment, under the heading "*Article 8 ECHR*", at p.820, McKechnie J. observes as follows:

"[I]*t is tremendously difficult to see how Article 8 of the Convention* ["*Right to respect for private and family life*"] *could be engaged in the circumstances of this case…. The interference with the appellants' property rights in the present case arises as a result of their personal and voluntary decision to enter into a commercial transaction(s) where, as security for money advanced, they committed the properties in question, including the family home, to the Bank…. the mortgagee's right to possession and sale of the properties arises as a matter of contract law, pursuant to an arrangement between private parties. Accordingly, it is somewhat difficult to see how Article 8 of the Convention, or Article 1 of the First Protocol, could in some way debar the respondent's right to enforce the contract so entered.* "

VII

Conclusion

63. For the various reasons outlined above, the court will make the order for possession sought.

64. The court will not grant any stay on the order for possession. This is because following on the order now being made, before actual possession is eventually effected, *i.e.* the order for possession is executed, the mortgagee will have to bring a fresh motion in the Circuit Court for execution, there will be no return date before the autumn of this year, that motion will have to be heard by a judge, and there is a right of appeal from whatever that judge decides. So, depending on how matters proceed, there could be another 18–24 months before the order for possession falls to be enforced. If Mr and Ms Cussen will just do the sensible thing and engage properly with Start (and with MABS) even at this late stage – and, at least to the court, this would seem the most prudent course of action for them to take – there is time galore in that 18-24 month period to see if there is some means of arriving at a repayment solution between themselves and Start that will not involve them losing their family home. They cannot, as they have done since 2017, pay absolutely nothing to reduce still-mounting arrears, avoid any meaningful engagement with Start, and expect that the courts will laud their stance or that things will somehow work themselves out. Start, to its credit, repeatedly made clear at the hearing of this application that it is open to sensible engagement by the Cussens; it is now for the Cussens to take the next step in this regard. That will begin with submitting a standard financial statement and engaging constructively with Start thereafter. It may take courage for them to abandon the path that they have hitherto pursued but their persistence in bringing the within proceedings to the present juncture suggests most strongly to the court that neither of the defendants is wanting in courage.

65. Complaint was made by Ms Cussen at the end of the hearing of this matter that she found counsel to have been "*quite aggressive*" and "*really aggressive*" during the course of the day. Lest Ms Cussen would persist in this complaint, the court reiterates, as it stated in court on the day of the hearing, that it considered (and it considers) counsel to have been a model of politeness towards Ms Cussen and more generally throughout the day that this matter was at hearing. Ms Cussen has absolutely no grounds for complaint in this regard.