Mortgage Enforcement Litigation: Review of Key Developments 2017

CONTACT US

Declan Murphy
Head of Corporate & Commercial Litigation and Private Client
Partner
dmurphy@osmpartners.ie
+ 353 1 691 5902

Richard O'Sullivan
Head of Debt Collection & Insolvency
Partner
rosullivan@osmpartners.ie
+ 353 1 691 5901

Claire Colfer
Senior Associate
ccolfer@osmpartners.ie
+ 353 1 691 5915

Andrew Croughan
Head of Personal Insolvency
Senior Associate
acroughan@osmpartners.ie
+ 353 1 691 5904

Raymond Lambe
Senior Associate
rlambe@osmpartners.ie
+ 353 1 691 5926

Welcome

This briefing 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 throughout 2017. The key areas are summarised below and we are 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:

- The Supreme Court settles the issues in the Langan case.
- The High Court confirms that a contractual power to appoint a receiver is not dependent on continuation of Conveyancing Acts or registration of Bank as owner of charge.
- The High Court confirms that mortgages executed but not registered against a folio have priority over subsequently registered judgment mortgages.
- The Court of Appeal sets aside an Order for Possession where service of the proceedings was not in strict accordance with the rules.
- The High Court confirms that the decision of Permanent TSB plc -v- Langan has no effect on matters the subject of the Land and Conveyancing Law Reform Acts 2013.
- The High Court refuse to imply a term that a mortgage cannot be transferred to an unregulated third party.
- The High Court rejects the argument that a purported assignment of a mortgage by the mortgagor to a third party under s93 of the Land and Conveyancing Law Reform Act 2009 is a valid assignment.
- The High Court considers the importance of carrying out assessments of mortgage contracts for unfair terms.
- The enactment of the Courts Act 2016 conferring jurisdiction on the Circuit Court in respect of properties with a market value not exceeding €3,000,000.00.
- A summary of the relevant 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.

General Commentary

Having caused difficulties for lenders in a large volume of cases over the last few years the problems caused by the Langan case and the case itself were finally put to rest in 2017. In January legislation came in to force allowing for the market value of a property to form the basis of the jurisdiction claimed in proceedings rather than the rateable valuation. Under this move the Circuit Court had jurisdiction if the market value of a property did not exceed €3,000,000.00, which was presumed to be the case unless otherwise proved. This legislative move served ultimately to dampen the impact of the Supreme Court decision handed down in December which finally put an end to the Langan litigation itself and held that if a property either had a rateable valuation of less than €253.95 or had no rateable valuation at all, the Circuit Court had jurisdiction (click here for separate briefing on this case from December 2017).

The validity and effect of a transfer of a loan to a third party was considered by the courts throughout the year in a number of contexts. The High Court confirmed that the contractual power to appoint a receiver was not dependent on the registration of the chargeholder as owner of the charge. In another case a distinction was made regarding the requirement to register the transfer of a charge in certain circumstances with the court holding that where a charge was transferred pursuant to an approved scheme under the Central Bank Act 1971, the change of ownership of the charge did not have to be registered in the Land Registry. The converse situation applied in a case concerning a Bank of Scotland (Ireland) Limited charge which had passed to Bank of Scotland plc (although was not registered as owner of the charge in the Land Registry) and subsequently to Tanager Limited (who was registered as owner of the charge in the Land Registry). The High Court was of the view that as Bank of Scotland plc should have been, but had not been, registered as owner, a question arose as to whether it was able to transfer the charge to Tanager Limited and whether one could look behind the conclusiveness of the Land Registry register in that regard. Accordingly the Court felt that a case should be stated to the Supreme Court in that regard. In another interesting case the High Court held that where there was a legal requirement on a transferee to given notice of an assignment of a loan, in the absence of such notice a debt could still be actionable in equity though not in law.

2017 saw another range of defences and appeals taken by lay litgants with varying degrees of success. Whilst acknowledging the requirement in repossession cases for an examination of the mortgage contract to be undertaken by a court for unfair terms, the High Court refused to allow this argument where it had not been raised at trial or appeal stages. In other cases challenged by borrowers the High Court refused to allow a stay to be placed on a judgment pending the resolution of a complaint to the Financial Services Ombudsman which it felt was doomed to fail and in another refused to imply a term precluding the transfer of a loan facility to an unregulated entity. The High Court held in another case that a purported assignment of the loan by a borrower to a third party SPV, to whom the borrower had been making his mortgage payments, was invalid. The High Court was critical in a number of cases of the assistance being provided to lay litigants by unqualified third parties and also confirmed the position that so called “McKenzie friends” could assist but not represent lay litigants in proceedings.

CASE LAW UPDATE

Claim Receiver estopped from bringing possession proceedings

"no estoppel in absence of evidence of representations allegedly made by receiver"

In the case of *Ken Tyrrell -v- David Wright and Rope Walk Car Park Ltd*[1], the Plaintiff, as Receiver over three properties, including the first named Defendant's principal private residence sought interlocutory injunctions requiring the Defendants to deliver up possession of the three properties. They also sought an order vacating the *lites pendentes* that had been registered against the properties by the first named Defendant's partner. The second named Defendant was a lessor of one of the properties.

The loan had been originally granted by Anglo to the first named Defendant and subsequently transferred to Launceston Property Finance Limited. The first named Defendant alleged that he had discussed with Pepper, who were servicing the facility on behalf of Launceston, the possibility of extending two of the properties which were adjoining properties, in order to increase their value. On foot of those discussions he spent in the region of €12,000.00 plus VAT applying for planning permission for the works, which was granted. The works were not carried out and ultimately the facility was demanded in full. Costello J. held that the first named Defendant had not, as suggested, identified a clear and unambiguous promise to the effect that he was to be permitted to develop the two properties so that he could repay all or a significant portion of the debt and retain one of the properties as his PPR. The court held that if there was an estoppel, it was of a temporary nature only to allow him time to carry out the works and Launceston could resile from such a promise on reasonable notice which had occurred in this case. It was evident that Launceston had afforded the first named Defendant time to carry out the works but then withdrew that once it became clear that the claims of the first named Defendant's partner and mother could put the security at risk.

The first named Defendant further argued that he had not been afforded the benefit of MARP. The Receiver argued *inter alia* that MARP did not apply as the CCMA does not apply to the Receiver or Launceston who are unregulated entities. The Court did not find it necessary to consider this point as it agreed that MARP would not apply in any event as the first named Defendant had allowed various claims to accrue without the prior consent of the mortgagee in breach of the mortgage conditions.

Ultimately the Receiver was entitled to orders for possession of the lands and injunctions restraining the Defendants from trespass on the lands. The *lites pendentes* were vacated save for that of the partner over one of the three properties.

Power to appoint receiver

"contractual power to appoint a receiver not dependent on continuation of Conveyancing Acts or registration of Bank as owner of charge"

The Plaintiff in the case of *Patrick J. Woods -v- Ulster Bank Ireland Limited, James Meagher and Adrian Trueick*[2] had granted charges over three properties to Ulster Bank Ireland Limited. The second and third Defendants had been appointed as joint Receivers over the properties. The Plaintiff sought to set aside the appointments and sought damages for breach of contract and fiduciary duty. The Bank and the Receivers sought to dismiss his claim as an abuse of process or having no reasonable prospects of success.

While there was no express power to appoint a receiver in the mortgages and no express incorporation by reference of the 1881 Act, there were references to a receiver throughout the document. Baker J. relied on a number of recent judgments considering the point and relied in particular in the case of *Dowdall & Anor -v- O'Connor & Anor*[3] which considered the same form of mortgage deed. He held that the proper construction of the mortgage required that the relevant provisions of the 1881 Act be incorporated into the agreement. The applicability of those provisions to the mortgage did not depend on the continuation in force of the relevant statutory provisions.

The Plaintiff had argued that as the Receivers had been appointed prior to the registration of the Bank as owner of the charge, the appointments were invalid. It was held and counsel for the Plaintiff accepted, that in accordance with Rule 63 of the Land Registration Rules 1972, registration is deemed to be completed on the day on which the application is received for registration. Furthermore, the joint receivers were appointed under a contractual power. As such, the Bank did not have to be registered as owner of the charge at the time they sought to exercise the power to appoint a receiver, as that power was not dependent on it being registered as owner of the charge.

The Plaintiff contended that the appointments were not executed by writing under hand as they were executed by donees of a power of attorney. The Court dismissed this

1 Ken Tyrrell -v- David right and Rope Walk Car Park Limited; 17th February 2017; [2017] IEHC 92
2 Patrick J. Woods -v- Ulster Bank Ireland Limited, James Meagher and Adrian Trueick; 21st February 2017; [2017] IEHC 155
3 Dowdall & Anor -v- O'Connor & Anor; [2013] IEHC 423

argument and relied on *McCleary -v- McPhillips*[4] where it was held that in such instances the requirements were that it be in writing and with the signature of a person duly authorised by the Bank to sign such documents, under hand, on behalf of the Bank.

The power of attorney gave the donees authority "to sign or otherwise execute and deliver" a range of documents and instrument including all documents relating to the exercise of the power of the Bank on foot of any security held by it. The Court held the Plaintiff's claim was bound to fail and struck it out.

Adequacy of Damages where property being sold

"damages were an adequate remedy for sale of property"

This decision of McGovern J. concerned two related sets of proceedings[5] taken by the same Plaintiffs. The first sought to restrain the receiver entering the premises over which he had been appointed and the second against the chargeholder sought specific performance of an alleged contract relating to the premises and/or damages. The application before the court was for interlocutory applications, in the first instance by the Plaintiffs seeking to restrain the receiver in interfering with the property and the second by the Receiver seeking possession of the property and restraining the plaintiffs from interfering with the property.

The Plaintiffs contend that it had an open ended agreement to buy out the loans of the first named Plaintiff. The Court heard that a settlement figure had been agreed but a portion of that sum had remained unpaid notwithstanding several time limits set in place. Certus, on behalf of the chargeholder, had clearly stated to the second named Plaintiff that as the various conditions specified had not been met with, including failure to discharge the agreed sum, there was no agreement in place. The Court held that it was open to the chargeholder to withdraw the offer and that there was no fair issue to be tried on this point.

The Court further held that damages would be an adequate remedy if a decision was given in favour of the Plaintiffs as the proceedings concerned a commercial investment property which the Plaintiffs have stated they are willing to see sold at a stated price. The Court noted that expressions of interest had been received for a sum in excess of that price. The Court held there was prima facie evidence of a valid appointment of receiver. Accordingly the balance of convenience lay in favour of the receiver carry out his duties and taking possession of the property and if necessary selling it. The Plaintiffis were refused the injunctions sought and the *lites pendentes* were vacated as the receiver could not deal with the property.

Transfer of charge pupursuant to Central Bank Act 1971

"charge transferred pursuant to approved scheme did not require registration under Central Bank Act 1971"

In *KBC Bank Ireland plc -v- Kevin Woods*[6] the Defendant had appealed the granting of an Order for possession. He argued that when the charge which was originally granted in favour of IIB Homeloans Limited was apparently transferred to KBC Bank Ireland plc, that transfer was not registered in the Land Registry. Accordingly, the Plaintiff had no entitlement to rely on the charge. Twomey J. in an ex tempore decision, distinguished this from the situation relating to Bank of Scotland plc. Unlike Bank of Scotland plc, KBC Bank Ireland plc had obtained title to the charge pursuant to S.I. 125 of 2009[7] and sections 35 and 36 of the Central Bank Act 1971[8] and this meant that a formal registration of the transfer of the charge was not required.

Abuse of Process

"Plaintiff's claim against Receiver dismissed as abuse of process"

In *Corrigan -v- Fennell*[9] the Plaintiff was the tenant of property owned by his brother. He claimed that the Defendant had acted as a receiver of the property pursuant to an invalid Deed of Appointment. The receiver sought to dismiss the Plaintiff's application on the ground that it disclosed no reasonable cause of action and/or was frivolous or vexatious and/or was an abuse of process. The Court noted that the High Court had already ruled on two separate occasions in relation to the validity of the Deed of Appointment. The Court questioned whether the Plaintiff had locus standi to challenge the validity of the Receiver but ultimately did not give a decision on that point. It was held that this case disclosed no reasonable cause of action and amounted to an abuse of process. Recounting the history of the various applications made by the Plaintiff, the Court went so far in its judgment as to suggest that the receiver would be within his rights to seek an *Isaac Wunder*[10] order which would "require a person with a history of vexatious or frivolous litigation to get the permission of the Court before issuing proceedings so as to protect another party from the oppression of having to constantly defend unwarranted proceedings."

[4] Paul McCleary -v- Paul McPhillips; Paul McPhillips -v- ACC Loan Management Ltd formerly ACC Bank plc, Grant Thornton International Ltd trading as Grant Thornton Ireland, Stephen Tennant, Paul McCleary, Declan Kavanagh and Jack McCann; [2015] IEHC 591
[5] Donor Garages Limited and Paul O'Reilly -v- Stephen Tennant; Donore Garages Limited and Paul O'Reilly -v- Ennis Property Finance Limited; 9th March 2017; [2017] IEHC 178
[6] KBC Bank Ireland plc -v- Kevin Woods 13th March 2017 [2017] IEHC 164
[7] Central Bank Act 1971 (Approval of Scheme of KBC Mortgage Bank and KBC Bank Ireland plc) Order 2009
[8] No 24/1971
[9] Corrigan -v- Fennell; 14th March 2017; [2017] IEHC 183
[10] Wunder -v- Hospitals Trust; Unreported Supreme Court decision 24th January 1967

Effect of unregistered mortgage on registered property

"Judgment mortgage had no priority over prior mortgage which was not registered on folio"

In *Larianov Foundation -v- Leo Prendergast and Sons (Engineering) Limited*[11] Keane J. upheld the principle that a mortgage which has been executed but not registered against a folio operates as a section 72[12] burden and takes priority over a judgment mortgage registered after the execution of the mortgage.

Application to set aside order where borrower unaware of proceedings

"Order for possession set aside as one borrower was not properly served with proceedings"

In *Start Mortgages Limited -v- Paul Tierney and Aileen Tierney*[13] the first named Defendant had brought an application to the High Court to set aside an Order for Possession granted by the High Court against property jointly owned by the Defendants. That application had been refused and the first named Defendant appealed that refusal to the Court of Appeal. The Court heard that the first named Defendant had not been personally served with the proceedings and was not made aware of them until he was phoned by his wife to say that the Sheriff had arrived to execute the possession order. He maintained that his wife had always dealt with the mortgage and he had been unaware of any difficulties surrounding the repayments. When the summons server attended at the property to serve the proceedings, the second named Defendant was personally served on her own behalf. She indicated to the summons server that the first named Defendant was indisposed but she would accept service on his behalf. The second named Defendant admitted that she did not however provide the documentation to her husband. Mahon J. on behalf of the three Judge division of the Court of Appeal considered in detail Order 9 rule 4 of the Rules of the Superior Courts. This provides that where a husband and wife are both defendants, service of a summons is to be effected on them both. Whilst in this case a practical approach was taken by the summons server, it was not in accordance with the Order and no step was taken to correct this by either applying for substituted service or applying to have service deemed good. The appeal was allowed.

Establishing entitlement to appoint receiver

"a stay on the appointment of a receiver was granted where a clear chain of title from the original mortgagee to the Plaintiff had not been evidenced"

In *Denis English -v- Promontoria (Aran) Limited*[14] the Plaintiff sought to stay the appointment of a receiver. The Court agreed with the Defendant's argument that he was entitled to see proof of the transfer of ownership of the mortgage before he could be compelled to give up control of the property to that third party. The Instrument of Appointment of the receiver stated that the basis of the Defendant's entitlement to appoint a receiver was a transfer of the mortgage from Promontoria Holding 128 B.V. to the Defendant. The evidence before the Court suggested that Ulster Bank had executed a mortgage sale deed in favour of Promontoria Holding 128 B.V. on the 16th November 2014 however a copy of that document was not before the court. The Court further noted that on the 12th February 2015 Ulster Bank purported to sell the same interest to the Defendant. Whilst there was reference to a Deed of Novation of the same date by Promontoria Holding 128 B.V. to the Defendant, this was not before the court and an assessment of the chain of title could not be carried out. Murphy J. placed a stay on the appointment of the receiver until the Defendant established as a matter of law and fact that it had at the relevant time a right to appoint him.

The matter came back before Murphy J. in May 2017[15] and having provided copies of the additional documentation showing the chain of title from Ulster Bank to the Defendant, Murphy J. lifted the stay on the appointment of a receiver.

Challenge to order amending Title of Plaintiff and their locus standi

"Rules specifically provide such applications to be made ex parte; Register conclusive evidence of title"

In *Start Mortgages Limited -v- Vincent Kavanagh and Madeleine (Ors Madeline) Kavanagh*[16] the first named Defendant sought to appeal the order for possession granted by the Circuit Court. He argued that the application to amend the title of the Plaintiff in the proceedings from Bank of Scotland plc. to Start Mortgages Limited was made without notice to him. The Court pointed to the relevant rules where it is clearly stated that such applications are to be made ex parte. As regards the Plaintiff's title to the charge the subject of the proceedings, Noonan J. pointed out that the position could not be clearer and the Land Registry register was conclusive evidence of the fact that the Plaintiff was the registered owner of the charge in question. He went on to observe that the Defendant was pursuing futile and potentially very costly appeals doomed to fail on the strength of misguided advice from unqualified anonymous third parties.

11 Larianov Foundation -v- Leo Prendergast and Sons (Engineering) Limited; 24th March 2017; [2017] IEHC 192
12 Section 72 Registration of Title Act 1964 (as amended)
13 Start Mortgages Limited -v- Paul Tierney and Aileen Tierney; 29th March 2017, [2017] IECA 103
14 Denis English -v- Promontoria (Aran) Limited; 16th November 2016; [2016] IEHC 662
15 Denis English -v- Promontoria (Aran) Limited (No. 2); 17th May 2017; [2017] IEHC 322
16 Start Mortages Limited -v- Vincent Kavanagh and Madeleine (Ors Madeline) Kavanagh; 4th July 2017; [2017] IEHC 433

registered owner of the charge in question. He went on to observe that the Defendant was pursuing futile and potentially very costly appeals doomed to fail on the strength of misguided advice from unqualified anonymous third parties.

Appeal of Order for possession on Langan grounds

"the decision of Permanent TSB plc -v- Langan has no effect on matters the subject of the Land and Conveyancing Law Reform Act 2013"

The first named Defendant appealed the granting of an Order for possession and sought a number of declaratory reliefs and cases to be stated. He argued that by virtue of the Langan[17] case the Circuit Court was deprived of jurisdiction in this case. However Noonan J. noted that the property was the principal private residence and therefore Section 3 of the Land and Conveyancing Law Reform Act 2013 conferred jurisdiction on the Circuit Court.

He also argued that pursuant to section 93 of the Land and Conveyancing Law Reform Act 2009 he was entitled to have his mortgage transferred to a third party known as the People's Mortgage Protection Vehicle. He informed the Court that he had been making mortgage repayments to that third party. The Court reiterated that the only party entitled to receipt of the mortgage payments was the bank or its lawful assignees of which there were none. He went on to state that the suggestion that the defendants could somehow defeat the claim of the plaintiff bank by assigning their interest in the mortgage or indeed property in question to a third party was utterly misguided and spurious. The Court further noted its concern that the first named Defendant and others like him were being duped by anonymous parties into paying money to them on the basis of so called legal advice. He criticised the quality of the advice and documents produced by such advisors and noted that the parties taking the advice ended up exposed to unnecessary costs. He went on to note the number of legitimate avenues open to parties to turn to for legal and financial advice.

Application for stay where FSO compliant made

"FSO complaint which was bound to fail no ground for staying judgment"

Barrett J. gave a single judgment in three sets of factually overlapping debt recovery summary proceedings taken by Promontoria (Aran) Limited against John Hughes and others[18]. The question arising was whether a stay on judgment in those proceedings should be granted where there were outstanding complaints to the Financial Services Ombudsman. Reliance was placed on the fact that the Ombudsman had expressed a preliminary view that the complaints would not be investigated as there was an alternative means of redress in relation to the conduct complained of i.e. the court proceedings themselves. Barrett J. also appeared satisfied that the complaint was premised on a wrong understanding of the applicable fact and that there was no real prospect of securing the required relief from the FSO. The complaints centred on the manner in which proposals made to the Defendants had been withdrawn. The Court's view however was that the offers made had not been simply withdrawn but had lapsed as the Defendants had not accepted the offers by the deadline given.

Borrowers seeking implied term precluding transfer of loan

"Court refused to imply term precluding transfer of loan facility by Bank"

In a case seeking summary judgment for a debt[19], the borrowers argued that the court ought to imply a term into the loan facility to the effect that Permanent TSB was precluded from transferring the loan facility to the Plaintiff. The Court's view was that terms and conditions of the facility clearly allowed the Bank to transfer the facility to a third party. The borrowers sought to imply a term that the Bank would not transfer the loan to "an unregulated or unauthorised entity". The Court noted that the facility was serviced by Pepper who were regulated by the Central Bank of Ireland. Considering the authorities on the question of implying terms, the court held such a term could not be implied as it did not meet the established tests and would have the effect of contradicting an express term of the contract.

High Court confirms the position of 'McKenzie Friend'

"High Court confirms that a litigant cannot be represented other than by a qualified lawyer"

In a case taken by lay litigant Henry Swords[20] he was accompanied by a "McKenzie friend". Eagar J. held that whilst a McKenzie friend could accompany the plaintiff and take notes, quietly make suggestions and give advice, he had no entitlement to take part in the proceedings as an advocate. He confirmed that a McKenzie friend had no right to address the court unless invited to do so by the presiding judge which invitation was not extended in that case. Eagar J. rejected any argument that there was any obligation under European law to permit a McKenzie friend represent a litigant and pointed to Article 19 of the Statute of the Court of Justice which clearly states that parties other than a Member State and Institution of the European Union must be represented by a lawyer.

---

[17] *Permanent TSB plc -v- David Langan; [2016] IECA 229. The Court of Appeal held that as domestic dwellings were unrateable by the Valuation Act 2001 the Circuit Court's jurisdiction to deal with such properties was excluded unless they fell under the Part 10 of the Land and Conveyancing Law Reform Act 2009 or section 3 of the Land and Conveyancing Law Reform Act 2013.*

[18] *Promontoria (Aran) Limited -v- John Hughes and Margaret Hughes; Promontoria (Aran) Limited -v- John Hughes; Promontoria (Aran) Limited -v- John Hughes and Thomas Browne; 11th July 2017; [2017] IEHC 447*

[19] *Cheldon Property Finance DAC -v- John Hale and Mary Hale; 4th July 2017; [2017] IEHC 432*

[20] *Henry Swords -v- AIB Bank plc and AIB Leasing Limited; 27th July 2017; [2017] IEHC 496*

Debt 'actionable in equity' in absence of assignment notice

"High Court holds that a debt was still actionable in equity where legal requirement to give notice of assignment not complied with"

By way of defence in an application for summary judgment[21] a Defendant argued that the proceedings could not succeed as she had not been given express written notice of the assignment of the debt in accordance with section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877. Baker J. took the view that whilst the Defendant had given a valid consent to the assignment of the debt, the apparent waiver of notice did not obviate the need for proof of notice pursuant to the 1877 Act. Baker J. held to a view previously expressed by her that the effective date of an assignment is the date that the notice is given to the debtor. She held that no particular form of notice had to be provided but that it must give express notice of the assignment of the debt, the identity of the assignee and contain sufficient information to enable the debtor know with reasonable certainty that the assignment did assign the debt. In the circumstances of the case Baker J. held that the Defendant had not been given the required notice of the assignment. This position however did not prevent the assignee from issuing proceedings as an equitable assignee. An equitable assignment of an existing debt did not require notice to be provided. The Defendant argued that in such circumstances a case could only be taken by the assignor. The Plaintiff argued that such a requirement was no longer necessary. Having considered the various differing authorities, Baker J. preferred the view that as the assignor (Allied Irish Banks plc) had ceased to have any rights by virtue of the scheme under which the debt was assigned to the Plaintiff, there was no legal or practical reason why they should be joined in the proceedings. In the circumstances Baker J. was satisfied that notwithstanding that the Defendant was not given sufficient express notice to meet the statutory requirements, the claim was validly brought by the Plaintiff and judgment was entered for the amount claimed.

Basic payment scheme payments can be subject to equitable execution

"the Court of Appeal upheld the appointment of a receiver by way of equitable execution over payments which might be made in the future under the Basic Payment Scheme"

This case[22] involved an appeal to the Court of Appeal over a High Court order varying an order for the appointment of a receiver by way of equitable execution over payments under the Basis Payment Scheme (formerly the Single Farm Payment Scheme). The appellant argued that there was a fundamental change in the nature of the payment which required a fresh application each year. The entitlement to payment therefore only arose after an assessment by the relevant department and that until a decision was made there was nothing to be attached. He further argued that all other remedies had not yet been exhausted and that the payments amounted to future income over which receivers could not be appointed. The respondent argued that whilst the payments were not legally due and accruing and as such beyond the normal legal process, the entitlement to claim the payments was a chose in action which was amenable to the appointment of a receiver by way of equitable execution. The Court considered in detail the jurisdiction to appoint a receiver by way of equitable execution. Ultimately the Court held that such payments were not future wages or salary although were future income and could be subject to the appointment of a receiver by way of equitable execution. All of the conditions required for the appointment of a receiver by way of equitable execution over the payments to become due under the scheme had been met and the appeal was therefore dismissed.

Unfair terms directive could not be pleaded after conclusion of appeal

"The High Court would not permit the introduction of an argument based on the Unfair Terms Directive where such an argument had not been raised at trial or appeal stages"

The High Court was asked in this case[23] to grant an injunction restraining the repossession of his family home on foot of a previous High Court order upholding the order for possession of the Circuit Court. The Plaintiff argued that consideration had not been given to whether the mortgage contract contained terms prohibited by Council Directive 93/13/EEC more commonly known as the "Unfair Terms Directive". Raifeartaigh J considered the principle of res judicata and the principles of finality and certainty emphasised in ECJ authorities and ultimately in this instance the Plaintiff was precluded from introducing this argument at this point. The Plaintiff had had ample opportunity to raise these arguments previously but did not do so and it would be an abuse of process to allow him to maintain the present proceedings in those circumstances. Raifeartaigh J declined to consider the question as to extent of a court's obligation to consider the terms of the directive in cases which were still ongoing.

[21] *AIB Mortgage Bank -v- Nadine Thompson; 31st July 2017; [2017] IEHC 515*
[22] *ACC Loan Management Limited -v- Mark Rickard and Gerard Rickard; 31st July 2017; [2017] IECA 245*
[23] *Patrick Cronin -v- Dublin City Sheriff and Tanager DAC; 17th October 2017; [2017] IEHC 685*

Order for possession overturned where no unfair terms assessment

"the High Court overturned an order for possession where the Plaintiff had not put before the Circuit Court all documentation required for unfair terms assessment to be carried out"

In an appeal[24] against an order for possession given by the Circuit Court, the Defendants advanced ten separate grounds of appeal. Whilst most were dismissed by the High Court, they were successful in arguing that an assessment as to whether the mortgage contract contained unfair terms should be undertaken. Barratt J held that as all of the relevant documentation which would have enabled the Court to carry out such an assessment had not been provided, the order for possession could not be allowed to stand. Barratt J commented that such an assessment was incumbent on it as a matter of European law.

Case stated concerning validity of transfer of charge

"the High Court considered that a case should be stated regarding Bank of Scotland plc's ability to transfer a charge to Tanager DAC"

In this case[25] Noonan J. heard an appeal from an order for possession of a property which had been obtained by Tanager DAC. The charge was originally registered in the name of Bank of Scotland (Ireland) Limited, being the entity which had offered the loan to the Defendant. All of the assets and liabilities of Bank of Scotland (Ireland) Limited subsequently transferred to Bank of Scotland plc by virtue of cross-border merger regulations. Bank of Scotland plc subsequently sold a portfolio of securities to the Plaintiff, including the mortgage the subject of these proceedings. The Plaintiff was subsequently registered as owner of the charge.

The Court took the view however that Bank of Scotland plc was not entitled to rely on the power to transfer a registered charge as it had not itself been registered as owner subsequent to its acquisition of the assets of Bank of Scotland (Ireland) Limited. The Plaintiff sought to rely on the argument that the Land Registry register was conclusive proof of its ownership of the charge. Noonan J. pointed however to the ability of a court to rectify the register on the grounds of fraud or mistake and suggested that there may have been a mistake in the circumstances. He ultimately was of the view that given that the decision of the High Court in the appeal was not appealable further and given that the argument was an issue of public importance, he felt a case should be stated to the Court of Appeal as to whether inter alia the court was entitled to have regard as to the circumstances in which the Plaintiff was registered as owner of the charge and whether the Defendant could argue those circumstances amounted to a mistake.

Issues raise in Langan case finally determined

"the Supreme Court holds that although a property is not rateable it may still be attributed with a rateable valuation for the purposes of establishing jurisdiction"

In a judgment delivered on the 12th December 2017, the Supreme Court finally settled the arguments raised in the Langan case. The Court held that whilst a property may not be "rateable" in that it was not subject to the payment of rates, it could still have a "rateable valuation". It held that the Circuit Court had jurisdiction in cases regarding properties which either had a rateable valuation not exceeding €253.95 or had no rateable valuation whatsoever. In such cases it would be necessary to provided evidence either of the rateable valuation or proof that it did not have a rateable valuation assigned to it.

LEGISLATIVE DEVELOPMENTS

Courts Act 2016[26]

This Act inserts a new section 53A into Civil Liability and Courts Act 2004[27]. It essentially provides that where jurisdiction of the Circuit Court in civil proceedings is conferred by reference to a monetary amount, if the Plaintiff alleges the market value of the property does not exceed that amount it shall be presumed, until the contrary is proved, that it does not exceed that amount. The section does not apply to civil proceedings initiated prior to passing.

Civil Liabilty and Courts Act 2004 (Commencement Order) 2017[28]

This is consequent on the enactment of the Courts Act 2016, and commenced sections 45-48 and 50-53 of the 2004 Act as of the 11th January. Amends monetary value of several acts to €3,000,000.00 including the third schedule of the Courts (Supplemental Provisions) Act 39/61. This means that the Circuit Court has jurisdiction to hear claims, including actions for possession of a property where the market value of a property does not exceed €3,000,000.00. This combined with the Courts Act 2016 served to fill the void in respect of actions against properties which would otherwise have fallen foul of the Langan case as the matter stood at that time.

[24] *EBS Limited -v- Trevor Kenehan and Bernadette Ryan; 24th October 2017; [2017] IEHC 604*
[25] *Tanager DAC -v- Rolf Kane; 22nd November 2017; [2017] IEHC 697*
[26] *Courts Act 2016, No. 22 of 2016*
[27] *Civil Liability and Courts Act 2004; No. 31 of 2014*
[28] *Civil Liability and Courts Act 2004 (Commencement) Order 2017; S.I. No. 2 of 2017*

LEGISLATIVE DEVELOPMENTS (CONTINUED)

Civil Court Rules (Jurisdiction) 2017 [29]

This is consequent on the enactment of the Courts Act 2016, and commenced sections 45-48 and 50-53 of the 2004 Act as of the 11th January. Amends monetary value of several acts to €3,000,000.00 including the third schedule of the Courts (Supplemental Provisions) Act 39/61. This means that the Circuit Court has jurisdiction to hear claims, including actions for possession of a property where the market value of a property does not exceed €3,000,000.00. This combined with the Courts Act 2016 served to fill the void in respect of actions against properties which would otherwise have fallen foul of the Langan case as the matter stood at that time.

PROPOSED GOVERNMENT AND LEGISLATIVE DEVELOPMENTS

Private Members Bills

The plight of those in homelessness and those experiencing mortgage difficulties remains a hot political topic and has been the subject of varied private members bills through the past year such as:

- Anti-Evictions Bill 2016 – this Bill seeks to increase notice termination periods for residential tenancies, abolish sale of a property as grounds for termination of tenancies and seeks to include receivers, banks and SPVs etc in the definition of "landlord". It has been referred to the Select Committee.
- Derelict and Vacant Sites Bill 2017 - this Seanad Bill sought to increase the levy on derelict sites and maintain a public register, to bring vacant sites levy into operation and protect tenants in buy to let properties. It was defeated at second stage.
- Keeping People in their Homes Bill 2017 – this Bill, seeks to introduce an extensive list of criteria that a Court must take into consideration when an order for possession is being sought e.g. the proportionality of the relief being sought, does it pursue a legitimate aim, the alternative options available, the availability of alternative accommodation, the ultimate cost to the state if the Order is granted, the amount paid by SPV for the loan etc. The Bill is awaiting the second stage.
- Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Bill 2017 – This Bill seeks to regulate purchasers of loans who are otherwise unregulated. It is awaiting second stage.
- Mortgage Arrears Resolution (Family Home) Bill 2017 – This Bill aims to establish a Mortgage Resolution Office within the Insolvency Service of Ireland as a dedicated unit. That unit would have the power to grant a Mortgage Resolution Order for financially restricted borrowers in relation to their own home. Unlike a Personal Insolvency Arrangement, there would be no veto for a bank on the proposed arrangement. This Bill has passed second stage and has been referred to the Select Committee

Rebuilding Ireland Action Plan for Housing and Homelessness [30]

This action plan launched in July 2016 has seen some development in its aims in the last year.

- Abhaile[31] – this state funded service aims to help insolvent homeowners in mortgage difficulties get legal and financial advice, providing vouchers to qualifying homeowners for consultations with a PIP, solicitor or accountant.
- Repair and Leasing Scheme – this scheme aims to assist property owners to bring vacant properties back into use. The grant is to allow such repairs to be carried out so that the property reaches the required standard for rented properties to a maximum of €40,000.00.
- Buy and Renew Scheme – this scheme will allow Local Authorities and Approved Housing Bodies to approach owners of vacant privately owned house in need of repair and remediation with the option to lease or buy and repair the property. €25 million is being made available this year.
- A Vacant Homes Strategy including a planned investment of €70 million to acquire vacant properties for social housing purposes.

[29] *Circuit Court Rules (Jurisdiction) 2017; S.I. No. 499 of 2017*
[30] *www.rebuildingireland.ie*
[31] *www.mabs.ie/en/abhaile/*

OSM Partners,
87 Harcourt Street,
Dublin 2, Ireland

Phone: + 353 691 5900
Email: info@osmpartners.ie

www.osmpartners.ie