OSM Partners Spring 2019 Litigation Bulletin

Summary of Developments

This briefing covers some of the more relevant case law and legislative developments in the area of mortgage litigation which have been published since this quarter.

The efforts of banks, funds and receivers to enforce their security and pursue contractual debts continue to be fiercely resisted by borrowers, tenants and indeed those less directly connected to the primary parties. As we have seen in previous bulletins, the courts continue to try to balance the competing rights and obligations of parties on both sides to proceedings with mixed results.

The key areas are summarised below and we are more than happy to advise or discuss in greater detail any of these issues which are of particular interest or concern to you or your organisation.

The highlights set out in this review include:

- High Court considers whether service of proceedings is a "proceeding" within Order 122
- High Court considers alleged fraudulent transfers
- High Court considers validity of demand for principal sums due
- High Court considers requirement to issue a demand prior to appointment of receiver
- High Court considers the application of the 'moratorium' under the CCMA
- High Court considers various lines of defence to a well charging application
- High Court considers admissibility of evidence by third party servicer on behalf of Plaintiff
- High Court considers defence to summary proceedings by one co-owner of property
- Supreme Court considers validity of receiver appointment
- No Consent, No Sale Bill 2019
- Land and Conveyancing Law Reform (Amendment) Bill 2019

For further information on any of the updates discussed below, or for general advice in relation to matters relevant to your business, contact any of our authors or your usual contact in OSM Partners.

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CASE LAW UPDATE

- **HIGH COURT CONSIDERS WHETHER SERVICE OF PROCEEDINGS IS A "PROCEEDING" WITHIN ORDER 122**
  "service of a summons is a "proceeding" within the meaning of Order 122"

In *Danske -v- Walsh*[1] Danske had obtained judgment in default of appearance against the Defendant, who subsequently brought a motion seeking to have that judgment set aside. The Defendant's sole ground of defence was that, in circumstances where judgment had been marked over a year after the issuing of proceedings, the Plaintiff had failed to comply with Order 122 Rule 11 of the Rules of the Superior Courts. That rule provides that where there has been no proceeding for one year since the last proceeding, the party wishing to proceed must give one month's notice to the other party of his intention to proceed. The question which Noonan J. had to consider was whether service of the proceedings was considered a "proceeding" within the meaning of that rule. In this instance, service of the proceedings was effected less than a year prior to the judgment. If service was considered a "proceeding" within the meaning of the rule, then there would have been no requirement for the Plaintiff to provide notice of their intention to proceed. However, if service was not considered a "proceeding" then notice would have been required and consequently judgment would therefore have been obtained in contravention of the rule. Having considered several authorities, Noonan J. took the view that the mere issuing of proceedings has no effect on a defendant and the court cannot its exercise jurisdiction over a defendant until the proceedings are actually served. Service had an immediate and direct consequence on the Defendant in that the clock began to run against him for the purposes of entering an appearance. He considered that it had been long established that the delivery of pleadings is considered to be taking a step in the proceedings and that it would be surprising if service of the summons itself was not so regarded. He concluded that service of proceedings did amount to a "proceeding" within the meaning of Order 122 Rule 11 and, therefore, the motion to set aside the judgment must fail.

- **HIGH COURT CONSIDERS ALLEGED FRAUDULENT TRANFERS**
  "necessary and probable consequence of transfers taking place shortly after judgment that the Bank would be hindered in recovering its debt"

In the case of *AIB -v Burke*[2], the Bank sought to overturn two transfers by the first named Defendant to the second named Defendant. The first named Defendant had defaulted on his loan repayments on foot of loan facilities provided by the Bank and the Bank obtained judgment against him in the sum of almost €5.5m in July 2017. The first named Defendant was served with an amended copy of the relevant order in October 2017. The first named Defendant subsequently made two separate transfers of property to his wife, the second named Defendant, in November 2017 and February 2018. On discovering that these transfers had taken place, the Bank issued proceedings in April 2018. Twomey J. placed great reliance on the timing of the transfers in that they both took place after judgment was obtained and after the order for judgement was served on the first named Defendant. He concluded that it seemed clear that it was "a necessary and probable consequence" of the transfers at the time when they took place, that the Bank would be hindered in recovering its debt. On that basis he held that the transfers were made with the intention of defrauding creditors and were therefore void and of no legal effect under s. 74 of the Land and Conveyancing Reform Act 2009.

- **HIGH COURT CONSIDERS VALIDITY OF DEMAND FOR PRINCIPAL SUMS DUE**

[1] *Danske Bank A/S (trading as Danske Bank) -v- Richard Walsh;* [2018] IEHC 799; 20th November 20188
[2] *Allied Irish Bank plc -v- Martin Burke and Deirdre Burke;* [2018] IEHC 767; 21st December 2018

In *AIB -v- McCabe*[3], Noonan J considered the question as to whether a lawful demand for monies due had been made in the context of an application for an order for possession of the Defendant's property. The mortgage deed was executed by the Defendant in favour of both AIB Mortgage Bank and the Plaintiff. The relevant mortgage conditions provided that the Plaintiff could not take any steps to enforce the mortgage without the consent of AIB Mortgage Bank. The Defendant argued that a letter of demand constituted a step to enforce the mortgage and as such would have required the prior written consent of AIB Mortgage Bank. The first letter of demand issued in August 2013, apparently without the prior consent of AIB Mortgage Bank. A second letter of demand was sent by the Plaintiff's solicitors in December 2015, again apparently without the consent of AIB Mortgage Bank and also purporting incorrectly to be a demand in respect of both banks when in fact the debt was due to the Plaintiff alone. Subsequent to those letters, the Bank sought to remedy its position by obtaining a letter of consent from AIB Mortgage Bank in January 2018. A further demand was then sent to the Defendant in February 2018, however, it again referred to both the Plaintiff and AIB Mortgage Bank and failed to clarify that the debt was due solely to the Plaintiff.

The Defendant argued that the issuing of a letter of demand was a step to enforce the mortgage and that the earlier demands therefore were invalid without the consent of AIB Mortgage Bank. He argued that the February 2018 demand was also invalid because it did not specify to whom the debt was due.

Whilst Simons J. indicated that he tended to agree with the argument that the issuing of a letter of demand was to be considered a step in the proceedings, in the current case any deficiency as highlighted by the Defendant was cured by the subsequent letter of consent and fresh demand. He did not believe that the error in the final demand referring to both banks invalidated that demand.

He remarked that clause 5 of the mortgage was aimed at regulating the position of the two banks *inter se* and the banks were entitled to waive compliance with same. Accordingly, he felt it would be difficult to understand how the Defendant could in any event rely on any alleged breach of that clause.

Ultimately Simons J. found a valid demand had issued, proceedings were instituted after that demand had been issued and therefore Section 62(7) of the Registration of Title Act 1964 had been complied with and the Plaintiff was entitled to the order for possession.

- **HIGH COURT CONSIDERS REQUIREMENT TO ISSUE A DEMAND PRIOR RO APPOINTMENT OF RECEIVER**

  "the question of the validity of the demand actually served was not relevant as the terms of the mortgage deed did not require the issuance of a demand prior to the appointment of a receiver"

In proceedings concerning the enforcement of a mortgage over the Diep le Shaker restaurant[4], a case was stated to the High Court as to whether the mortgage became immediately enforceable on the occurrence of stated events, without the requirement for the issuance of a demand, and if the answer to that was in the negative, whether the Bank had a right to appoint a receiver on foot of the demand actually served.

Ni Raifeartaigh J considered a number of cases dealing with the issue including the *Gunn*[5] and *Gillespie*[6] decisions before concluding with an analysis of the conditions of the mortgage deed in question. She considered that the relevant clause in the mortgage deed regarding the appointment of a receiver as follows:

"At any time after the security hereby constituted has become enforceable…the Bank may from time to time appoint…any person or persons to be receiver and manager or receivers and managers".

[3] *Allied Irish Banks plc -v- Patrick McCabe;* [2019] IEHC 28; 28th January 2019

[4] *Arthur Ffrench O'Carroll -v- Permanent TSB plc, Keith Lowe, Stephen Tennant, Havbell DAC, Tom O'Brien; Havbell DAC and Tom O'Brien -v- Arthur Ffrench O'Carroll and Christine Ffrench O'Carroll*; [2016] IEHC 794; 18th December 2018.

[5] *Start Mortgages -v Gunn*; [2011] IEHC 275.

[6] *EBS -v- Gillespie*; [2012] IEHC 243

Considering when the security became enforceable, she found the clause 7.1 of the relevant mortgage conditions clearly provided that the security became enforceable upon the happening of one of the trigger events listed therein, which included where there was a failure to pay. She considered that this was an automatic trigger without the requirement for a letter of demand. She distinguished this from the provisions of clause 2.1 of the mortgage which dealt with the personal liability of the borrowers, as opposed to the appointment of a receiver, and that the former clause clearly required a demand letter.

- **HIGH COURT CONSIDERS THE APPLICATION OF THE 'MORATORIUM' UNDER THE CCMA**
  "where business borrowings secured on the family home the CCMA must be applied before issuing proceedings"

In *AIB -v- Buckley*[7], the Bank had issued a special summons seeking possession of property owned by the Defendant. The property comprised both the Defendant's home and farming lands. The Defendant argued that the Bank had not complied with the Code of Conduct on Mortgage Arrears ("CCMA") and therefore could not succeed with the application. The Bank argued that it had no obligation to apply the CCMA in this instance as the loan which it was relying on was used for the Defendant's farming business and not for the purposes of funding his primary residence. Simons J. however accepted the Defendant's argument that the CCMA applies to the target of the proceedings, rather than the nature of the loan. Accordingly, even though it was a business loan, it was secured on *inter alia* the primary residence and as the special summons sought possession of property which included the primary residence, the moratorium should have been applied. The Bank were therefore held to be in breach of the provisions of the CCMA and the proceedings were dismissed.

- **HIGH COURT CONSIDERS VARIOUS LINES OF DEFENCE TO A WELL CHARGING APPLICATION**
  "a party cannot re-litigate arguments previously raised or raise new defence which could have been raised in the earlier proceedings"

In the case of *AIB -v- Kelleher*[8]*,* the High Court considered an application for a declaration that a judgment mortgage stood well charged over the Defendants' property and for an order for sale. The Defendants raised a number of grounds of defence all of which were rejected by Allen J.
In the first instance, the Defendants claimed that the loan, which was the subject of the initial judgment proceedings, was illegal under the rules of champerty as it was said to have been for the purposes of funding litigation taken by the Defendants regarding the alleged defective construction of their home. They also contended that the Bank's recourse under the loan was limited to the expected damages from the litigation. Allen J. refused to consider these arguments, agreeing with the Bank's position that the Defendants could not re-litigate issues already determined or raise issues which could have been raised in earlier proceedings. The Defendants raised a number of technical arguments regarding the drafting of the indorsement of claim which were rejected out of hand, including the argument that the description of the property as "land" when it also included a house, was deliberate concealment of the existence of a house. He also rejected the contention that discrepancies in versions of the original court order relied on had the effect of invalidating the judgment. A further contention that the order took effect from the date of perfection rather than the date of pronouncement was also dismissed, with Allen J. holding that the date of perfection relates to the running of time for the filing of an appeal but not the coming into effect of the order. Ultimately Allen J. held that the judgment mortgage was well charged.

- **HIGH COURT CONSIDERS ADMISSIBILTIY OF EVIDENCE BY THIRD PARTY SERVICER ON BEHALF OF PLAINTIFF**
  "evidence given by a third party servicer who was not a partner or officer of the Plaintiff was inadmissible"

[7] *Allied Irish Bank plc -v- Sean Buckley;* [2019] IEHC 97
[8] *Allied Irish Banks plc -v- Gerald Kelleher and Ann Kelleher;* [2019] IEHC 53; 1st February 2019

In a summary summons case for liberty to enter final judgment[9], the debtor sought to defend the proceedings on a number of grounds. The main line of defence considered by Noonan J. was that the affidavit grounding the proceedings was sworn by an employee of Link ASI Limited, a third party servicer acting on behalf of the Plaintiff, rather than an employee of the Plaintiff, and was accordingly inadmissible.

Noonan J considered a number of previous cases he felt clearly dealt with the same issue. In the case of *Bank of Scotland -v- Stapleton*[10], the application for an order for possession was grounded on the affidavit of an employee of Certus, who were servicing the loan on behalf of the plaintiff bank. In that case Peart J. held such evidence to be hearsay as the Bankers Books Acts only permitted a partner or officer of the plaintiff bank to prove the records of the bank and this function could not be delegated to a third party. Noonan J. also considered the decision in *Ulster Bank Ireland Limited -v- Dermody*[11] which applied the decision in *Stapleton.* In *Dermody,* the affidavit grounding the application for judgment had been sworn by an employee of Ulster Bank Limited who were an associated company of the plaintiff bank. As the deponent was not an officer of the plaintiff bank, his evidence was also deemed hearsay and inadmissible.

Following a detailed analysis of a variety of cases he concluded that the evidence of the servicer was inadmissible and therefore insufficient evidence was before the court to enable it to grant judgment. Rather than strike out the proceedings however, Noonan J. indicated that the proceedings could be remedied by the Plaintiff putting forward further evidence on affidavit and that he would therefore discuss with the parties where they wished to put forward any further evidence.

- **HIGH COURT CONSIDERS DEFENCE TO SUMMARY PROCEEDINGS BY ONE CO-OWNER OF PROPERTY**

  "*a Bank is not obliged to take a particular or any course of action to enforce its security"*

In *Bank of Ireland -v- Neary and McDonald*[12], Simons J. considered the position of the first named Defendant, Mr. Neary, who sought to defend summary proceedings for monies due on foot of a mortgage taken out with the Plaintiff. The Defendants had previously been in a relationship which had since broken down and were co-borrowers and tenants in common of the property the subject of the mortgage. An order for possession of the property had been obtained in March 2017.

Mr. Neary advanced three main grounds of defence. His first line of argument was that the letter of demand was ambiguous and therefore invalid. The letter did not specifically demand payment of the full balance, however the redemption balance and arrears figures were both noted in the heading of the letter. This argument was dismissed as on a reading of the letter itself Simons J. felt that there was no doubt but that the full sum due was being called in.

The second ground of defence relied upon was that the Plaintiff had failed to write to Mr. Neary with notification of the changes in the variable rates of interest throughout the lifetime of the loan. The Plaintiff was not in a position to produce proof of such notifications as the letters would be computer generated and individual copies were not retained. Mr. Neary did not depose on affidavit that he had not received such notifications and therefore Simons J. felt that he had not made out his case on that point.

The final ground was that Mr. Neary had offered to voluntarily surrender his interest in the property in 2012 and, having done so, argued that the Plaintiff had an obligation either to accept that surrender or take action to enforce the security. Having offered to surrender the property, he felt that he should not be held responsible for any interest from the date he offered to surrender his property. It was noted however that the Plaintiff could not accept the surrender unless executed by both Defendants. Simons J.

[9] *Promontoria (Aran) Limited -v- Gerry Burns;* [2019] IEHC 75; 13th February 2019

[10] *Bank of Scotland -v- Stapleton;* [2012] IEHC 549

[11] *Ulster Bank Ireland Limited -v- Dermody*; [2014] IEHC 140

[12] *Bank of Ireland Mortgage Bank -v- Michael Neary and Margaret McDonald*; [2019] IEHC 169; 15th March 2019

held that there was no duty on a bank to take a particular or any course of action to enforce its surety. He reiterated the joint and several nature of the borrowings and that the Bank was entitled to pursue the first named Defendant alone.

Finally, Simons J. addressed a point which had been raised during the course of proceedings regarding compliance with the CCMA. He confirmed however that the recovery of debt pursuant to a mortgage does not constitute proceedings for possession within the context of the CCMA and therefore it did not apply here.

- **SUPREME COURT CONSIDERS VALIDITY OF RECEIVER APPOINTMENT**
  "signature of individual under power of attorney has same effect as if executed by Bank under seal"

In the case of *McGuinness -v- Ulster Bank*[13], Finlay Geoghegan J in the Supreme Court considered an appeal regarding the validity of a deed of appointment which had been held to be valid by the High Court. The appointment was signed by a Michael McNaughton for and on behalf of Ulster Bank under a power of attorney. No seal was affixed to the appointment. The Plaintiffs argued that the appointment was invalid as it was not in accordance with the relevant provision of the mortgage which permits the appointment by the Bank to be made by a document either signed by an officer of the Bank or executed under seal. The Bank accepted that Mr. McNaughton had not signed as an officer of the Bank but in accordance with the power of attorney. The Bank argued that in accordance with the Powers of Attorney Act 1996 and Section 64 of the Land and Conveyancing Law Reform Act 2009, the signature of Mr. McNaughton constituted a valid execution of the appointment and had effect as if it were a document executed under seal. Having considered the relevant legislative provisions in detail, Finlay Geoghegan J concluded that the signature without seal pursuant to the power of attorney represented a valid execution of the appointment on behalf of the Bank. The appeal was therefore dismissed.

[13] *Charles McGuinness and Noel Mulligan -v- Ulster Bank Ireland Limited*; [2019] IESC 20

GOVERNMENTAL AND LEGISLATIVE UPDATES

- **NO CONSENT, NO SALE BILL 2019[14]**

The No Consent, No Sale Bill is a private members bill introduced by Pearse Doherty which aims to give residential borrowers control over the proposed sale of their loan to a third party. The bill proposes that lenders be required to give borrowers certain prescribed information regarding the proposed sale and the effects on them, to allow them to make an informed decision.
The bill also provides that specific consent must be provided where the lender will lose control over the setting of rates or how they deal with arrears and the bill states that prior consent will not be valid. The bill has passed the Dáil Second Stage and awaits the committee stage.

- **LAND AND CONVEYANCING LAW REFORM (AMENDMENT) BILL 2019[15]**

This bill aims to introduce a new Section 2A into the Land and Conveyancing Law Reform Act 2013. This section would relate essentially to borrowers who had engaged with a PIP but had not been able to resolve the matter. In those circumstances, the bill proposes that when considering an application for an

order for possession the court shall take account of a number of various factors including whether the order would be proportionate, the circumstances of the mortgage, the conduct of the parties and the amount of the debt remaining due. This bill is sponsored by the Minister for Justice and Equality and is due to reach the Seanad Committee Stage on the 2nd April 2019.

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[15] No. 19 of 2019