THE HIGH COURT

[2023] IEHC 738

RECORD NO 2023/8 CA

BETWEEN

START MORTGAGES LIMITED

PLAINTIFF

AND

MICHAEL RYAN AND AGNES RYAN

DEFENDANT

***Ex tempore* ruling of Mr. Justice Heslin delivered on 12 December 2023**

1. I am now going to give a ruling, having carefully considered the submissions made on both sides as well as entirety of the papers. Given the importance of it, my intention will be to have it typed up and circulated, not least because it is going to take a considerable amount of time to deliver. That is just as it should be because it is important that any party to proceedings understand the reasons why the court has come to a decision. So, therefore, it is going to be a decision of some length, and some of what the court has to say may not be welcome to certain parties.

2. There is one application before the court today, and only one. It is an appeal, by the second named defendant, of a decision by the Circuit Court which was made on 17 January 2023 by His Honour Judge O'Sullivan, refusing the second named defendant's application for liberty to extend time to bring an appeal against a possession order, which was made by the Kildare County Registrar on 21 February 2022. I will refer to this order as "the possession order".

3. This ruling deals with this single application. However, in order for the ruling to be meaningful it will be necessary to look, in some detail, at the chronology of the relevant events which have led up to today. I want to make clear that in doing so, there should be no impression taken that the court is hearing, today, an appeal against the possession order. It is not. I now propose to look at matters in chronological order.

6 September 2016 - Civil bill

4. Over 7 years ago, on 6 September 2016**,** the plaintiff, Start Mortgages Limited, caused a Civil Bill for possession to issue in the Kildare Circuit Court, against Michael Ryan and Agnes Ryan, both of whom are named as defendants.

The property

5. The property in question is described in the schedule to the Civil Bill in the following terms:-

> "*All that and those hereditaments and premises comprising 1.650 acres or thereabouts measure situate in the townland of common north Barony of Offaly East in the County of Kildare comprising the property more particularly described on the map annexed to a certain indenture of conveyance dated the 28th of December 2001 and made between Rosaleen Maria Harper of the one part and Francis Southern of the other part and thereon outlined in red and marked with the letter "B" and more commonly known as Carna Suncroft County Kildare, hereinafter the property*".

6. I pause to make what is perhaps a very obvious comment. Whilst the Civil Bill does not attach the 2001 deed of conveyance (i.e. "the Deed", to which a map is said to be attached) the fact that neither the Deed nor its Map are attached to the Civil Bill does *not* render the description of the property any less clear, or any less specific.

7. Furthermore, as will presently be seen, the description of the property in the Civil Bill incorporates (i) the entire wording used in the Mortgage which the Defendants executed *plus* (ii) the description of the property which the defendants chose to use in the Deed of conveyance pursuant to which they became owners of the property as joint tenants; as well as (iii) the description of the property used by the defendants in the family home declaration which the defendants swore at the same time as executing the mortgage.

8. These comments are appropriate at this juncture, because, in the manner I will presently come to, one of the issues raised by the first named defendant, long after the possession order was made, is the suggestion that the property, the subject of the proceedings, cannot be properly identified without the aforementioned map.

9. With respect, that is an entirely specious argument. It ignores the fact that the property was described with reference to a specific deed which itself includes a map, but also in an extremely detailed narrative which included specifics as to location, size and what the property was more commonly known as. It also ignores the fact that the description in the Civil Bill incorporates the *defendant's* description of their own property. Nor, I should add, was such an argument raised at any stage during the six years between the Civil Bill issuing and the possession order being made.

31 August 2916 verifying affidavit

10. Continuing with the narrative, on 31 August 2016**,** a verifying affidavit was sworn in respect of the contents of the Civil Bill, by a Ms Siobhan Coen, Company Secretary of the plaintiff.

11. Ms Cohen averred, inter-alia, that the defendants acquired title to the property by a deed of conveyance, dated 9 March 2005, made between Michael Ryan, of the one part, and the defendants, of the other part.

12. A copy of that deed of conveyance was exhibited, wherein, Michael Ryan is defined as 'the husband', and Agnes Ryan as 'the wife'.

13. Para 1 of the recitals to this deed of conveyance describes the property as follows:-

> "*Whereas*
> *(1) the husband is seised of the lands hereditaments and premises comprising 1.650 acres or thereabouts of the statute measure situated in the townland of Common North, Barony of Offaly East County of Kildare, hereinafter called the premises*" (emphasis added)

14. I pause to make two observations. First, the following words are identical in *both* the Deed of Conveyance and the Civil bill: (and I quote) "*…hereditaments and premises comprising 1.650 acres or thereabouts… situated in the townland of Common North, Barony of Offaly East… County of Kildare".* By way of a second comment, the parties to this deed of conveyance, being of course both of the defendants, did not deem it necessary to refer to or attach any map, yet the narrative description of the property was plainly sufficient for the conveyance to them, further highlighting the entirely unstateable nature of any suggestion that the property was not sufficiently defined in the Civil Bill.

15. The Deed went on to make clear that the property constituted a family home within the meaning of the 1976 Act; and that the husband was desirous of vesting the property in the husband-and-wife, as joint tenants. Ms Cohen averred that the said deed of conveyance was registered in the Registry of Deeds on 10 October 2005. This speaks to the reality that this narrative description, which of course is reflected in the Civil Bill, was sufficient for the purposes of vesting the property so described.

February 2005 Facility Letter

16. Ms Cohen also avers inter alia that the defendants availed of loan facilities in the sum of €500,000.00 and she exhibits the loan offer or facility letter from the Bank dated 18 February 2005. This contains the signatures of both defendants, witnessed by a named solicitor, under the heading of "*Borrowers signed acceptance of the offer of mortgage loan",* which acceptance is dated 23 February 2005.

Ref: 2834609

17. The very first line in the loan offer or facility letter document is headed "Our Ref" and this is followed by a number being "2834609". Later, I will return to this number which appears precisely in the Schedule to the deed of assignment from the bank to the plaintiff. The Bank's *"Homeloan Mortgage Conditions"* are also exhibited, in which, among other things, *"debt"* is defined, and very widely so.

10 March 2005 Mortgage and charge

18. Ms Cohen went on to aver, inter-alia, that, by deed of mortgage and charge, dated 10 March 2005, (which I will call "the mortgage") the defendants mortgaged and charged the property in

favour of Bank of Scotland Ireland Ltd. (which I will call "the Bank"). Ms Cohen exhibited a copy of that mortgage which bears the signatures of both defendants, duly witnessed by a named solicitor, and it is an "all sums due" mortgage. Ms. Cohen also avers that the mortgage was registered in the Registry of Deeds on 19 April 2005.

19. I pause here to say that at no stage in the 6 years leading up to the grant of the possession order did the defendants ever suggest that the mortgage was invalid; that there had not been default in respect of their repayment obligations; that there had not been valid demand made; or that the power to possess the property had not arisen in those circumstances.

20. In the manner touched on earlier, the description of the property which appears in the schedule to the 2005 mortgage, which both the defendants executed, is reflected exactly in the description of the property in the plaintiff's Civil Bill which issued in 2016. That is not the full extent of the description in the Civil Bill. Rather, the plaintiff *also* uses the very language chosen by the defendants in both their family home declaration and in the conveyance to them. Nor was there any map attached to the mortgage, and again, this utterly undermines any suggestion that the mortgage is void or that the property was not properly described in the proceedings.

9 March 2010 Family Home Declaration

21. Ms Cohen also avers inter-alia that, at the time of entering into the mortgage, the defendants executed a family home declaration; and a copy of that statutory declaration is also exhibited. It bears the signatures of both defendants and was sworn by them on 9 March 2005, being the very day before the mortgage was executed by the Defendants. Paragraphs 1 and 2 of that family home statutory declaration, which both of the defendants swore, begins as follows:-

> *"This declaration relates to the property known as Carna, Suncroft, Co Kildare (hereinafter called the property)*
>
> *2. The property as our family home within the meaning of that term in the family Home Protection Act 1976, as amended by the Family Law Act 1995…"* (emphasis added)

22. Returning to the description of the property in the Civil Bill, the foregoing narrative from the Family Home Declaration is *also* used, namely, the words *"... as commonly known as Carna, Suncroft, Co Kildare (hereinafter the property)"*. These words are used in the Civil Bill in addition to the entire narrative description of the property as it appears on the 2005 mortgage.

23. First, these were the very words employed by the Defendants themselves to describe their property when they swore a Family Home Declaration on 9 March 2005, contemporaneous with the mortgage which they executed on 10 March 2005, both documents having been necessary in the context of the creation and registration of the charge on the property to secure the loan facilities they availed of.

24. Second, the Civil Bill does not describe the property with refence to these words alone. Rather, the schedule in the Civil Bill also uses the *entire* narrative description as the parties used in the

Mortgage executed by the Defendants which created the charge given rise to the proceedings, as well as the narrative description in the Deed of conveyance by which the defendants acquired title to the property.

25. Paras. 6 to 8 of the said statutory declaration is in the following terms and I quote:-

> *"6. The property is not subject to any trust, licence, tenancy or proprietary interest in favour of any person or body corporate arising by virtue of any arrangement agreement or contract entered into by either of us, or by virtue of any direct or indirect financial or other contribution to the purchase thereof or by an operation of law or otherwise, and the property is held free from encumbrances.*
>
> *7. We understand the effect and import of this declaration which has been fully explained to us by our solicitor.*
>
> *8. We make this solemn declaration conscientiously, believing it to be true pursuant to the provisions of the Statutory Declarations Act 1938".*

26. This is of significance because, in the manner I will presently come to, the first named defendant swore an affidavit on 16 March of this year, in which she avers that her sister lives with her in the property, the subject of the possession order and that if possession has to be surrendered, it will have a hugely detrimental effect on her sister who (in the manner averred by the second named defendant, has a complex medical history and very significant care needs).

27. Two points are important to emphasise. First, at no point up to and including the possession order did the defendants or either of them state that any party other than the defendants had any *interest* in the property. Thus, the *status quo* remained, at all material times up to March of this year, as Declared by the Defendants in March 2005.

28. Second, at no point during the more than 7 years which elapsed between September 2016 (when the Civil Bill for possession was issued) and March 2023 (when the second defendant swore her affidavit grounding the present application) did the second defendant refer to her *sister* residing with her in the property.

<u>Acquisition by the plaintiff</u>

29. Returning to the verifying affidavit, from paragraph 18 to 21 inclusive, Ms Coen makes inter-alia the following averments:-

> *"18. I say and believe that by cross–border merger pursuant to the European Communities Cross Border Regulations 2008 of Ireland and the Companies Cross Border Mergers Regulations 2007 of the United Kingdom approved by the High Court of Ireland on 22nd of October 2010, and approved by the Scottish Court of Sessions on 10 December 2010, all of the assets and liabilities of Bank of Scotland Ireland Limited including the loan facility and the mortgage or charges the subject matter of these proceedings transferred to Bank*

of Scotland plc. by operation of law at 23:59 hours on the 31st of December 2010, I say that pursuant to Regulation 19 1 G and H of the Irish Regulations the loan facility and mortgage or charge the subject of the within proceedings are to be construed and have effect as if Bank of Scotland plc. have been a party thereto instead of Bank of Scotland Ireland Limited.

19. I say that by virtue of a deed of assignment dated the 20th of February 2015 and made between the bank and the plaintiff, the bank unconditionally, irrevocably and absolutely assigned to the plaintiff all such rights, title and interest as the bank had in and to the purchased assets with effect from the date thereof…."

(and she goes on to refer to a copy extract of Schedule 1 to the deed of assignment)

"20. I say and believe that the loan facility and the mortgage or charge the subject of the within proceedings were included in the purchased assets therefore acquired by the plaintiff from the bank.

21. In or about February 2015, Bank of Scotland plc. wrote to the defendants to notify the said defendants of its agreement to assign the loan facility and the mortgage or charge the subject of the within proceedings to the plaintiff herein. By letter dated 23rd February 2015 the plaintiff wrote to the defendants to confirm that it had acquired the said loan facility and the mortgage or charge…"

Ms. Cohen exhibits that correspondence.

30. The second named defendant has not explained on affidavit why she did not seek to raise the issue of what she subsequently describes as the plaintiff 'stepping into the shoes' of the Bank which originally advanced the loan to the defendants. Again, that is an argument which is simply, unstateable given the evidence. Nor was it raised at any point in the 7 years prior to March 2023.

Courts of Justice Act, 1936

31. In my view, her failure to do so constitutes a failure to comply with s. 37 of the 1936 Courts of Justice Act, and I will presently return to that, but it is appropriate to note that s. 37 (2) states:-

"*(2) 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, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal.*" (emphasis added)

32. Accepting that I am the judge dealing with the present application, it is still the case that no *reason* has been given on affidavit by the second named defendant as to why she wishes or seeks to raise in 2023 something she did not seek to raise in the proceedings 6 or 7 years ago.

***Prima facie* evidence**

33. Furthermore, and even if I were wrong in that view, I am entirely satisfied that the averments which I have just quoted from, combined with the documents exhibited and the contents of same, establish at least on a *prima facie* basis that the plaintiff acquired the bank's interest. Therefore, despite how skilfully made, the reliance by the second named defendant, through Mr McNamara, on *Mars Capital Finance DAC v. Temple* [2023] IEHC 94 simply cannot avail her.

34. A particular deed was at issue in that case and in *Mars v Temple* there were two EBS entities, giving rise to some doubt about what had transferred. Whilst *Mars v. Temple* concerned a lack of evidence, in stark contrast the deed of transfer exhibited makes explicit that the Bank (defined therein as Assignor) was assigning all of its rights in the facilities (as defined therein) to the plaintiff (who is defined as the Assignee), and that assignment was *per* the schedule. If one turns to the schedule it includes, unredacted, the loan account 2834609. It will be recalled that this was the very loan account reference on the loan facility which the defendants accepted and signed to that effect. Therefore, the approach taken by this Court mirrors that in *Ulster Bank Limited v. Quirke* [2021] IEHC 199.

35. In short, there is uncontroverted evidence before the court that the plaintiff is the successor to the bank in respect of the mortgage. This is also significant because, a year after the possession order was made, the second defendant now seeks to argue that the plaintiff failed to prove its entitlement to 'step into the shoes' of the Bank. Again, this is an argument which first, to my mind, cannot be brought given that no reason has been advanced to explain the failure to seek to ventilate it in the previous 7 years. Second, even if I am entirely wrong in that, it is simply unstateable having regard to the uncontroverted evidence which the second named defendant has been aware of since at least the service upon her of the proceedings. I will presently come to look in some detail at the service, not least because another contended-for ground of defence concerns what might be called a 'service' point.

27 April 2017 Order for substituted service

36. Moving on with the chronology, following an application for substituted service made by the plaintiff, the Kildare County Registrar made an Order, on 24 April 2017, granting the plaintiff liberty to serve the Civil Bill by ordinary prepaid post. Furthermore that order provided that service by that method would be deemed "*good and sufficient*" That order also provided that the plaintiff was permitted to serve all subsequent documents in the same manner, i.e., by prepaid ordinary post.

37. Service of the proceedings, which occurred on 10 November 2016, was deemed good pursuant to the 24 April 2017 order.

Proof of service of the proceedings

38. As to the evidence before the court of service, this is in the form of a statutory declaration of service, dated 22 November 2016, wherein a Ms Roisin Macken, of Ivor Fitzpatrick & Co solicitors, declares that she served the Civil Bill for Possession. It is appropriate for me to quote from that, and she avers that she served: "*…on the occupier(s) of the mortgaged premises…"* She goes on to aver that this was: "*…in an ordinary prepaid envelope addressed to the occupier(s)…"* of the property. She also exhibits the cover letter from her firm. Rather than being addressed to either or both of the defendants, the letter is headed "*By certified post*" and is addressed to (and I quote) "*The Occupier(s)"*. This is followed by the address of the property.

39. Having cited the title of the proceedings, the text of this letter, in relevant part, states:-

> *"Dear Sirs,*
> *We refer to the above entitled proceedings in which we act for Start Mortgages Limited. We enclose true copy Civil Bill for Possession in respect of the property, Carn, Suncroft, Kildare. We are unaware of your interest in the said property*…" (emphasis added)

40. I pause to say that this is plainly evidence that service was effected just as in the manner approved by the order made by the court below, and on those in occupation. The letter concluded:-

> "*We are writing in order to put you on notice of the within proceedings which may result in an order for possession in respect of the said premises. The matter will come before the Circuit Court at the next hearing date on the 23rd of January 2017".*

41. Three comments are appropriate at this juncture. First, service was effected by pre-paid ordinary post. Thus, it was in compliance with the Order for substituted service, made on 24 April 2017. Second, that order explicitly deemed service, *via* that mode, to be "*good and sufficient service"*. Third , service was effected on those in occupation.

42. In light of the foregoing, the suggestion made by the second named defendant, several years later and long after the possession order was granted, to the effect that there was any *defect* in service of the proceedings, and any such suggestion made with reference to Circuit Court Practice Direction CC 17, is with respect, utterly unstateable.

25 January 2018 Affidavit sworn by second defendant

43. Continuing then with the chronology, on 25 January 2018, the defendants, as 'litigants in person', issued an application seeking to have the plaintiff *provide originals* of all documents; as well as an order to *view original* documents. That motion was grounded on an affidavit sworn by the second named defendant on 25 January 2018, in which she averred, inter alia, and I quote *"I have a full defence to my claim by the plaintiff as I do not owe the Plaintiff the sum owed".*

44. I pause to make several comments. Quite apart from that being a 'bald' or a "bare" assertion, it is important to note what was *not* raised by the second named defendant on the 25 January

2018 despite, very obviously, the second named defendant having every opportunity to do so in the affidavit she chose to swear. No mention was made of anyone other than the defendants being in possession. There is no mention of any alleged failure to serve the proceedings, either on the defendants or on anyone else. No mention was made of the second named defendant's sister being in possession. There was no suggestion that the property was not sufficiently described in the Civil Bill, be that due to the absence of a deed or a map attached to that deed, or anything else, including the use in the description in the Civil Bill of what the property is commonly known as. It was not suggested that the Defendants had not drawn down the money. It was not suggested that there was no failure in terms of repayment obligations. It was not suggested that demands had not validly been made. It was not suggested that there was no failure to repay the sums demanded. There was no suggestion whatsoever that the plaintiff had not validly succeeded to the interest formerly held by the Bank.

Forensic report

45. Rather, the grounds of defence put forward was that a "*forensic report*" of the mortgage account would prove "*overcharging*". However, no such report was attached, and none was ever proffered by or on behalf of the defendants or either of them, at any point, or at any stage up to the making of the possession order over 4 years *after* the second defendant swore this affidavit. Indeed, that remains the position to this very day.

Plaintiff's April and October 2018 affidavits

46. A replying affidavit was furnished in April 2018 by a Ms Eva McCarthy, litigation manager on behalf of the plaintiff, and Ms McCarthy also swore a supplemental affidavit in October 2018. In these affidavits, it was averred, inter-alia, that, at all material times, the plaintiff was willing to provide the defendants with copies of all the documents relied upon, and to facilitate inspection of the originals of such documents as were in the possession of the plaintiff.

47. Furthermore, averments were made to the effect that the total balance including arrears had been correctly calculated; and in this regard an up-to-date statement of account was furnished, covering the period from 9 March 2005 to 30 September 2018. This statement of account itemised each transaction type, including debits; credits; the-then balance; and the date of each transaction.

€200 – August 2017

48. As of the swearing by Ms McCarthy of her affidavit on 16 October 2018 the last credit payment recorded was €200 in August 2017, and the balance stood at €438,517.61. It was further averred that the loan, the subject matter of the proceedings, was not impacted by the central bank's tracker mortgage review.

49. There was no further affidavit sworn by the second defendant until after the possession order was made, and no affidavit ever appears to have been sworn by the first defendant.

Plaintiff's 19 November 2019 affidavit

50. Sticking with the chronology, just over a year later, on 19 November 2019, Mr Justin Nevin, litigation manager, swore an affidavit on behalf of the plaintiff, in which he averred inter alia that the current monthly repayments due by the defendants were in the sum of €2,847.85; that the entire outstanding balance on the mortgage loan account stood at €444,397.22, and an up-to-date statement of account was exhibited, showing that the most recent credit on the account was the aforesaid €200, paid over 2 years earlier, in August 2017.

Plaintiff's 31 July 2021 affidavit

51. Mr Nevin swore a further affidavit on 26 August 2021, in which he averred inter-alia that, as of 31 July 2021, the entire outstanding balance on the mortgage loan account stood at €453,869.93; that current monthly repayments due by the defendants were in the sum of €2,847.93; and that the last payment on the account was the aforesaid €200 paid just over 4 years earlier on 1 August 2017. Mr Nevin exhibited up-to-date statements of accounts, addressed to the defendants respectively, giving an item-by-item account of all transactions.

10 September 2021 Circuit Court Order

52. The matter came before the Circuit Court on 10 September 2021, and at that stage the County Registrar made an order, from which the following is a verbatim quote:-

> "*The defendant having been duly served with the Civil Bill for possession and the same coming before the court this day whereupon and on reading the pleadings and documents filed and on hearing the solicitor for the plaintiff and the defendant in person the court doth order:-*
>
> > *(i) Adjourned to the 21st day of February 2022 on condition that the sum of €1,500 is paid per month commencing on the 21st of September 2021 and on the 21st day of every month thereafter;*
> >
> > *(ii) Direct that the divorce order to be available in court on the 21st of February 2022 and that the standard financial statement is to be completed".*

It is clear from the foregoing that the defendant was 'in person' before the court on 10 September and, thus, was very well aware that the case would proceed on 21 February 2022, as specified in the said order of the 10 September 2021 which was perfected on 28 September 2021.

Plaintiff's 7 February 2022 affidavit

53. In advance of the hearing, on 7 February 2022, Ms McCarthy swore a further affidavit in which she averred inter-alia that: the last payment made on the mortgage loan account was the aforesaid sum of €200 in August 2017; that the then current monthly repayments due by the defendants were in the sum of €2,847.65, and that the balance due, as of 31 January 2022, stood at €456,601.87. Up-to-date statements to that effect are also exhibited.

21 February 2022 possession order

54. On 21 February 2022, the County Registrar made an order, from which the following is a verbatim extract:-

"*The defendant having been duly served with a Civil Bill for Possession herein and the same coming before the court this day whereupon and on reading the pleadings and documents filed herein and on hearing the evidence adduced and what was offered by counsel for the plaintiff and there being no appearance by or on behalf of the defendant and it appearing to the court that the plaintiff is entitled to recover possession of the premises as claimed in the Civil Bill for possession, the court doth order:-*

(i) That the plaintiff do recover possession of all that and those the hereditaments and premises comprising 1.650 acres or thereabouts situate in the townland of Common North, Barony of Offaly East in the County of Kildare comprising the property more commonly known as Carna, Suncroft Co. Kildare from the defendants;

(ii) a stay on the execution of this possession order for eight months from this date;

(iii) A permanent stay in the event that the sum of €2,850 is paid per month commencing on the 28th day after service of this order upon the defendants and monthly thereafter;

(iv) Liberty to either party to apply within 28 days of service of this order;

(v) No order as to costs".

24 February 2022 notice of the making of the order

55. Notice of the possession order was served by prepaid ordinary post on 24 February 2022. This is averred to at para.15 of Ms McCarty's 31 May 2023 affidavit, wherein she exhibits the letter sent by the solicitors for the plaintiff, which is dated the 24 February 2022. The *address* on that letter begins as follows:-

"BY CERTIFIED POST
The Occupier(s)
Residence of Michael Ryan and Agnes Ryan.."

56. This is then followed by the address of the property. The body of the letter, having quoted the title of the proceedings; the circuit court record number; and the address of the property, began as follows:-

"Dear Sir/Madam
We refer to the above and confirm that an order for possession has been granted on the 21st day of February 2022…"

57. The letter went on to explain the terms of the order and recommended that the recipient obtain legal advice and bring that correspondence to the attention of their legal advisors. Again, notice of the grant of the possession order was plainly not confined to the defendants.

On the contrary, and just as was the case with respect to service of the proceedings themselves, notice was directed to those in *occupation.*

58. The key point for present purposes is, however, that any suggestion, made in March 2023, that there were service defects 5 years earlier, is simply unstateable, whether with reliance on Circuit Court Practice Direction CC 17 or otherwise. Why? Because service was in accordance with a court order which provided for service by ordinary prepaid post and which also deemed service "*good and sufficient"* if by that means, and it *was* by that means. Furthermore, and speaking to the point about the second named defendant's sister, service both (i) of the proceedings; and (ii) of notice of the making of the possession order was to the *occupier(s),* i.e. not limited to the *defendants.*

Effective service

59. It can also be said that the order made by the court below on 10 September 2021 which began: "*The defendant having being duly served with the Civil Bill for possession, and the same coming before the court this day*…" speaks to a decision by the lower court as long ago as 10 September 2021 that service of the proceedings had been property effected on the defendants. It will be recalled that the second named defendant attended court on 10 September 2021 in response to what was plainly effective service. This further underlines that the service point is entirely specious.

30 June 2022 Appearance

60. The book of pleadings, which I was helpfully provided with in advance of yesterday and which I took the time to consider with great care, contains an entry of Appearance dated 20 June 2022, which is obviously some 4 months *after* the making of the possession order. That Appearance identifies Messrs. Carter Anhold & Co. as the solicitors for the second named defendant. The said Appearance is marked 'received' by the relevant courthouse on 30 June 2022, which, as I say, is over four months *after* the date of the possession order.

July 2022 - Second named defendant's motion

61. A notice of motion, marked as 'received' by the court office in question on 14 July 2022 and made returnable for 3 October 2022, sought an order pursuant to Order 67, Rule 6, of the Circuit Court Rules, to extend time for the second named defendant to appeal the County Registrar's 21 February 2022 order for possession. Why such an extension of time was necessary is not difficult to understand, given that almost 5 months had elapsed between the making of the order for possession, and the issuing of the motion seeking to extend time to appeal it (bearing in mind that the time limit for an appeal was 10 days). Measuring the time from the date of perfection of the order, being 7 March 2022, it was still in excess of 4 months before the motion to extend time was issued. However, it will also be recalled that those in occupation had been served, on 24 February 2022, with notice that the 21 February possession order had been made.

12 July 2022 Affidavit of second named defendant

62. The motion seeking to extend time was grounded on an affidavit sworn on 12 July 2022, by the second defendant. The contents of that affidavit can be fairly summarised as follows. From paras. 5 to 9, averments are made in relation to the "*avenues explored*" by the second named defendant, and contact with a number of parties, up to December 2017, including, a personal insolvency practitioner; the Money and Budgeting Service; Phoenix Project Ireland; and somebody identified as a Mr Horan said to be of Rockwell Private & Associates Limited and/or Mortgage Arrears Assist.

Beyond concerning

63. Before I make any further comments, I want to state in the clearest of terms that it is beyond concerning that there would appear to be persons holding themselves out as in a position to assist, for fees, those in mortgage arrears without those persons having or indeed holding themselves out to have rights of audience before the courts, and without these persons having any legal qualifications.

Personal sympathy

64. I also want to make clear that there must be sympathy, in a personal sense, for someone who decides, for whatever reason, to retain such a person, and to pay such a person to give them legal advice and assistance, despite knowing at all material times that they are not a qualified lawyer. Having made that clear, because nothing I have to say in this ruling is intended to be disrespectful or unkind, the following must be said.

Choice

65. Nowhere does the second defendant aver that Mr Horan is a solicitor or counsel, or that he has any legal qualification, or that she understood him to have same. Yet, she plainly chose to take his advice in relation to how to respond, or not, to the plaintiff's claim. It is an issue I will return to, but the point which I am afraid must be emphasised is that this was a choice which the second named defendant made. That is not at all to condone those persons who apparently are willing to hold themselves out as providing a 'service', and I use 'service' in the loosest of manners, for value. Bearing that in mind, and continuing to look at the averments made by the second named defendant in the 12 July 2022 affidavit, the second defendant avers inter alia that the situation was very stressful for her and that she sought medical assistance in November 2017; and a medical report dating from November 2017 is exhibited.

66. From paragraph 10 onwards, the second defendant avers that Mr Horan gave her to understand that he was liaising with a representative of the plaintiff with regard to a *"settlement"* of the possession proceedings; and that Mr Horan advised her *against* making any payments in relation to the mortgage.

67. I pause to say that, taking nothing away from how troubling it is that someone would provide, for value, such a 'service', it is, with respect, clear from the averments that it was the second

named defendant who chose not to comply with contractual obligations in respect of mortgage payments and chose that course, not based on advice from a qualified solicitor or counsel, but from someone she knew to be neither.

***"take on"* the plaintiff**

68. The second defendant avers inter alia that Mr Horan informed her that he would "*take on*" the plaintiff and would prevent an order for possession being issued against the property. She goes on to refer to the fees charged by Mr Horan, both initially, and thereafter; and the second defendant avers that throughout the period of her engagement with him, she paid Mr Horan a total sum of approximately €14,000. It is very difficult, on the face of the evidence before this Court, to disagree with Mr McNamara's characterisation of matters as involving fraud, not least given some of the correspondence exhibited.

69. The second defendant also avers that she *was* in court, accompanied by Mr Horan, when the County Registrar made the order of 10 September 2021. She avers that he did not speak, but directed her as to what she should say. She refers to the contents of 10 September 2021 Order, including the payments directed in the said order. Despite the payment directed of €1,500 per month specified in the said order, the second defendant avers, inter alia, that Mr Horan advised her *not* to pay anything;

70. She went on to aver that, in February 2022, she received advice from Mr Horan to the effect that her attendance in court on the February 2022 was unnecessary; that a representative of the plaintiff had agreed to adjourn the proceedings; and that counsel would "*take care*" of the matter. Again, I pause to say that these averments by the second defendant can be 'distilled' to a range of very unfortunate choices made by her, all of which flowed from her decision to obtain legal advice and assistance from someone whom she knew to have no legal qualifications or right of audience before the courts.

71. Doubtless this is a choice she has come to regret, but whilst no pleasure is taken in saying so, the evidence speaks to this being her choice at the time. She goes on to aver that, unbeknownst to her, no Appearance or Defence had been entered; and the County Registrar made the possession order in her absence. I pause to say that at all material times the second named defendant, indeed both defendants, chose to represent themselves as 'litigants in person'. Therefore, it is difficult to understand how the defendants or either of them could have understood that someone whom they knew to have no legal qualifications or standing before the courts, could have conducted their defence. At paragraph 14, the second defendant makes the following averments:-

> "*Following the making of the* [possession] *order and the service of the said order upon me in or about March 2022, I immediately inquired with Mr. Horan as to the events of the 21st of February 2022. Mr. Horan advised me that he would submit an appeal to the High Court".*

72. At paragraph 15, she makes averments in relation to contact with Mr Horan, the execution of a notice of appeal, the stamping of same and Mr Horan informing her that he would furnish same to the plaintiff's solicitors on the evening of 14 March 2022 by DX. At paragraph 16 and 17, the second defendant avers that she made enquiries with Mr Horan on about 18 March; made several telephone enquiries to him; and that she contacted Carter Anhold & Co, her now solicitors, on about 21 April 2022.

73. At paragraph 18 she avers that, following investigations by her solicitors on her behalf, on about 28 April it was discovered that no appeal had been filed by Mr Horan on her behalf. She further avers that attempts were made by her solicitors to secure counsel to act in the proceedings, from 11 May 2022, with alternative counsel confirming availability to act in the matter on 17 June 2022. Having averred at paragraph 20, that, at all material times, she believed an appeal had been filed, averments are made at paragraph 21 in relation to what the second defendant contends to be arguable grounds for appeal.

74. These have been touched on earlier in this ruling. I will refer to them again presently. In short, a trinity of issues are raised. The first is that the second defendant was deprived of an opportunity to defend the proceedings; the second is that the property cannot be accurately identified without the map attached to the 2001 Deed; and the third, but plainly related to the second, is that use in the mortgage of the description of what the property is commonly known as, renders the mortgage void.

<u>26 September 2022 supplemental affidavit</u>

75. The second defendant swore a supplemental affidavit on 26 September 2022 in which she made inter alia the following averments, at para. 5:-

> "*…upon further review of my papers I located a letter dated 24th February 2022 from the solicitors for the plaintiff which I had misplaced, and which was served upon me on or about the 28th February 2022…The said letter informed me of the making of the order…*"

76. I pause to observe that the period between 28 February 2022 (when the second named defendant was, as she avers, made aware that the possession order had been made a week earlier) and 14 July 2022 (when the motion to extend time was issued) is a period of some 4 and ½ months. If one compares that to the 10 days allowed for an appeal, the difference is stark, and the delay is obvious.

77. Earlier I quoted *verbatim* what the second named defendant averred at paragraph 14 of her 12 July 2022 affidavit i.e., that she did not learn about the possession order until March. In 26 September 2022 affidavit, she avers that she was mistaken; and she makes averment to the effect that the correct sequence of events is that she formed a *bona fide* intention to appeal upon being notified, by means of the 24 February 2022 letter, that the possession order had been made.

78. She proceeds to aver that, it was at this juncture, she contacted Mr Horan and she avers that he assured her, inter alia, that the Plaintiff had arranged for the matter to be adjourned; that an appeal could be made; that he would take care of that on her behalf to be "*on the safe side*"; and that she was to take no heed of the correspondence from the plaintiff.

Seeking legal advice and assistance from a non-lawyer

79. Again, whilst no pleasure is taken in saying this, the foregoing averments are an account of advice and assistance which the second named defendant, for whatever reason, chose to seek from, and which was given to her by, someone she knew was not a legal professional. This is perfectly clear from the second named defendant's description of Mr Horan in para. 10 of her supplemental affidavit wherein she states that he was:-

> *"an individual recommended by one of her neighbours as someone who could assist with mortgage arrears difficulties".*

80. Two comments are appropriate. First, this underlines the choice made by the second defendant to retain this individual, as opposed to a qualified legal representative. Second, her reference to "*mortgage arrears difficulties*" speaks to the acknowledgement by the second defendant of the fact of the mortgage arrears. It is entirely consistent with the validity of the mortgage and the plaintiff's entitlement to the sums including mortgage arrears.

Seeking and following advice from "*the wrong person*"

81. In this supplemental affidavit, the second named defendant accuses Mr Horan of deceit. As Mr Mc Namara very appropriately submits during today's hearing, the second defendant was "*seeking advice from the wrong person*". Whilst I entirely agree with that, there is no averment of duress; there is no averment of being mistaken as to Mr Horan or his firm having qualifications which they lacked. Rather, she chose, very unfortunately to *seek* advice for the wrong person and to *follow* it.

Eire Continental

82. Returning to the contended-for grounds of defence, the second defendant makes clear in her supplemental affidavit that the third of these, namely, about the commonly-used name or description of the property is linked to the absence of the aforementioned map. Ms McCarthy swore an affidavit on behalf of the plaintiff on 8 November 2022 in response to the affidavits sworn by the second named defendant taking issue with the matters raised and referring of course to the leading case in this area, namely, the Supreme Court's decision in *Eire Continental Trading Co Ltd v Clonmel Foods Ltd* [1955] IR 170. The so-called *Eire Continental* 'principles' identify the matters which this Court should consider when determining if time should be extended, or not.

83. The first is whether there was *a bona fide intention to appeal* formed within the permitted time and for the purposes of this hearing, I am accepting that such a *bona fide* intention was

formed. Therefore I do not believe it would be fair to proceed other than on the basis that the first of the *Eire Continental* principles applies.

84. However, the second is whether something like a *mistake* can be shown in relation to why the time limit for lodging appeal was not met.

85. The third requires the would-be appellant to establish that *arguable grounds* of appeal exist.

86. As Mr McNamara rightly submits, he does not have to prove this to the civil standard, but he does have to, on his client's behalf, meet the lower threshold of arguable grounds. However, and I have used the term more than once in this ruling, *arguable* is certainly not met by the *unstateable.*

No mistake

87. Turning then to the question of mistake, and speaking directly to the second of the *Eire Continental* principles, as I have pointed out earlier, nowhere does the second defendant aver that she understood Mr Horan to be what he is not; or that he held himself out to be a qualified solicitor, and that she proceeded to retain him, and pay him, on that basis. Rather, she chose, for whatever reason, to retain someone she knew to have no legal qualifications; no legal expertise; and no rights of audience before the courts, and thus somebody who could not conceivably run her defence on her behalf, given that at all material times, she was a 'litigant in person'. Again, and this may be difficult to hear, this does not disclose a mistake on her account. The reasons why the appeal was not lodged in time 'boil down' to a conscious decision by her to follow the advice of a non–lawyer in respect of legal proceedings.

Bitter regret

88. Whilst her decision to do this and, on her account, her decision to pay some €14,000, may well be something she bitterly regrets, it does not seem to me to constitute a mistake within the *Eire Continental* principles. It certainly speaks to (i) the folly of choosing to retain an unqualified person to provide legal advice and legal assistance; and (ii) the inadvisability of *deferring to* the views of an unqualified person in respect of legal issues as important as attending the court for hearing of proceedings, despite (iii) knowing at all times that those proceedings will go ahead without any solicitor on record for one, as well as (iv) the very obvious dangers of *delegating to* such an unqualified person the filing of an appeal, knowing at all material times that *you* are a 'litigant in person' and that *they* are not a lawyer.

89. Similar comments apply in relation to the range of choices made by the second named defendant with reliance on what was, in substance, legal advice offered, as the second defendant plainly knew, by someone with no legal qualification to give it. Those choices include, variously, (i) the decision not to pay anything on foot of her mortgage obligations; (ii) the decision not to comply with the terms of the 10 September 2021 order; and (iii) the decision not to attend the hearing of her own case.

The 'fruits' of choices made

90. As I have said, it is beyond concerning that there are persons willing to take money for such a 'service' but, for the reasons set out in this ruling, the evidence discloses the fruits of the second named defendant's choices, *not* a mistake.

Unexplained delay

91. Even if I am entirely wrong in that view with respect to the second of the *Eire Continental* principles, it is beyond doubt that the second defendant knew from the 28 February 2022, that a possession order had been made. It is beyond doubt that she knew at least from 28 April 2022 that no appeal had been filed. Despite this, a further 11 weeks elapsed, i.e. almost 3 months, before any application for liberty to extend time was brought - bearing in mind, as I say, that the time limit for an appeal was 10 days. The 'sum total' of the efforts to explain this delay comprise the averments made at paras. 18 and 19 of the second named defendant's affidavit sworn on 12 July 2022, and I now quote both paragraphs *verbatim* and in full:-

> "*18. I am advised that following investigations undertaken by my solicitors on or about 28 April 2022 it was discovered that no appeal had been filed by Mr. Horan on my behalf, either in the High Court as proposed by Mr. Horan, or in the Circuit Court office in Naas Courthouse. I am advised that my solicitors subsequently made attempts to secure counsel to act in the within proceedings from 11 May 2022 with alternative counsel confirming availability to act in the matter on 17 June 2022.*
>
> *19. I am advised that in the intervening period further instructions and inquiries were necessitated with regard inter alia to acquiring missing documentation and correspondence pertaining to the possession proceedings, correspondence as between myself and the plaintiff and as to the legitimacy or otherwise of the purported agreement as between Mr Horan and Mr Blake to adjourn the possession proceedings generally".* (emphasis added)

92. The reference to *"Mr Blake"* appears to be a reference to someone never employed by or on behalf of the plaintiff, but someone referred to by Mr. Horan on the second named defendant's account. However, taken at their height, these averments are made in the most general of terms and simply do not disclose any *reason* why an application to extend time could not have been issued at the end of April or, for that matter, in May or in June 2022, or for that matter, throughout the entire month of June. Therefore, even confining the analysis to this 11 weeks of delay, it mitigates against this Court's discretion being exercised in favour of extending time within which to bring the appeal.

93. Returning to the contended-for grounds of defence, the first observation which has to be made is that, at no stage in the many years up to the possession order did the second defendant chose to raise *any* of these grounds. It will be recalled that she had every opportunity to do so, and this is evidenced by the swearing by her of the affidavit in January 2018. Despite swearing that affidavit, she did not take any opportunity to raise the grounds she now seeks to advance. She and her co-defendant have had every opportunity to set out such grounds of defence as

she or they wished to rely upon. Para 21 of the second named defendant's 12 July 2022 affidavit disclose the three key grounds:-

(i) that she was deprived of the opportunity to defend the proceedings based on misrepresentations by Mr Horan;

(ii) that the plaintiff's proofs were not in order in the Circuit Court, specifically that the property was insufficiently identified in the Civil Bill;

(iii) inextricably linked with the second, the proposition that the mortgage is void for uncertainty because of the use of the wording representing what the property is commonly named as.

These are, for reasons given in this ruling, entirely unstateable grounds.

Personal Insolvency Practitioner

94. Lest any other ground be disclosed in the body of that affidavit, the following can be said. Contact with a personal insolvency practitioner, which appears to have taken place as long ago as 2017, does not disclose a defence, and it was not averred that any application for personal insolvency arrangement was ever instituted. Indeed it was only at the 'eleventh hour' (a letter was handed in, dated 8 December 2023, on foot of which an adjournment application was made today, an application which, for reasons given in my earlier ruling, I refused) that there was any further attempted progress with respect to the personal insolvency route.

Stress

95. The reference to "*stress*" and the exhibiting by the second named defendant of a letter dated 28 November 2017 from a Dr Cuddihy does not disclose any grounds for defence. One could have nothing but sympathy for someone suffering from stress, particularly arising out of mortgage arrears issues, but stress alone does not constitute a defence. It must also be noted that the name and address used by this doctor on their 28 November 2017 letter is :- "*Ms Agnes Ryan, Carna, Suncroft, Co Kildare".* Why is this significant? The second named defendant, very obviously, supplied this address to her doctor. This is the very *same* address which the second defendant asserts, over 5 years later, to be so vague as to render the mortgage of the property void for uncertainty.

€14, 000

96. The second named defendant's choice to retain Mr Horan; and her choice to pay him €14,000; and her choice to follow legal advice from a non–lawyer; does not amount to a defence to the possession claim.

Ignore directions

97. Given that the order made by the County Registrar on 10 September 2021 was directed to the defendants (not to Mr Horan) in legal proceedings against the defendants (not against Mr Horan) I cannot accept the proposition that the second named defendant can avoid

responsibility for *her* decisions in *her* proceedings, including to *ignore* directions in a court order, and to decide *against* attending the hearing of her own case.

Delegating

98. Similar comments, I am afraid, must apply with equal force to the second named defendant's decision to delegate, to a non–lawyer, the filing of her notice of appeal in legal proceedings in which she had chosen to represent herself as a 'litigant in person'.

Not deprived of an opportunity to defend

99. In other words, the evidence does not disclose that the second name defendant was deprived of an opportunity to defend these possession proceedings. Rather, it discloses a range of very unfortunate choices freely made by her and those choices include, variously, (i) to file just a single affidavit in 2018 which did not disclose the grounds of defence which years later she seeks to advance; (ii) the decision to attend court in September 2021 and apparently to listen to a non–lawyer as to what to say in court; and (iii) her decision not to attend court for the hearing in February 2022. This is not a situation where the second named defendant has ever been deprived of the opportunity to make a defence to the proceeding should she so wish. These proceedings were ongoing for 6 years before the possession orders were made. They were ongoing for 5 years and 3 months from (i) service upon her of the proceedings and (ii) the making of the possession order, and that 'window of opportunity' of over 5 years was more than ample to allow her to raise on affidavit any and all grounds of defence which she wished to raise. In short, what emerges is not any conceivable grounds of defence.

New evidence

100. The most recent affidavit sworn by the second named defendant, on 16 March 2023, is one in which she seeks to furnish new grounds of defence, and new evidence. Earlier, I made clear that under s. 37 (2) of the Courts of Justice Act 1936 the requirements facing the second named defendant have simply not been met. Despite this (and with no explanation and no reference to any reason why the second named defendant is now seeking to have new evidence admitted and to raise new issues for the first time) it will be clear from the ruling that I have engaged with the substance of everything which the second named defendant has put before the court by means of her affidavits, and the skilled submissions made by her counsel. I did so for three reasons.

- First, so that there was no lack of clarity on the part of the second named defendant in relation to why this Court had reached its decision, and that she could have confidence that every issue had been looked at.

- Second, I was satisfied that doing so would not produce any prejudice to the plaintiff.

- Third, because the bedrock of this Court's decision-making must be the interests of justice and, lest it produce an unfairness, I felt that this was the appropriate course in these particular circumstances.

The second defendant's sister

101. The final affidavit sworn by the second named defendant is largely devoted to averments related to her sister and her sister's very significant health challenges. However, for reasons set out earlier, whilst challenges faced by her sister could only attract very genuine sympathy from the court, and whilst the second named defendant's care for her sister is doubtless to her enormous credit, none of this discloses any conceivable defence to the possession claim.

102. It also has to be said that there is evidence before the court to the effect that the second named defendant informed the plaintiff that there were three persons in the property, namely, herself, and her two dependent children (and by that I am referring to the contents of 'Standard Financial Statements' of 2019 and 2020 which comprise Exhibit EMCC 2 to the 31 May 2023 affidavit sworn by Ms McCarthy). No mention is made in those Standard Financial Statements of the second named defendant's sister.

103. The alleged service defect which features heavily in the last of the affidavits sworn by the second named defendant is simply without merit. It is unstateable. The final ground, again featuring heavily in this last affidavit, is that the plaintiff failed to prove its entitlement to *"step into the shoes"* of the Bank. Again, this is simply unstateable. It is a contention which ignores uncontroverted evidence which the second named defendant has been aware of ever since the proceedings were served on her over 7 years ago, in November 2016. It comprises a mere or bare assertion which is, with respect, utterly undermined by the evidence, and it is not even an assertion which the second named defendant chose to make when she swore the single affidavit prior to the possession order, namely, in 2018. It is not an assertion the defendants or either of them chose to make when they were notified in 2015 of the acquisition by the plaintiff of the interest.

104. For these reasons, I am refusing the application to extend time.