

Mortgage Enforcement Litigation Update

August 2016

Summary of Developments

This update covers some of the more relevant Case Law and Legislative updates and a summary of some of the proposed developments of the legislature and government since April 2016. 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 include;

- The Court of Appeal finally settled the position as regards the Jurisdiction of the Circuit Court as regards the Rateable Valuation of residential properties.
- The Court of Appeal decide the issue of the enforcement of Judgment Mortgages in respect of a family home.
- The substitution of Plaintiff in proceedings involving the acquirer of loan portfolios and the positive and negative outcomes for loan acquirers in separate actions.
- The introduction of new regulations relating to lending activities to small and medium sized enterprises.
- The publication of the Addendum to the Consumer Protection Codes of 2012 relating to Variable Mortgages.
- A summary of the relevant programme for government initiatives.

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

- **SUBSTITUTION OF PLAINTIFF IN PROCEEDINGS WHERE LOAN ACQUIRED**
“order substituting Stapleford Finance Limited as Plaintiff affirmed”

In *Stapleford Finance Limited -v- Peter Lavelle*¹ the Plaintiff had acquired the loan the subject of the proceedings from Irish Bank Resolution Corporation Limited (IBRC) subsequent to the initiation of summary proceedings against the Defendant.

An order was made by Baker J. in the High Court substituting Stapleford Finance Limited as Plaintiff in the proceedings. The Defendant appealed this order to the Court of Appeal, arguing that Baker J. erred in law in interpreting the transfer of the loan from IBRC to Stapleford as a “change in interest” within the meaning of the Superior Court Rules which would entitle Stapleford to take over the existing proceedings and to bring their application for substitution under Order 17 r. 4. The Defendant argued that the existing proceedings could accordingly not be maintained and Stapleford would have had to institute new proceedings which were by then statute barred.

The Court of Appeal held that Baker J. had correctly interpreted the transfer of the loan as a change in interest and that Stapleford was entitled to the order for substitution as granted.

- **REQUIREMENT FOR A DEMAND LETTER PRIOR TO ISSUING DEBT RECOVERY PROCEEDINGS**
“a summons cannot be considered a notice of demand”

In *Start Mortgages Limited -v Shane Hanley*², a demand letter had been sent prior to the issuing of debt recovery proceedings, however it had been erroneously sent to someone other than the Defendant.

The Plaintiff argued that:

- the wording of the loan stating that it “may” demand repayment of a loan meant that it did not have to issue a letter of demand and
- the summons itself was a form of notice of demand.³

The arguments were rejected as a matter of law and with a side note that it would be contrary to the requirements of the CCMA not to issue a demand letter. Barrett J. further noted that the Plaintiff itself must have considered a demand letter as being necessary prior to the issuing of proceedings, having in fact sent one, albeit to the wrong individual.

¹ *Stapleford Finance Limited (as substituted) -v- Peter Lavelle and Irish Bank Resolution Corporation Limited (In Special Liquidation) (Notice Party)*; 11 April 2016; [2016] IECA 104

² *Start Mortgages Limited -v- Shane Hanley*; 14 July 2016; [2016] IEHC 320

³ In *N. Joachimson (A Firm Name) -v- Swiss Bank Corporation*; 11 March 1921; (1921) 3 KB 110 the English Court of Appeal held that whilst a demand may be a necessary ingredient of a cause of action, this need not take a specific form and a writ can of itself constitute a demand. This case has been successfully relied on in more recent Irish Commercial Court cases on this point. This case however was not specifically referred to in the Hanley judgment.

- **OMNIBUS APPLICATION FOR SUBSTITUTION OF PLAINTIFF**

“an omnibus application for substitution of Plaintiff was refused”

In *Irish Bank Resolution Corporation Ltd -v- Kennedy*⁴, the President of the Circuit Court had refused an application by Mars Capital Ireland Limited for an order substituting it as Plaintiff in lieu of Irish Nationwide Building Society, Anglo Irish Bank Corporation Limited and Irish Bank Resolution Corporation Limited, as appropriate, in some 583 Circuit Court cases throughout the country.

An appeal was brought by Mars to the High Court in respect of 576 cases.

The unlikelihood of prejudice to the Defendants in allowing such an omnibus application succeed in allowing such an application, together with the implications for costs was noted, however the appeal was ultimately dismissed by McDermott J. on the basis that he felt it may confuse or disrupt the orderly local administration of each case.

Rather than allow scope for the possibility of each individual circuit dealing with omnibus applications in respect of cases issued in each circuit, he went on to hold that each of the 576 cases should be seen to be dealt with individually in its proper local jurisdiction. Consequently, individual applications for substitution of a plaintiff in Circuit Court cases must be brought in each individual case.

- **DEBT RECOVERY PROCEEDINGS CONCLUDED BY ACQUIRER OF LOAN**

“successful action concluded by acquirer of loan”

In *Ennis Property Finance Limited -v- Hynes*⁵, Costello J. sitting in the Commercial Division of the High Court gave judgment in a case concerning the recovery of loans due by the Defendants where those loans had been sold to the Plaintiff by Bank of Scotland (Ireland) Limited subsequent to the initiation of the proceedings.

The Court rejected a number of defences advanced by the second named Defendant including a challenge to the validity of the order substituting the Plaintiff to the proceedings. Evidence of the loans and the outstanding balances was given at the plenary hearing of the matter by employees of the Plaintiff and Pepper Asset Servicing who serviced the loans, in what can be viewed as an example of a successful action involving acquired loans.

- **ENFORCED SALE OF CO-OWNED PROPERTY BY JUDGMENT MORTGAGE HOLDERS**

“judgment mortgage holder could not force sale of property co-owned with spouse”

Two cases taken by Muintir Skibbereen Credit Union⁶, heard together by the Court of Appeal represent the first consideration by the Court of Appeal or Supreme Court of the powers of partition and sale of the family home pursuant to the Land and Conveyancing Law Reform Act 2009⁷.

⁴ *Irish Bank Resolution Corporation Limited -v- Conor Kennedy and Cecily Kennedy*; 06 July 2016; [2016] IEHC 395

⁵ *Ennis Property Finance Limited -v- Alan Hynes and Noreen Hynes*; 08 July 2016; [2016] IEHC 387

⁶ *Muintir Skibbereen Credit Union -v- Cornelius Crowley and Breda Crowley (Notice Party); Muintir Skibbereen Credit Union -v- Brendan Hamilton and Breda Hamilton (Notice Party)*; 13 July 2016; [2016] IECA 213

⁷ Number 207 of 2009

In both instances, judgments had been granted against the Defendants and registered as judgment mortgages against their family homes which each co-owned with their respective spouses. The High Court refused to exercise its discretion under the 2009 Act to grant the Plaintiff orders allowing for the partition and sale of the homes.

In the appeal brought by the Plaintiff, the Court of Appeal considered various factors including the fact that neither spouses had been consulted about the original loans, their personal circumstances and the fact that 50% of the proceeds of sale of either home would not be sufficient for either family to purchase another home.

Ultimately Hogan J. declined to make a formal decision on the affordability factor and decided to dismiss the Plaintiff's appeal on the basis that *"the effect of any such order would be to direct the sale of the family home over the wishes of the innocent spouse who was not a party to the loan transaction which gave rise to the judgment mortgage in the first instance and who had never formally consented to same."*

- **THE JURISDICTION OF THE CIRCUIT COURT**

"the Circuit Court does not have jurisdiction to deal with unrateable properties"

In our last briefing we highlighted the uncertain position arising from two conflicting High Court decisions regarding the jurisdiction of the Circuit Court to deal with cases relating to domestic property which is no longer rateable by virtue of the Valuation Act 2001⁸.

The Court of Appeal finally settled the issue in *Permanent TSB -v- Langan*⁹ and affirmed the decision of Murphy J. in *Bank of Ireland Mortgage Bank -v- Finnegan & Ward*¹⁰ as the correct interpretation of the matter.

The Langan case concerned properties which were not the principal private residence of the Defendant and therefore did not come within the mandatory jurisdiction of the Circuit Court pursuant to the Land and Conveyancing Law Reform Act 2013¹¹. The loans in question did not fall under the category of housing loans under the Land and Conveyancing Law Reform Act 2009 which also provides for a mandatory Circuit Court jurisdiction.

The question which then fell to be considered was whether the properties in question, being domestic and therefore no longer rateable, could be dealt with by the Circuit Court. In his decision, Hogan J. held that as the properties were no longer rateable, they could not be said to have a rateable valuation at all. Accordingly, the Circuit Court had no jurisdiction in disputes regarding such properties. The position is therefore that the High Court is the correct jurisdiction for all actions concerning such properties.

In his decision Hogan J. points to the as yet un-commenced Section 45 of the Civil Liability and Courts Act 2004¹² which would allow for the Circuit Court to claim jurisdiction on the basis of the market value of a property, rather than rateable valuation, with an upper limit of €3,000,000.00. Whether the decision in this case will provide an impetus to consider the commencement of this section remains to be seen.

⁸ Number 13 of 2001

⁹ *Permanent TSB plc -v- David Langan*; 28 July 2016; [2016] IECA 229

¹⁰ *Bank of Ireland Mortgage Bank -v- Laura Finnegan and Christopher Ward*; 20 May 2015; [2015] IEHC 304

¹¹ Number 30 of 2013

¹² Number 31 of 2004

LEGISLATIVE DEVELOPMENTS

- **ADDENDUM TO CONSUMER PROTECTION CODE 2012**
“additional protections for variable rate mortgage holders”

The Central Bank has recently published an *“Addendum to Consumer Protection Code 2012”* providing for increased protections for variable rate mortgage holders. The addendum requires that regulated entities produce a summary statement of its policy for setting each variable mortgage interest rate that it makes available to a **personal consumer** (excluding tracker interest rates). The statement must be published at all times on the regulated entity’s website and must be in the format set out in Appendix F to the Code. The statement must clearly outline:

- The factors which may result in changes to the variable interest rate,
- The criteria and procedures applicable to the setting of the variable interest rate,
- Where the regulated entity applies a different approach to the setting of the variable interest rate for different cohorts of borrowers and the reasons for the different approach.

Such statement must be provided to a prospective borrower with the offer document. If any changes are made to a summary statement, notification of those changes must be provided to personal consumers to whose mortgage that summary statement applies.

In addition to the annual statement of account, a personal consumer must also be provided with a summary of other mortgage products available that could provide savings for the personal consumer at that point in time and details of how they can obtain further information. It must also contain a link to the Competition and Consumer Protection Commission website relating to switching lenders or mortgage type. This information must also be provided when notifying the personal consumer of an increase in a variable interest rate.

The addendum comes into effect on 01 February 2017.

- **EUROPEAN UNION (CONSUMER MORTGAGE CREDIT AGREEMENTS) REGULATIONS 2016¹³**

The Regulations came into force on 21 March 2016 and transpose into Irish law the EU Directive¹⁴ on credit agreements for consumers relating to residential immovable property.

Some of the main points of the regulations are summarised below:

- Anyone wishing to act as a mortgage credit intermediary or provide advisory services must hold an authorisation from the Central Bank, or have an authorisation from another EEA Member State pursuant to the Directive and have notified the Central Bank of their intention to carry out those activities in the State;
- Anyone who is already authorised as a mortgage intermediary under the Consumer Credit Act will be deemed to be authorised as a mortgage credit intermediary under

¹³ S.I. No. 142 of 2016

¹⁴ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010

the new regulations, subject to them complying with additional requirements laid down by the Regulations by 21 March 2017;

- A list of the various categories of people who can provide advisory services is set out;
- Creditors and mortgage credit intermediaries are required to act “honestly, fairly, transparently and professionally” in their dealings with consumers when devising products, acting as an intermediary, providing advisory services or executing a credit agreement;
- Specific information is to be provided to consumers in the advertising of products and concerning the person acting as a mortgage credit intermediary and creditor;
- Specific information concerning the credit offer is to be provided in the format set out in the European Standardised Information Sheet. A thirty day reflection period is to be provided to allow consumers to compare offers of mortgage credit;
- Certain tying and bundling practices involving the choice of auctioneers, solicitors and financial products are prohibited;
- A consumer cannot be unfairly penalised for early redemption;
- A creditor has to exercise reasonable forbearance before initiating possession proceedings and must at a minimum comply with the provisions of any Central Bank measure or code regarding the handling of arrears;
- Where a property is sold the creditor shall ensure as far as is reasonably practicable that the property is sold at the best price reasonably obtainable; and
- If an outstanding debt remains, the creditor shall put in place measures to facilitate repayment of the outstanding debt by the consumer, having regard to the Insolvency Service of Ireland guidelines on a reasonable standard of living and reasonable living expenses.

- **NEW CENTRAL BANK REGULATIONS ON LENDING TO SMALL AND MEDIUM-SIZED ENTERPRISES¹⁵**

These regulations apply to regulated entities (RE) engaging in the provision of credit facilities, credit servicing activities and other related activities to small and medium-sized enterprises (SMEs).

The regulations set out the manner in which regulated entities must deal with SMEs and guarantors of credit to SMEs. The regulations distinguish between micro/small enterprises and medium enterprises, offering additional protections to the former.

Some of the main points common to both categories are set out below:

- A RE must offer the borrower the option of an annual meeting which is to include a credit review;
- All information provided is to be clear and comprehensible with information of material importance to be specifically brought to the attention of the borrower;
- Specific information regarding the credit facility is to be provided before a borrower is bound by the credit facility agreement;

¹⁵ Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises) Regulations 2015, S.I. No. 585 of 2015

- Where a guarantor is required, the RE must provide the intended guarantor with an explanation as to why guarantee is required and the potential consequences for the guarantor;
- If security is required, the RE must provide the borrower with an explanation as to why security is required;
- If the borrower notifies the RE that it is at risk of going into arrears or financial difficulties the RE must offer the borrower the option of an immediate review of the facility, alternative arrangements and security as appropriate;
- Written policies and procedures for borrowers in financial difficulties must be in place;
- A standard information booklet must be in place and given to borrowers in financial difficulties;
- Communications with borrowers in financial difficulties must be proportionate and not excessive;
- There must be a written procedure for the proper handling of complaints;
- The borrower and any guarantor must be given specific information when a security realised; and
- Where an alternative arrangement is offered specific information must be provided.

Additional provisions relating to micro/small enterprises include:

- A RE cannot make any unsolicited offer of credit;
- Information regarding the credit application process is to be provided to the applicant including, when requested, guidance in assisting the applicant to make a successful credit application;
- If the RE cannot make a decision within 15 working days of receipt of a completed application for credit it must inform the applicant why the assessment will take longer than 15 working days and the expected timeframe for a decision;
- Where the application is refused, the RE must explain why and notify the applicant of their options regarding an appeal of the decision and their complaints procedure;
- Where a borrower remains in arrears for 15 working days after the arrears first arose, the RE must contact the borrower to identify why and assess whether an assessment is appropriate;
- A borrower in arrears can be classified as not co-operating if it does not provide requested information; and
- The RE must have an internal appeals procedure regarding the refusal of a credit application, withdrawal or reduction of a facility or a classification as not co-operating.

The rules came into effect on 01 July 2016 save for credit unions who will become subject to the rules on 01 January 2017.

- **CIRCUIT COURT RULES (ACTIONS FOR POSSESSION, SALE AND WELL-CHARGING RELIEF) 2016**

S.I. No 171 of 2016 came into effect on 19 May 2016 introducing minor amendments to the precedent Civil Bill, Entry of Appearance and Grounding Affidavit.

PROPOSED GOVERNMENT AND LEGISLATIVE DEVELOPMENTS

- **CENTRAL BANK REGULATION OF VARIABLE RATE MORTGAGES**

On 16 May 2016 Deputy Michael McGrath presented a private members bill¹⁶ aimed at giving the Central Bank certain powers regarding the regulation of variable rates for principal dwelling house mortgage loans. In essence the Central Bank would have the power to issue a direction to a lender to vary their rates if the Central Bank's assessment of same finds them to be too high according to a set list of assessment criteria. The Central Bank would have the power to issue sanctions for failure to comply with any such direction.

Whilst undoubtedly a populist move, this proposed bill has been met with resistance by the Central Bank and would likely serve to act as a restriction on competition in the market.

- **PROGRAMME FOR GOVERNMENT INITIATIVES**

A number of initiatives relevant to the sector have been promised in the latest programme for government¹⁷ including:

- A strengthening of the existing mortgage arrears framework;
- Greater protection for mortgage holders, tenants and SMEs where loans have been transferred to non-regulated entities;
- A "Help to Buy" scheme to assist first time buyers with accessing adequate and affordable mortgage finance or mortgage insurance;
- Tackling high variable interest rates;
- Code of conduct for switching mortgage provider;
- Additional long term solutions for mortgage arrears cases;
- New national service to standardise supports available to borrowers in mortgage arrears;
- Review of thresholds and processes for Personal Insolvency Arrangements;
- New court dedicated to handling mortgage arrears and personal insolvency cases;
- Amending the CCMA and placing it on a statutory basis; and
- Retaining mortgage interest relief beyond December 2017.

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¹⁶ Central Bank (Variable Rate Mortgages) Bill 2016

¹⁷ A Programme for a Partnership Government, May 2016