

**THE HIGH COURT**

[2023] IEHC 462  
[Record No. 2022/202CA]

**BETWEEN:-**

**MARS CAPITAL FINANCE IRELAND DAC**

**PLAINTIFF/RESPONDENT**

**AND**

**DAMIAN GIBNEY AND IRENE GIBNEY**

**DEFENDANTS/APPELLANTS**

**JUDGMENT of Mr. Justice Barr delivered on the 28<sup>th</sup> day of July, 2023.**

**Introduction.**

**1.** This is an appeal by the defendants from an order of his Honour Judge Quinn made in the Circuit Court on 27 July 2022 granting the plaintiff/respondent (hereinafter 'the respondent') possession of all that and those the premises comprised in folio 13277 of the Register of Freeholders of County Meath and more commonly known as Dunlever Lodge, Trim, County Meath, which is the property of the defendants.

**2.** The respondent is the assignee of various loans and underlying securities executed by the defendants in favour of Irish Life and Permanent plc. The respondent is the registered owner of a charge over the defendant's lands as comprised in folio 13277 of the Register, County Meath.

**3.** While the defendants originally challenged the entitlement of the respondent to an order for possession in respect of the lands on a large number of grounds; at the hearing of the appeal herein, the grounds of appeal were limited to two grounds of appeal; namely, that the original deeds transferring the loan and the underlying mortgage from the original lender to the first assignee, Cheldon Property Finance DAC (hereafter "Cheldon"), was void, due to the fact that it had not been signed by two people on behalf of the original lender, as required by clause 18 of the terms and conditions governing the mortgage that had been created by the defendants as security for the original loan; or in the alternative, clause 18 was void as being an unfair contract term, contrary to the Unfair Terms in Consumer Contracts Regulations 1995.

4. As this was a circuit appeal, the respondent was obliged to establish its entitlement to an order for possession *de novo*.

**Summary of the Evidence.**

5. The original civil bill in this case was issued on 26 April 2017 at the suit of Cheldon.

On 21 April 2017, an affidavit was sworn by Mr. Donal O'Sullivan, company director of Cheldon, in support its application to obtain vacant possession of the property.

6. In the affidavit, Mr. O'Sullivan averred that by mortgage sale agreement dated 8 July 2015, Permanent TSB plc (formerly Irish Life and Permanent plc) (hereinafter 'the bank') agreed to sell and the plaintiff agreed to buy certain mortgage assets and their underlying loans, including, *inter alia*, the loan advanced by the bank to the defendants and the mortgage securing same. He exhibited a copy of the said mortgage sale agreement. He stated that portions of that agreement had been redacted, because the agreement contained particulars in relation to a large number of loans that had been transferred by the parties. He stated that it was necessary to redact those particulars that related to third parties, which particulars were totally unconnected to the plaintiff's application. In addition, there were commercially sensitive matters referred to in the documents and they had also been redacted.

7. Mr. O'Sullivan stated that further to the mortgage sale agreement, by deed of transfer dated 14 October 2015, the bank transferred to Cheldon, *inter alia*, the charge the subject of these proceedings. By deed of assignment, conveyance and transfer of the same date, the bank transferred to the plaintiff all of its interest in so much of the property sold to the plaintiff by the said mortgage sale agreement as was unregistrable property. The defendants were notified of the said sale and transfer. He exhibited copies of the said deeds.

8. Mr. O'Sullivan went on to state that the defendants were the full owners of the property known as Dunlever Lodge, Trim, County Meath, which was comprised in folio 13277 of the Register of Freeholders of County Meath. He exhibited a copy of Land Registry folio 13277 in this regard. He stated that he believed that the property was the principal private residence of the second named defendant. As far as he was aware, she was the only known occupant of the property.

9. Mr. O'Sullivan gave details of the original mortgage. He stated that by deed of mortgage and charge dated 16 August 1999, the defendants had charged the lands

comprised in folio 13277 with repayment to the bank of all present and future advances payable by them to the bank. He exhibited a copy of the deed of mortgage and charge, together with the mortgage conditions applicable thereto. He stated that the charge was registered as a burden on folio 13277 on the Register of Freeholders of County Meath. He stated that as of the date of swearing that affidavit, Cheldon was the registered owner of the charge.

**10.** He went on to give details of the loan agreement that was relied upon in the proceedings. He stated that by facility letter dated 28 July 1999, the bank had offered to the defendants, a mortgage loan in the sum of £230,000. The interest rate on the loan was fixed at 4% per annum for the first year of the term of the loan; after which, a variable rate would apply. The loan was to be repaid by way of monthly instalments of £1,701.28. The loan was to be secured by a mortgage over the property at Dunlever Lodge, Trim, County Meath. He stated that the defendants signed the said facility letter by way of acceptance of its terms and drew down the loan. He exhibited a copy of the facility letter, together with a copy of the bank's general conditions applicable thereto.

**11.** Mr. O'Sullivan stated that by restructure agreement dated 20 April 2012, the bank offered to vary the defendant's loan agreement by way of a "capital payment holiday", whereby the defendants were only required to make monthly payments towards interest only for a six-month period from April to September 2012 inclusive. Thereafter, they were to resume payments of principal and interest for the remaining term of the loan agreement. The defendants had signed the said restructure agreement by way of acceptance of its terms. The capital payment holiday was applied to their account. He exhibited a copy of the restructure agreement.

**12.** Mr. O'Sullivan went on to state that the defendants had failed to make repayments of the loan in accordance with the terms of the said facility letter. At the time of swearing the affidavit, the account was significantly in arrears. He stated that by letters dated 5 October 2016 the plaintiff wrote to the defendants demanding that they repay to the plaintiff the sum of €114,547.25, being the total sum due as of the date of the said letter, including accrued interest, in respect of the defendant's mortgage loan. He exhibited copies of the said letters. He stated that despite the said demands and in breach of the terms of the said facility letter as varied, the defendants had not repaid the sums owed to the plaintiff. He stated that the total sum of €117,397.15 remained due and owing by the

defendants to the plaintiff, as of the date of swearing the affidavit. In this regard, he exhibited a copy of a statement of account in respect of the defendant's said mortgage loan, which evidenced the level of indebtedness of the defendants to the plaintiff.

**13.** Mr. O'Sullivan stated that by reason of the defendant's failure to make repayments in accordance with the terms of the facility letter and by reason of their failure to repay the amount due by them upon demand by the plaintiff, it was his believe that the plaintiff was entitled to possession of the secured property pursuant to its statutory rights and the terms of the above-mentioned deed of mortgage and charge.

**14.** Mr. O'Sullivan stated that when the defendants' mortgage loan account went into arrears, the defendants were afforded the protection of the plaintiff's mortgage arrears resolution process. The defendants were classified as non-cooperating for the purposes of MARP, by reason of their failure to make disclosure of all relevant information to the plaintiff, their failure to communicate with the plaintiff or its agents, and the failure to meet their mortgage repayments, or discharge the arrears on their account. By letter dated 4 August 2016, the plaintiffs' agent, Pepper Asset Servicing, wrote to the defendants informing them that they were outside the protection of MARP. They were called on to avail of one of the options open to them to address their indebtedness, including consenting to the voluntary sale of their property. He exhibited a copy of the letter dated 4 August 2016. He concluded the affidavit by stating that it was the plaintiff's intention, in order to recover the monies advanced and outstanding herein, to exercise its power of sale and to that end, it required vacant possession of the property to obtain the best possible price for same. He prayed the court for the reliefs set out in the civil bill.

**15.** A replying affidavit was sworn by the first defendant, on behalf of himself and on behalf of the second defendant, on 6 June 2018. He stated that Mr. O'Sullivan had committed perjury because he had given his address in his grounding affidavit as being First Floor, 1-2 Victoria Buildings, Haddington Road, Dublin 4, which was not his place of residence. He further alleged that the affidavit was not authentic, because the date was missing from the jurat thereof. He stated that the jurat did not comply with the rules of court, because the date was missing and also because the person before whom the affidavit had been sworn, had not stated that he knew the deponent, or knew some person named in the jurat, who certified his knowledge of the deponent. He further stated that a

lot of the averments contained in Mr. O'Sullivan's affidavit were incorrect and were therefore perjurious.

**16.** As an example of this perjury, the first defendant stated that Mr. O'Sullivan committed perjury when he stated that to his knowledge and belief there was no other person over the age of eighteen years, in occupation of the property. He stated that accordingly he was unable to prove precisely who, over the age of eighteen years, was in occupation of the first defendant's domestic dwelling. He stated that all persons over that age had not been lawfully and legally served. He stated that all the persons in occupation of their domestic dwelling, had not been served in accordance with the rules of court. He stated that there was no evidence of service to prove the contrary.

**17.** The first defendant stated that Mr. O'Sullivan could not state as a fact that there was a particular amount owing to them and that that amount was correct. He stated that the total amount transferred from Permanent TSB to Cheldon, included arrears in interest. He stated that that amount had been capitalised, so it was not showing a correct figure allegedly outstanding. He stated that they were in the process of getting the interest rate checked. He stated that they knew that it would be returned to them with proof that they had been overcharged interest.

**18.** The first defendant stated that the plaintiff had not exhibited a Family Home Protection Act 1976 form, signed by the defendants, to demonstrate the precise particulars of the security that he relied on in accordance with the Circuit Court rules.

**19.** The first defendant stated that the plaintiff had exhibited folio 13277, which stated that Cheldon were the owners of the charge. They claimed that they had purchased the charge from Permanent TSB plc. The first defendant stated that that was legally impossible, because Irish Life and Permanent plc, did not legally transfer a charge to Permanent TSB plc. He stated that that was contrary to the Registration of Title Act 1964, which stated that only the full owner of the charge can transfer the charge. He further pointed out that the plaintiff stated that the property was unregistrable property, which was not true, as it was registered in Land Registry folio 13277, as exhibited.

**20.** The first defendant further asserted that the defendants had not delegated their power of attorney to Permanent TSB plc, or to Cheldon. He stated that that was contrary to the Powers of Attorney Act 1996. He stated that a power of attorney could only be

created in an instrument signed by the donor in favour of the donee and no such form existed in this case.

**21.** The first defendant stated that the courts did not have jurisdiction, because his domestic dwelling was his family home. It was not his principal private residence. It was a wholly domestic premises and not a mixed use premises. He stated that it was protected under the Courts (Supplementary Provisions) Act 1961, the Valuations Act 2001 [sic], and under the Constitution of Ireland.

**22.** The first defendant asserted that the plaintiff had commenced proceedings under the Land and Conveyancing Law Reform Act 2013, but had no jurisdiction under the Courts (Supplementary Provisions) Act 1961, because no form 1A had been produced and signed by both parties to enable the Circuit Court's jurisdiction to be enlarged to that of the High Court. He stated that the defendants had no intention of signing such a form.

**23.** He asserted that the plaintiff was not the legal owner of the charge, as they did not have in their possession the original documents, including the facility letter and the mortgage sale agreement. He stated that if they did, he would like to have the opportunity to examine those documents.

**24.** At para. 21, the first defendant stated that in March 2014, Permanent TSB had been paid in full by a third party, namely the People's Mortgage Protection Vehicle. He stated that this money was lawfully and legally paid in accordance with the Bills of Exchange Act 1882. He stated that at no time had Permanent TSB returned the promissory note. Therefore in accordance with the 1882 Act, the debt was deemed paid. He stated that they were still the holder of the promissory note in due course. He stated that Permanent TSB had chosen to ignore the promissory note and had sold the loan facility to Cheldon. He exhibited a copy of the said promissory note, together with proof of postage and proof of receipt by PTSB on 21 March 2014.

**25.** The first defendant stated that on 30 April 2018, Cheldon sold the loan to Mars Capital. He exhibited a copy of the said letter. He stated that on 1 June (year not stated) he had sent a letter to the County Registrar requesting a copy of the certificate of compliance of the solicitor for the plaintiff. He stated that to date, he had not received a reply, despite providing a stamped self-addressed envelope. He exhibited a copy of the letter.

**26.** On 2 November 2019, an affidavit was sworn by Ms. Claire McDermott, a solicitor in the firm of Flynn O'Driscoll Solicitors of 1 Grant's Row, Lower Mount Street, Dublin 2. In that affidavit, she stated that the original affidavit had been sworn by Mr. O'Sullivan before her on 21 April 2017. Due to inadvertence on her part, the date had not been recorded in the jurat to the affidavit. However, she pointed out that each of the cover pages on the nine exhibits to that affidavit, had been signed by the deponent and had been dated with that date. She exhibited a true copy of the said exhibit cover sheets.

**27.** On 21 October 2019, an order was made on consent of the parties by the County Registrar for the County of Meath, substituting Mars Capital Finance Ireland DAC as plaintiff in the proceedings. An amended civil bill for possession was issued on 8 November 2019.

**28.** On 8 October 2019, an affidavit was sworn on behalf of the respondent, by Mr. Colin Maher, a director of the plaintiff/respondent. He began by giving a brief overview of the proceedings, which arose out of a loan originally granted by Irish Life and Permanent plc to the defendants in 1999, which loan had been secured by a mortgage over the defendant's principal private residence. He stated that in 2015, the bank had sold and assigned the loan and mortgage, the subject of the proceedings, to Cheldon.

**29.** Mr. Maher stated that in 2017, Cheldon had sold the loan and mortgage to Mars Capital Management Ireland DAC (hereinafter 'MCMCI'). An assignment of the said loan and mortgage on foot of the loan sale had followed in 2018. He noted that none of those facts were disputed by the first defendant in his replying affidavit. He further noted that at paras. 12 and 21 of his affidavit, the first defendant had implicitly acknowledged that he had received a loan from the bank. He further implicitly acknowledged that the loan had been assigned by the bank to Cheldon and he had further admitted at para. 22, that Cheldon had sold the loan to MCMCI.

**30.** Mr. Maher stated that there had been a further transfer of MCMCI's legal interest in the mortgage and loan the subject of the proceedings, to the respondent.

**31.** By way of verification of the factual matters pleaded in the amended civil bill, Mr. Maher exhibited a number of documents which grounded the respondent's claim in these proceedings. He stated that by mortgage sale agreement dated 8 July 2015, the bank had agreed to sell and Cheldon had agreed to buy certain mortgage assets and their underlying loans; including, *inter alia*, the loan advanced by the bank to the defendants and the

mortgage securing same. He exhibited a copy of the mortgage sale agreement. Mr. Maher stated that significant portions of that agreement had been redacted, due to the fact that it contained personal information relating to other borrowers, which was not relevant to the proceedings herein. He further stated that by deed of transfer dated 14 October 2015, the bank had transferred to Cheldon, *inter alia*, the charge the subject of these proceedings. By deed of assignment, conveyance and transfer of that date, the bank had transferred to Cheldon, all of its interest in so much of the property sold to Cheldon by the said mortgage sale agreement, as was unregistrable property. He exhibited a copy of the deeds.

**32.** Mr. Maher stated that the defendants had been notified of the said transfer by letters from the bank dated 15 October 2015. They had also been notified by letters on behalf of Cheldon dated 16 October 2015. He exhibited copies of the relevant letters.

**33.** He stated that by deed dated 28 December 2017, Cheldon agreed to sell and MCFI agreed to purchase certain assets listed in the schedules to the said deed, which included, *inter alia*, the loan agreement dated 28 July 2019 between Irish Life and Permanent plc and the defendants and the mortgage dated 16 August 1999, both of which were the subject of these proceedings. He exhibited a copy of the said loan sale deed. He stated that parts of that deed had been redacted because they contained commercially sensitive information, or because they related to personal data of third party borrowers, which data was private to them and was not relevant to the proceedings.

**34.** Mr. Maher stated that by deed of assignment dated 30 April 2018, Cheldon had assigned to MCFI the assets identified in the loan sale deed dated 28 December 2017, which included the defendant's loan and mortgage. He exhibited a copy of the said deed of assignment.

**35.** Mr. Maher stated that on foot of the said loan sale and assignment, MCFI had applied to the Land Registry to be registered as the owner of charges which had been assigned to it by Cheldon, including, *inter alia*, the charge registered on folio 13277 of the Register of Freeholders of County Meath, being the folio which recorded the title of the land the subject of the proceedings herein. He exhibited a copy of the form 56 application made by Cheldon and MCFI to the Land Registry in this regard.

**36.** Mr. Maher stated that by letters dated 20 February 2018 and 30 April 2018, Cheldon had written to each of the defendants notifying them of the said loan sale and assignment. MCFI had also written to the defendants to notify them of the said loan sale



and assignment, by letters dated 4 May 2018. He stated that the letters incorrectly stated that the purchaser of the defendant's loan and mortgage contracts was Mars Capital Finance Ireland DAC, as opposed to Mars Capital Management Ireland DAC. He exhibited copies of the relevant letters.

**37.** To correct that error, both Cheldon and MCMI wrote to the defendants again. He stated that Cheldon had written to the defendants by letters dated 25 January 2019, advising them that the purchaser of their loans was Mars Capital Management Ireland DAC and not Mars Capital Finance Ireland DAC, as previously advised. MCMI wrote to the defendants in similar terms by letter dated 29 January 2019. He exhibited copies of the corrective letters. Mr. Maher stated that by reason of the said loan sale and assignment, which had been notified to the defendants, the contractual obligations previously owed by the defendants to the bank, and subsequently to Cheldon, became enforceable by MCMI.

**38.** Mr. Maher went on to outline how the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018, had made certain amendments to the Central Bank Act 1997, the effect of which was that holding the legal title to certain types of credit agreement constituted "credit servicing", within the meaning of the 1997 Act. He stated that as a result of this, it became necessary for the party holding the legal title to such credit agreements, to have the necessary authorisation from the Central Bank. In order to comply with the new legislation, MCMI decided to transfer the legal interest in the defendants' loans and mortgage to the respondent, which had the requisite authorisation; while MCMI would retain the beneficial interest in those agreements. In this regard, he exhibited a legal title holder deed dated 16 September 2019 giving effect to the arrangement between these entities.

**39.** Mr. Maher stated that by legal title transfer deed dated 16 September 2019, between MCMI and the respondent, MCMI agreed to sell and the respondent agreed to purchase certain assets listed in the schedules to the said deed, which included, *inter alia*, the legal interest in the loan agreement dated 28 July 1999 between Irish Life and Permanent plc and the defendants and the legal interest in the mortgage dated 16 August 1999, both of which are the subject of the proceedings herein. He exhibited a copy of the loan sale deed. Schedule 4 of that deed confirmed that MCMI's interest in the within proceedings, had been transferred to the respondent.

**40.** Mr. Maher stated that the defendant's loan agreement had been identified in part A of schedule 1 of the legal title transfer deed. He exhibited an extract of same, on which the defendants' properties were listed. Mr. Maher stated that the defendants' mortgage had been identified in part B of schedule 1 of the legal transfer deed. He exhibited an extract of same, on which the defendants' properties were listed.

**41.** Mr. Maher stated that the defendants had been notified of the said transfer by letters dated 7 May 2019 and 17 September 2019 and he exhibited same. He stated that pursuant to the said legal title transfer deed, legal ownership of the charge recording the mortgage on folio 13277, County Meath, was transferred from MCM I to the respondent by Land Registry form 56. He exhibited a copy of the said form. He stated that as a result of that, the respondent was now the registered owner of the charge on folio 13277. He exhibited an up-to-date copy of the folio.

**42.** Mr. Maher stated that the defendants are the full owners of the property at Dunlever Lodge, Trim, County Meath, which is comprised in folio 13277, County Meath. He noted that in the replying affidavit the first defendant had stated that there were other persons over the age of eighteen in occupation of the property, although he had not identified who these people were. For that reason, Mr. Maher stated that the respondent proposed to reserve the amended civil bill, together with a copy of his affidavit, on all persons in occupation of the property and to identify, insofar as was possible, who the occupants of the property were.

**43.** Mr. Maher went on to deal with the details of the security and the details of the loan agreement relied upon by the respondent in the proceedings. He exhibited a copy of the deed of mortgage and charge dated 16 August 1999 and the facility letter dated 28 July 1999. He also exhibited a copy of the restructure agreement dated 20 April 2012, which provided for the six month "capital payment holiday".

**44.** At paras. 33 *et seq*, Mr. Maher outlined the default on the part of the defendants in relation to repayment of the loan, which default entitled the respondent to seek the reliefs sought in the amended civil bill. He noted that when the defendants had failed to make repayments of the loan in accordance with the terms of the said facility letter, by letter dated 5 October 2016, Cheldon had written to the defendants demanding that they repay the sum of €114,547.25, being the total sum due as of the date of that letter. He exhibited a copy of the relevant letters. He stated that despite the said demands and in breach of

the terms of the said facility letter as varied, the defendants had not repaid the sums owed to the respondent and the total sum due and owing, as of the date of swearing of the affidavit, was €131,154.36. He exhibited a copy of an updated statement of account in this regard. He stated that due to the defendant's failure to make the repayments in accordance with the terms of the said facility letter and by reason of their failure to repay the amount due by them upon demand by the respondent, it was his belief that the respondent was entitled to possession of the secured property, pursuant to its statutory rights and pursuant to the terms of the above-mentioned deed of mortgage and charge.

**45.** Mr. Maher dealt with the application of the MARP process and the classification of the defendants as being "non cooperating" thereunder. He exhibited the relevant documents in this regard.

**46.** Mr. Maher went on to answer the allegations made by the first defendant in his replying affidavit sworn on 7 June 2018. A brief account of his responses in this regard, will suffice. He denied that Mr. O'Sullivan had committed perjury when he had given his business address in his grounding affidavit. It was alleged that it was perfectly appropriate for a deponent to do so. He accepted that the jurat did not contain the date on which the affidavit had been sworn, but he noted that the date had been included in the cover sheets in respect of the nine exhibits thereto, all of which had been signed by the deponent. He noted that while the first defendant had accused Mr. O'Sullivan of perjury, he had in fact explicitly or implicitly accepted a number of the averments contained in his affidavit, and in particular in relation to the various assignments of the loan and mortgage that had occurred.

**47.** Mr. Maher noted that while the first defendant had alleged that he had been overcharged interest, he had not set out the factual basis for that assertion; nor had he quantified the amount of interest by which he maintained he had been overcharged.

**48.** Mr. Maher noted that the fifteen-year term of the defendant's loan, which had issued in 1999, had expired. He noted that the defendants had not made any mortgage repayments since Cheldon acquired their loan and mortgage from the bank in October 2015.

**49.** He stated that the assertion that the respondent had not exhibited a form pursuant to the Family Home Protection Act 1976, was not relevant, due to the fact that both of the defendants were co-owing spouses of the property, the subject matter of the proceedings.

He stated that insofar as the first defendant had complained that there was no transfer from Irish Life and Permanent plc to Permanent TSB plc; that that was not necessary, as they were not separate legal entities, but rather the one company, which had changed its name. In that regard, he exhibited a certificate of change of name that had been filed in the CRO by Permanent TSB plc. Even if that were not the case, he stated that he had been advised by the respondents' lawyers, that the folio was still conclusive as to the respondent's ownership of the charge at issue in the proceedings.

**50.** In relation to the assertion at para. 16 of the first defendant's affidavit in relation to the power of attorney, he stated that no power of attorney was relied upon by the respondent in relation to the property the subject matter of the proceedings. In relation to the issue of the jurisdiction of the Circuit Court to deal with the matter, he stated that it was his belief that the property had a market value of less than €3m and that therefore the Circuit Court had jurisdiction to deal with the matter. Accordingly, no question of enlargement of jurisdiction arose in the case.

**51.** Insofar as the first defendant had challenged the respondents' ownership of the charge over the property, he stated that the relevant folio exhibited to his affidavit at CM15, was conclusive evidence that the respondent was the registered owner of the charge the subject of the proceedings herein.

**52.** In relation to the alleged promissory note that had been issued by an entity known as the People's Mortgage Protection Vehicle, he noted that the first defendant had exhibited what he described as a promissory note sent to the bank in repayment of the loan. The document exhibited to the affidavit was numbered page one of three, but the latter two pages were not furnished to the respondent. He stated that the defendants had no lawful entitlement to transfer their contractual obligations to a third party, he pointed out that the up-to-date copy of the folio as exhibited to his affidavit, was conclusive evidence of the ownership of the charge registered on the folio. It did not evidence any transfer of ownership of the charge to the so-called People's Mortgage Protection Vehicle.

**53.** Mr. Maher noted that p.1 of the purported promissory note stated that it enclosed payment in the sum of €294,282; however, the respondent had no record of that sum being furnished to the bank, or to Cheldon, or to it, in discharge of the defendant's outstanding debts. He pointed out that clause 2.9 of the mortgage conditions applicable to the defendant's mortgage, required repayment to be made by direct debit. He stated that

purported payment by way of promissory note was not therefore a contractually valid method of discharging the mortgage loan.

**54.** Finally, with reference to para. 23 of the first defendant's affidavit, Mr. Maher stated that a certificate of compliance with the requirements of Practice Direction CC17, had been filed with the Circuit Court Office on 25 April 2017. He exhibited a copy of same.

**55.** A short affidavit was sworn by Mr. Michael Kelly on 9 January 2020. Mr. Kelly is a solicitor in the firm of Hayes Solicitors, who are the solicitors on record for the respondent in these proceedings. He stated that on 8 November 2018, pursuant to an order for substituted service on the defendants dated 5 July 2017, he had arranged for a certified copy of the amended civil bill and a certified copy of the affidavit of Mr. Maher sworn on 8 October 2019 and a certified copy of the order of the Circuit Court substituting the respondent as plaintiff in the proceedings, to be served on the defendants by ordinary prepaid post and also by email. He stated that a further copy of the said documents was sent by ordinary certified post to the defendants on 11 November 2019. He exhibited the copy of the relevant documents and the proofs of posting thereof.

**56.** Mr. Kelly stated that on 2 December 2019, he received a document from the defendants by registered post. That document bore the flag of the United States of America. It exhibited the documents that he had sent to the defendants. There were a number of incomprehensible handwritten notations thereon. He stated that it was his belief that the document had no connection with any court of the United States of America. He exhibited a true copy of the said document.

**57.** Mr. Kelly stated that he received a further document by registered post on 10 December 2019, in the same style and using similar language to the document above referred to. He exhibited a copy thereof.

**58.** He stated that on 25 October 2019, the Circuit Court had directed that the defendants had a period of six weeks to file any affidavit in reply to the amended civil bill and the affidavit of Mr. Colin Maher. Mr. Kelly stated that his letters of 8 November 2019 and 11 November 2019 had put the defendants on notice of that direction. He stated that the defendants had not filed any further replying affidavit.

**59.** A second affidavit was sworn by Mr. Colin Maher on 12 February 2020. In that affidavit, he stated that a mistake had been made by him in relation to an exhibit to his previous affidavit, wherein the unredacted portion of the schedule exhibited at "CM12"

referred to a property at 12 The Oak, Clonshaugh Woods. He stated that that was a property owned by the defendants, but was not the property the subject of these proceedings.

**60.** Mr. Maher exhibited a further extract from part B of schedule 1 of the legal title transfer deed dated 16 September 2019, which referred to the defendants' property at Dunlever Lodge, Trim, County Meath.

**61.** The court was furnished with a copy of the order made by his Honour Judge Quinn in the Circuit Court on 27 July 2022, wherein he directed that the respondent recover from the defendants' possession of the property comprised in folio 13277, County Meath, together with costs. A stay was placed on execution of the order for possession for twelve months from 27 July 2022. The court was also furnished with a copy of the notice of appeal dated 4 August 2022, filed by Mr. Jeffrey Nwadike, solicitor of GN & Co., solicitors on behalf of the defendants.

**Submissions on behalf of the Defendants.**

**62.** At the hearing of the appeal, Ms. Ruschitzko BL submitted to the court that there were two grounds on which the respondent should not be granted the reliefs sought in the amended civil bill. Counsel submitted that the assignment between the bank and Cheldon, had not complied with the provisions of clause 18 of the mortgage deed executed by the defendants and the bank on 16 August 1999, the relevant portion of which, provided as follows:

*"18. Power of attorney.*

*The mortgagor hereby irrevocably (but subject to redemption) appoints the secretary for the time being of the Irish Permanent and any person nominated for the purpose by the Irish Permanent in writing underhand by an officer of the Irish Permanent to be the attorney of the mortgagor in his name and on his behalf (using the company seal of the mortgagor if appropriate) and as his act and deed and at his expense to do any act or thing which may be required in the exercise of any of the Irish Permanent's rights or powers hereunder or otherwise for any of the purposes of this security and in particular:*

*(a) to sign, seal and deliver and otherwise perfect every or any deed of conveyance or assignment of any leasehold reversion held in trust for the Irish Permanent which may be desired by the Irish Permanent in order to*

*vest in the Irish Permanent or in any person or persons in trust for the Irish Permanent subject as aforesaid or in any purchaser of the property the said leasehold reversion and any further or other interest which the mortgagor now has or may acquire in the property or any part thereof;*

*(b) to serve any notice of intention to claim any relief by way of new tenancy, reversion release, compensation, enlargement of interest or otherwise under the Landlord and Tenant Acts 1967-1994;*

*(c) to commence institute and prosecute such proceedings and applications in the appropriate court or office as may be necessary for the purpose of obtaining any such relief;*

*(d) to discontinue or compromise any such proceedings and applications and to appeal against any judgments in any court in any such proceedings or applications;*

*(e) to claim assess agree recover and receive any compensation payable pursuant to any Statute or otherwise; ...”*

**63.** Counsel stated that the defendant had accepted that there was a transfer of his loan; however, he had not accepted that the charge had been validly transferred. It was submitted that the purported transfer of the charge from PTSB to Cheldon was defective, because the bank had not complied with clause 18 of the mortgage deed, as there was only one signature on the transfer document, when there should have been two signatures, as required by clause 18 of the mortgage.

**64.** It was submitted that in these circumstances, Cheldon’s “root of title” in relation to the charge was bad, therefore they could not validly transfer the charge to MCMCI, nor could it be validly transferred from MCMCI to the respondent; therefore, the respondent was not entitled to an order for possession of the property the subject matter of the charge.

**65.** Counsel submitted that it was significant that while there was only one signature on the purported transfer of the charge from the bank to Cheldon, the form 56, which had been filed in relation to the transfer of the charge from Cheldon to MCMCI dated 30 April 2018, as exhibited at exhibit CM6 to the affidavit sworn by Mr. Maher on 8 October 2019, had two signatures on behalf of Cheldon, being Mr. O’Sullivan and Mr. Prenderville; thus, they had ensured that they complied with the provisions of clause 18 of the mortgage deed.

**66.** Similarly, the legal title holder deed dated 16 September 2019 between MCFI and the respondent, as exhibited at exhibit CM9 to Mr. Maher's affidavit, also had two signatures on behalf of the transferor; thereby complying with clause 18. It was submitted that this established that Cheldon, MCFI and the respondent, had all identified the obligation to have two signatures for a valid transfer of the charge under the provisions of clause 18 of the mortgage deed.

**67.** Counsel submitted that as that had not been done in relation to the initial transfer from the bank to Cheldon, there had been no valid transfer from it to Cheldon and therefore Cheldon was not in a position to validly transfer ownership of the charge to MCFI, nor could it validly transfer the charge to the respondent. Accordingly, the respondent had not established that it was the valid holder of the charge and was therefore not entitled to an order for possession of the property comprised in the relevant folio.

**68.** Counsel submitted that insofar as it may be argued that the wording in the clause was ambiguous and in particular that the word "and" as contained therein may not make it clear that two signatures were required, it was submitted that if the meaning of the clause was ambiguous in this regard, it should be read *contra proferentem*, meaning contrary to the meaning that may be put forward by the bank.

**69.** By way of alternative submission, it was submitted that clause 18 was unfair in that it was a generic term that had not been individually negotiated with the defendants. It was submitted that the clause was unfair in that it purported to allow the bank to appoint people to act as attorney for the mortgagors, without their knowledge or consent. It was submitted that this was clearly unfair to the defendants.

**Submissions on behalf of the Respondent.**

**70.** In response, Mr. Martin BL, submitted that there were three grounds on which the objections to an order for possession as put forward on behalf of the defendants, were not sustainable. First, it was submitted that clause 18 was not relevant to the application for possession of the property brought by the respondent. It was submitted that under clause 18 the mortgagor irrevocably appointed the secretary for the time being of Irish Permanent, and any other person nominated for the purpose by Irish Permanent in writing under hand by an officer of Irish Permanent, to be the attorney of the mortgagor. Such



attorney was then given power to do various acts that may be required to be carried out by the mortgagor, as enumerated in the subparagraphs to that clause.

**71.** It was submitted that under the clause, the mortgagor was giving the mortgagee a power of attorney to do certain things on his behalf. It was submitted that that had nothing to do with the present case, which involved a transfer of the mortgagee's interest in the mortgage. Furthermore, no reliance was placed on any power of attorney in the present proceedings. Accordingly, it was submitted that clause 18 was not relevant to the proceedings.

**72.** Secondly, it was submitted that even if the court had any doubt about the validity of the transfer of the ownership of the charge between the bank and Cheldon, the issue of ownership of the charge had been resolved conclusively in favour of the respondent due to the provisions of s.31 of the Registration of Title Act 1964, which provided that the Register of Freeholders was conclusive evidence as to the ownership of charges registered therein: see *Tanager DAC v. Kane* [2018] IECA 352.

**73.** Thirdly, it was submitted that the assertion that clause 18 constituted an unfair contract term, was unsustainable for two reasons: first, because clause 18 was not relevant to the respondent's application in these proceedings; secondly, the proceedings concern the transfer by PTSB of its interests as mortgagee. It did not affect the mortgagor's interests under the mortgage. The defendants were being treated exactly the same under the mortgage, as they would have been, if no transfer of ownership of the charge had taken place. Their position had not been affected by the transfer of ownership of the charge between the various entities. Accordingly, it could not be argued that clause 18 was unfair, insofar as it provided that the mortgagor had irrevocably appointed such people as may be nominated by the bank to take actions on his behalf, because no such appointment had been made and no such actions had been taken.

**74.** Finally, counsel pointed out that clause 6.7 of the mortgage deed provided that Irish Permanent may at any time (without the consent of the mortgagor) transfer the benefit of the mortgage to any person and from and after such transfer, certain consequences would flow therefrom, as set out in the subparagraphs to that clause.

**Conclusions.**

**75.** The court is satisfied from the affidavits and exhibits that have been filed in the proceedings to date, that the respondent is entitled to an order for possession of the

premises comprised in folio 13277 of the Register of Freeholders of County Meath and more commonly known as Dunlever Lodge, Trim, County Meath.

**76.** The court is satisfied from the averments contained in the affidavits sworn by Mr. O'Sullivan and Mr. Maher, that the defendants entered into a loan agreement with the bank and provided a mortgage over the property comprised in folio 13277, County Meath, as security for that loan. The court is satisfied from the matters deposed to in those affidavits and from the statements of account exhibited thereto, that the defendants have failed to make the repayments that are due under the said loan. In addition, the court is satisfied that the loan, being a fifteen-year term loan, which was created in 1999, has expired.

**77.** In fairness to the defendants, they do not challenge the existence of the loan. Nor do they challenge the purported transfers of the loan from the bank to Cheldon and from Cheldon to MCMI and from that company to the respondent. Insofar as it was alleged in the affidavit sworn by the first defendant that the debt had been repaid by virtue of a promissory note, allegedly issued by an agent of the defendants known as the People's Mortgage Protection Vehicle, the court does not accept that any payment was actually made by or on behalf of the defendants. The court accepts the evidence given by Mr. Maher in his affidavit that no payment was received by the bank, or by Cheldon, or by the respondent on foot of the so-called promissory note.

**78.** The defendants do not contest that they executed the mortgage deed on foot of which the respondent registered the charge on the Register of Freeholders of County Meath. The defendants' main ground of objection is that the purported transfer of the charge from the bank to Cheldon was defective, because it did not comply with clause 18 of the mortgage deed, which they alleged required the signature of two people on behalf of the bank to validly transfer the charge from the bank to an assignee thereof.

**79.** The court does not regard this submission as being well founded for a number of reasons. First, the court accepts the submission made by Mr. Martin BL on behalf of the respondent that clause 18 of the mortgage deed is not relevant to the within proceedings. That clause provides that the mortgagor irrevocably appointed the secretary for the time being of Irish Permanent and any person nominated for that purpose by Irish Permanent, to act as his attorney in relation to taking certain steps on his behalf in relation to various matters as outlined in the subparagraphs of that clause. In the present proceedings, the

respondent does not seek to rely on any steps taken pursuant to that power to appoint attorneys to take actions on behalf of the mortgagor. This case solely involves the transfer of the mortgagee's interest under the mortgage. It has nothing to do with clause 18 of the mortgage deed.

**80.** Even if the court is wrong in holding that clause 18 does not apply in the circumstances of this case; the court finds that on a proper construction of clause 18, the word "and" therein, did not impose an obligation on the bank to have two signatures before it could validly transfer the loans and/or the underlying securities, or the charges created on foot thereof; but did the opposite, by permitting all relevant documents which required signatures by the debtor, or mortgagor, to be signed on his/her behalf by the secretary of the bank, or by any other person so nominated in that regard.

**81.** Secondly, the question of the ownership of the charge has been conclusively proved by virtue of the registration of the respondent as owner of the charge as registered on folio 13277 of the Register of Freeholders of County Meath. The respondent is the registered owner of the charge on the folio. Section 31 of the Registration of Title Act 1964 provides that the register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon. Section 31(1) of the 1964 Act provides as follows:

*"31.—(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."*

**82.** The effect of s.31 of the 1964 Act was considered by the Court of Appeal in *Tanager DAC v. Kane*, where Baker J. delivering the judgment of the court, referred to the statement in Curtis & Rouff, *The Law and Practice of Registered Conveyance* (2<sup>nd</sup> Ed., Stevens & Sons, 1965) where the learned authors had pointed out that the whole essence of the matter was that after the date of first registration of absolute title, it was neither

necessary nor permissible *"to go behind the impenetrable curtain of the register"*. She stated as follows at paras. 32 and 33:

*"32. That statement of principle underlies the clear deeming words of s. 31(1) of the 1964 Act which, in its express language, makes conclusive the registered title to ownership of land and, inter alia, to charges registered against such title.*

*33. In his recent text Registration of Deeds and Title in Ireland (1st ed., Bloomsbury Professional, 2014), at para. 6.01, Deeney explains the meaning of "conclusive" in the context of s. 31(1) of the 1964 Act as follows: "'Conclusive' in this context means that the facts stated are to be regarded as true and that no other evidence is necessary or permitted to verify or contradict this statement."*

**83.** Having reviewed the authorities on the provisions in the Act and having reviewed the relevant rules of court, Baker J. stated as follows in relation to the power of a court to entertain a challenge to the correctness or conclusiveness of the Register:

*"57. In my view, a court hearing an application for possession may not determine a challenge to the correctness or conclusiveness of the Register in these proceedings for the following reasons.*

*58. The provisions of s. 31(1) of the 1964 Act that make the entry on the Register conclusive evidence of title are subject to the jurisdiction of the court to direct the rectification of the Register on the ground of actual fraud or mistake."*

**84.** Baker J. summarised the steps that must be taken by a plaintiff when seeking an order for possession at para. 67, as follows:

*"67. A plaintiff seeking an order for possession must adduce proof, inter alia, that he or she is the registered owner of the charge. It is registration that triggers the entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification."*

**85.** The court is satisfied, having regard to the provisions of s.31 of the 1964 Act, and having regard to the decision in the *Tanager* case, and having regard to the authorities

cited therein, that it is not appropriate for this Court to go behind the Register, in order to enable the defendants to question the title of the respondent to ownership of the charge in question. That being the case, the court is satisfied that the respondent is entitled to the orders that it seeks in the amended civil bill.

**86.** Finally, as the court has found that the provisions of clause 18 of the mortgage deed are not relevant to the proceedings herein, it is not necessary for the court to come to any conclusion as to whether the provisions of that clause constitute unfair terms in the mortgage deed, contrary to the provisions of the Unfair Terms in Consumer Contracts Regulations 1995.

**Decision of the Court.**

**87.** Having regard to its findings herein, the court will dismiss the defendants' appeal.

The court affirms the judgment and order made in the Circuit Court.

**88.** The court will extend the stay in relation to the execution of the order for possession in favour of the respondent until the date on which final orders are made by this court herein.

**89.** As this judgment is being delivered electronically, the parties will have four weeks within which to deliver brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

**90.** The matter will be listed for mention at 10.30 hours on 5 October 2023 for the purpose of making final orders.