

THE HIGH COURT

[2019 No. 58 CA]

BETWEEN

KBC BANK IRELAND PLC

PLAINTIFF/RESPONDENT

AND

JOHN WILSON & ANNE WILSON

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Barr delivered on the 19th day of December, 2019

Introduction

1. In this appeal, the defendants/appellants (hereinafter referred to as "*the defendants*") are appealing an Order for possession made by Her Honour Judge O'Malley Costello in the Circuit Court on 14th February, 2019, whereby the Court ordered that the plaintiff/respondent (hereinafter referred to as "*the plaintiff*") was entitled to recover from the defendants possession of all that and those the property comprised in folio 16901F County Cavan, more commonly known as Blenacup, Cavan Post Office, County Cavan.
2. The Order for possession was made on foot on an indenture of mortgage and charge created by the defendants in respect of all present and future debts owed by them to IIB Homeloans Limited. In the proceedings it was alleged by the plaintiff that the defendants had defaulted on their repayment obligations in respect of an initial loan of €165,000, which was drawn down in September 2002 and in respect of two further top up loans, which were drawn down in January and June 2007.
3. The plaintiff sued in its capacity as the company to which the banking business of KBC Mortgage Bank had been transferred. At the hearing of the appeal, the defendants insisted that all matters should be formally proven by the plaintiff.

Background to the Application for Possession

4. The basis of the plaintiff's application for an Order for possession of the property was set out in the affidavit sworn on 27th January, 2016 by Ms. Lisa O'Callaghan, a solicitor employed by the plaintiff. She outlined how the initial loan, which will be described in more detail later, was advanced by IIB Homeloans Limited to the defendants. IIB Homeloans Limited converted to an unlimited company, IIB Homeloans, by way of special resolution passed on 30th September, 2008. IIB Homeloans, by way of special resolution dated 2nd October, 2008, changed its name to KBC Mortgage Bank. On 26th June, 2009, KBC Mortgage Bank transferred its banking business to KBC Bank Ireland plc further to a Scheme of Transfer signed on 26th February, 2009, which had been approved by the Minister for Finance under section 33 of the Central Bank Act, 1971, as evidenced by S.I. 125 of 2009. In her affidavit, Ms. O'Callaghan exhibited the relevant certificates of incorporation on change of name, and the Scheme of Transfer dated 26th February, 2009.
5. She went on in her affidavit to set out the security on which the plaintiff moved this application. By deed of mortgage/charge dated 6th September, 2006, made between the defendants of the one part and IIB Homeloans Limited of the other part, the defendants' entire interest in the property comprised in folio 16901F, County Cavan was

mortgaged/charged to secure the repayment of a loan set out therein, together with all monies then owing, or which thereafter might become owing from the defendants to IIB Homeloans Limited. A copy of the mortgage was exhibited to the affidavit.

6. In the mortgage the defendants covenanted to pay to IIB Homeloans Limited the secured monies on demand and, in addition, pursuant to clause 12 thereof, agreed that the secured monies would become immediately due and payable on the occurrence of any one of a number of specified events, which included, if the plaintiffs defaulted in the performance of any of the covenants contained in the mortgage and such default continued unremedied for a period of seven days. The mortgage was duly registered as a burden on the property and in that regard a certified copy of the folio was exhibited to the affidavit.
7. In her affidavit, Ms. O'Callaghan gave details of the loan agreement and other advances relied upon by the plaintiff as a basis for enforcing its security against the defendants in the following terms: by letter of offer dated 29th August, 2002, IIB Homeloans Limited offered the defendants a loan of up to €165,000. The loan was repayable by monthly instalments and was offered subject to the terms and conditions set out in the letter of offer. The defendants accepted the letter of offer in writing on 6th September, 2002. As appeared therefrom, the loan was to be secured by way of a first legal mortgage over the property securing the advance together with interest thereon and all present and future liabilities of the defendants to IIB Homeloans Limited. Ms. O'Callaghan went on to state that in performance of the loan agreement, IIB Homeloans Limited advanced the sum of €165,000 to the defendants on or about 17th September, 2002.
8. By a top up letter of offer dated 15th December, 2006, IIB Homeloans Limited offered the defendants a loan of up to €105,400. The said loan was repayable by monthly instalments and was offered subject to the terms and conditions set out in the letter of offer. The defendants accepted the said top up letter of offer. That further loan was to be secured by way of a first legal mortgage over the property securing the advance together with interest thereon and all present and future liabilities of the defendants to IIB Homeloans Limited. Ms. O'Callaghan went on to state that in performance of the top up loan agreement IIB Homeloans Limited advanced the sum of €93,400 to the defendants on or about 24th January, 2007. A further sum of €12,000 was advanced to the defendant on or about 27th June, 2007. The various letters of offer and acceptances thereof were exhibited to her affidavit.
9. At paragraphs 15 et seq Ms. O'Callaghan outlined how the defendants had defaulted on their repayment obligations in respect of the loans and that the plaintiff had issued letters of demand following such default. She stated that in breach of the covenants contained in the mortgage and the conditions of the letter of offer, the defendants periodically failed to discharge the monthly instalments as and when they fell due. She averred that as of 23rd December, 2015, a total sum of €253,066.79 was due and owing by the defendants on foot of the loan agreement after all just credits and allowances, which said sum was inclusive of arrears of €42,676.46. Interest continued to accrue on the total amount due

and owing to the plaintiff. She exhibited a statement of account in respect of the indebtedness of the defendants.

10. By letter dated 24th March, 2015, the plaintiff demanded of the defendants payment of the money secured by the mortgage. She exhibited a copy of that letter. She went on to state that despite the said demand, the defendants had failed or neglected to discharge the monies due to the plaintiff. By letter dated 16th April, 2015, the plaintiff through its solicitors demanded possession of the property the subject matter of the charge from the defendants on foot of the deed of mortgage/charge. She exhibited a copy of the letter from the plaintiff's solicitor. She stated that despite these requests, the defendants had failed to deliver up possession of the premises. The plaintiff believed that the defendants would not deliver up possession thereof unless ordered to do so by the Court.
11. At paragraphs 22 – 28, Ms. O'Callaghan stated that the plaintiff had complied with the provisions of the consumer protection code insofar as they related to the defendants' loan agreement. She further stated that as the property was the primary residence of the defendants, within the meaning of the Central Bank's code of conduct on mortgage arrears, that code was applicable to the proceedings herein. She stated that the plaintiff had made every reasonable effort to agree an alternative arrangement with the defendants prior to the issuing of the within proceedings. She stated that a completed standard financial statement ("*SFS*") and supporting documents were received from the defendants. The plaintiff completed its assessment of the defendants' financial circumstances, based on the SFS and supporting documents submitted and that following said assessment, the plaintiff wrote to the defendants by letter dated 11th August, 2014, offering them an alternative repayment arrangement on the terms set out in the said letter.
12. She further stated that despite the plaintiff's further efforts to contact the defendants, the defendants had failed or neglected to accept the alternative repayment arrangement offered and accordingly the plaintiff by letter dated 20th January, 2015, notified the defendants that as they were unwilling to enter into the alternative repayment arrangement, they were outside the plaintiff's Mortgage Arrears Resolution Process ("*MARP*") and the protections of MARP no longer applied to the defendants. The letter from the plaintiff confirmed to the defendants that the proceedings herein would not commence until the expiry of three months from the date of the said letter, or eight months from the date when the defendants' loan account went into arrears, whichever was later, so as to allow the defendants time to consider their options, as set out in the said letter. Ms. O'Callaghan stated that the defendants had failed, refused and/or neglected to avail of any of the options available to them. She exhibited copies of the relevant correspondence. In the circumstances it was submitted that the plaintiff had complied with the Central Bank's code of conduct on mortgage arrears and had applied its Mortgage Arrears Resolution Process to the defendants' loan account, but that the defendants had failed to enter into the alternative payment arrangement offered by the plaintiff. As a result, the protections of the Mortgage Arrears Resolution Process no longer applied to the defendants.

13. It was submitted that based on the averments made by Ms. O'Callaghan in her affidavit and the documents exhibited thereto, the plaintiff was entitled to an Order for possession of the property set out in folio 16901F, County Cavan.

Response on Behalf of the Defendants

14. A number of affidavits were filed in response to the application lodged by the plaintiffs. The motion seeking an Order for possession of the property was initially heard in the Circuit Court on 5th December, 2018. At that stage the defendants were represented by a solicitor, who made submissions to the Court. On 12th December, 2018, the learned Circuit Court Judge gave preliminary rulings in relation to the matters that had been raised in oral argument on behalf of the defendants, but allowed them the opportunity to file an affidavit before making any formal ruling on the matter. The first defendant swore an affidavit on 21st December, 2018. The matter was further listed for hearing before the Circuit Court on 14th February, 2019, when the learned Circuit Court Judge, having heard further arguments, made an Order giving the plaintiff possession of the property comprised in folio 16901F, County Cavan, with no order being made as to costs.
15. It is not necessary to set out the content of the replying affidavit sworn by the first defendant on 21st December, 2018, nor of the supplemental affidavit sworn by him on 12th February, 2019, as much of the matter therein related to legal submission, rather than matters in respect of which the first defendant had actual knowledge. Save to note that at paragraph 6 of the affidavit sworn by him on 21st December, 2018, he stated that neither he, nor his wife, had any recollection of completing any Deed of Charge four years after the monies were alleged to have been advanced by IIB Homeloans Limited. He stated that this required "*further enquiry*". He noted that it seemed unusual that they did not have a recall of completing a Deed of Charge in September 2006, given that they received an offer of a top up loan by letter dated 15th December, 2006. The first defendant stated that he did not recall completing any documentation for IIB Homeloans Limited within a short time period prior to the top up advance. He continued in that affidavit to make points about an alleged lack of banking licence being held by IIB Homeloans Limited at the relevant time, which will be dealt with later in the judgment. He also made various points in relation to the absence of definitive proof that the loans to him and his wife were part of the banking business that was transferred from KBC Mortgage Bank to KBC Bank Ireland plc. In particular, he argued that as the relevant schedules to the Scheme of Transfer had not been exhibited, it was not possible to know whether his loan was part of the banking business that was excluded from the transfer, as set out in schedules two and three thereto. Again, this is a matter upon which submissions were made and it will be dealt with later under those headings.
16. The first defendant did not aver to any additional averments of fact in his supplemental affidavit dated 12th February, 2019.

Legal Submissions on Behalf of the Defendants

17. Mr. Moran B.L. on behalf of the defendants made a number of submissions why an Order for possession should not be made on a summary basis, but instead submitted that the appropriate course was for the action to be remitted to plenary hearing. His primary

submission was to the effect that the scheme for transfer of the business between KBC Mortgage Bank and KBC Bank Ireland plc as exhibited to the affidavit sworn by Ms. O'Callaghan, made it clear that within the definition of "*business*" as set out in the scheme, all the matters coming within that definition as set out in schedule one to the agreement, being the transfer agreement dated 26th February, 2009, would be transferred from the transferor, being KBC Mortgage Bank to the transferee, being the plaintiff. However, the scheme also made it abundantly clear that some of the business of the transferor was not going to be transferred to the transferee. The term "*excluded business*" was defined in the scheme as meaning all assets, rights, contracts, arrangements, obligations and liabilities of the type set out in schedule two to the agreement to which the transferor was party, or held by the transferor, as at the transfer date.

18. He pointed out that it was specifically provided in the scheme in clause 5.5 (a) that no asset, property, right, contract, arrangement, liability or obligation of the type described in schedule two or schedule three to the agreement held or owned by the transferor, or as applicable, between the transferor and any other party in force or effect on the transfer date, shall be transferred or assumed, or deemed to be so transferred or assumed other than as provided pursuant to the Agreement and each such asset, property, right, contract, arrangement, liability and obligation shall, save to the extent otherwise provided in the agreement, remain held or owned by the transferor and, where applicable in full force and effect in accordance with its terms between the transferor and the relevant party; and (b) no provision of the schedule shall take effect in relation to any asset, property, right, contract, arrangement, liability or obligation of the type described in schedule two or schedule three to the agreement held or owned by the transferor, or, as applicable between the transferor and any other party in force or effect on the transfer date.
19. Counsel further pointed out that these provisions were mirrored in the approval of the scheme given by the Minister for Finance in S.I. 125/2009.
20. Counsel submitted that in this case, Ms. O'Callaghan on behalf of the plaintiff had not exhibited either the agreement dated 26th February, 2009, nor schedules two or three thereto. He submitted that in Irish Law it was essential for an assignee of a debt, who is seeking to enforce a security based on that debt, to establish clearly that he had both a right to recovery of the debt and a right to enforce the security. It was submitted that in this case the plaintiff had failed to do that, because they had not shown that the underlying loans from IIB Homeloans Limited to the defendants, had in fact been part of the business which had been transferred by KBC Mortgage Bank to the plaintiff. Therefore, it had not been established that the plaintiff had a legal right to enforce the charge and recover possession of the property against the defendants.
21. Secondly, counsel submitted that it was significant that the first defendant had specifically averred in his affidavits that neither he, nor his wife had any recollection of executing the charge on 6th September, 2006. This was particularly significant as they did not have

any recollection of giving any such security shortly in advance of receiving the top up letter of offer of €105,400 on 15th September, 2006. It was submitted that this was a significant averment and was one, which on its face justified the matter being remitted to plenary hearing.

22. Thirdly, counsel submitted that the parties had been incorrectly named in the indenture of mortgage/charge dated 6th September, 2006. In particular, the lender therein was stated to be "*IIB Home Loans Limited*". Counsel submitted that it was not clear what entity this was. This discrepancy between the name recorded and the name of the entity that had provided the original loan had not been explained by the plaintiff.
23. Counsel's final submission was in relation to the absence of any averment or proof that IIB Homeloans had held a banking licence at any time prior to 24th October, 2008. The only banking licence which the first defendant had managed to locate in relation to the plaintiff was a licence issued by the Chief Executive of the Financial Regulator on 23rd October, 2008, giving KBC Mortgage Bank a licence to carry on banking business within the State as and from 24th October, 2008. In this regard, it was noteworthy that the certificate of incorporation on change of name certified that IIB Homeloans, having changed its name by special resolution of the company, was incorporated under the name KBC Mortgage Bank on 24th October, 2008.
24. In his affidavit sworn on 21st December, 2018, the first defendant had averred: "*Despite enquiries, I have been unable to ascertain whether the named transferor therein or its predecessors in title ever held a banking licence prior to that granted on 24th October, 2008, and in particular at the time of the purported advances herein*". Counsel submitted that this raised a serious question which justified the matter being remitted to plenary hearing, as it was arguable that IIB Homeloans had no authority to give the loan which they did in 2002, nor did they have the authority to accept the charge, which they had done in 2006.
25. It was submitted that having regard to all of these issues, the defendants had established that there were serious issues to be tried and as such had crossed the relatively low threshold to prevent the plaintiff obtaining an Order for possession of the property on a summary basis.

Submissions on Behalf of the Plaintiff

26. In response, Mr. Todd B.L. on behalf of the plaintiff submitted that the averment contained in Ms. O'Callaghan's grounding affidavit that KBC Mortgage Bank had transferred its banking business to the plaintiff on 26th June, 2009, further to a Scheme of Transfer signed on 26th February, 2009, which had been approved under section 33 of the Central Bank Act 1971 as evidenced by S.I. 125/2009, had not been denied. While he accepted that the schedules to the agreement, which set out what the excluded business was, had not been exhibited; the important point was that it had been averred in the grounding affidavit sworn by Ms. O'Callaghan, that the banking business had been transferred to the plaintiff and that had not been contradicted by the defendants. The averment contained in Ms. O'Callaghan's affidavit had not been denied. There was no

suggestion that any other party had continued to seek payment of the loan from the defendants after the transfer date of 26th June, 2009, nor had any other parties sought to enforce the charge or mortgage against them. Furthermore, it was noteworthy that the defendants had continued to make some sporadic repayments in respect of their loans to the plaintiff up to 6th July, 2015. This meant that the defendants had paid the plaintiff on foot of the loans for six years after those loans had been transferred to it. In these circumstances it was submitted that there was more than ample evidence before the Court that these loans had been part of the business which had actually been transferred from KBC Mortgage Bank to the plaintiff under the Scheme of Transfer.

27. In relation to the averment by the first defendant that he had no recollection of signing the deed of mortgage/charge, counsel submitted that whether or not the defendants had any such recollection, was irrelevant. The first defendant had not denied that he signed the document. He had not challenged his signature as appearing on the document. It was noteworthy that his signing of the document had been witnessed by his own solicitor. Counsel pointed out that the mortgage was an "*all sums due*" mortgage, which meant that it captured monies previously lent by the plaintiff or their predecessors, to the defendants and monies which would be lent to them in the future. There was no denial that monies had been drawn down on foot of the original letter of offer and on foot of the subsequent top up letter. There was no dispute that the defendants had received these sums. Nor was there any dispute that they had made default on their repayment obligations up to July 2015, with no payment at all being made thereafter. It was submitted that in these circumstances, the recollection or lack thereof, which the defendants may have of signing the indenture of mortgage/charge was completely irrelevant.
28. Counsel accepted that there was a minor typographical error in the name of the lender as contained in the indenture of mortgage. However, relying on the authority of *Bank of Scotland PLC v. Fergus* [2014] 4 I.R. 428, it was submitted that the Court could adopt the principle of "*correction of mistakes by construction*", whereby if it was clear to the Court that a mistake had been made and it was equally clear what the correction ought to be, the Court could make the necessary correction to a contract: see paragraphs 20 – 21 of the judgment of Finlay Geoghegan J.
29. Counsel submitted that in this case, where the address of the lender was "*2 Hume Street, Dublin 2*", it was abundantly clear that this was merely a typographical error whereby the figure "*2*" had been wrongly placed immediately after the name of the company ending in the word "*Limited*". It was submitted that in these circumstances, the case clearly fell within the parameters of the decision in *Bank of Scotland PLC v. Fergus* and the Court should accordingly make the necessary correction.
30. Finally, in relation to the issue whether any banking licence was held by IIB Homeloans Limited in 2002 or 2006, it was submitted that the mere giving of a loan and the accepting of a charge as security, did not necessarily constitute banking business, such as to require a body carrying out such activities to have a banking licence. There was no

evidence before the Court that IIB Homeloans Limited had acted illegally in either giving the loans, or accepting the security.

31. It was submitted that where there was clear evidence that the loans had been given; a relevant charge had been created and there had been default in repayment of the loans such as to give rise to a right in the lender to enforce its security, it was submitted that in these circumstances it was appropriate to grant the Order for possession as sought by the plaintiff in this case.

Conclusions

32. The defendants have raised a number of arguments as to why the plaintiff should not be granted an Order for possession of the property, and why the matter should be remitted to plenary hearing in the Circuit Court. They make this submission on a number of grounds. I will deal each of these in turn.
33. The first submission was that there was no proof before the Court that the loan, which was originally given by IIB Homeloans Limited and which by diverse means became part of the business of KBC Mortgage Bank, was actually part of the business transferred by KBC Mortgage Bank to the plaintiff under the transfer agreement dated 26th February, 2009, and the Scheme of Transfer for the transfer of the business between these entities as approved by the Minister for Finance in S.I. 125/2009. In particular, it was argued on behalf of the defendants that the scheme specifically provided that there were categories of "*excluded business*" as set out in schedule two to the transfer agreement, which was not transferred to the plaintiff. It was submitted on behalf of the defendants that there was no proof that the loans in question were actually part of the business which was transferred from KBC Mortgage Bank to the plaintiff, or conversely, that such loans were not part of the excluded business which had been retained by KBC Mortgage Bank.
34. It is certainly true that where a person sues as an assignee of a debt, a fundamental proof is that they establish that the debt has been assigned to them. It is that fact which establishes their right to sue the defendant on foot of the debt, and their right to enforce any security which may have been given in respect of repayment of that debt. While it is certainly true that schedules two and three to the transfer agreement were not exhibited in the grounding affidavit sworn by Ms. O'Callaghan, that is not the only way in which this fact can be established in evidence. The fact at issue, being whether the loans in question were part of the business held by KBC Mortgage Bank which was transferred to the plaintiff is, like any other fact, one that has to be proved on the balance of probabilities. The Court is entitled to look at all the available evidence when coming to a conclusion as to whether a particular fact has been established to that level of proof. The Court is not confined to only one method of proving any given fact.
35. In looking at the question of whether there was evidence to the effect that the loans in question were part of the business transferred by KBC Mortgage Bank to the plaintiff in 2009, the Court has had regard to the following matters which have been established in evidence:

- (a) After the transfer date, being 26th June, 2009, statements and other correspondence issued from the plaintiff to the defendants in respect of these loans. This indicated that those loans had in fact been part of the banking business transferred from KBC Mortgage Bank to the plaintiff.
- (b) The defendants made sporadic payments after 2009 to the plaintiff, up to the last payment made in July 2015. Thus, the defendants made repayments to the plaintiff for a period of six years after the date on which the business had been transferred to the plaintiff.
- (c) There is no evidence that any other entity, in particular KBC Mortgage Bank, or anyone else, made any demand of the defendants for repayment of the loan after the transfer date; nor did any other entity seek to enforce the charge against the defendants. If the loans had in fact been part of the "*excluded business*" and therefore retained by KBC Mortgage Bank, one would have expected to have found correspondence from them to the defendants when payments made after the transfer date were not made to them, but were in fact made to the plaintiff. However, there is no such correspondence.
- (d) When letters of demand for repayment of the loan were sent by the plaintiff to the defendants, they did not respond to such correspondence by stating that no such repayments were due by them to the plaintiff. Nor, when the plaintiff's solicitor wrote to the defendants seeking possession of the property on foot of the charge, did the defendants write back to the plaintiff stating that it did not have any right to seek to enforce its security against them. Such silence was significant. The Court has had regard to the decision of Charleton J. in *Ulster Bank Ireland Limited v. O'Brien* [2015] IESC 96 where it was stated as follows:
- "As a matter of law, where circumstances indicate that a reasonable person would have responded to an allegation in the context of an appropriate commercial relationship where money is due, but does not so respond, an admission may be set up. The court may act in that situation."*
- (e) The defendants did more than just stay silent, they actually engaged with the plaintiff in relation to a possible restructuring of their debt repayments. This is clear from the letter of variation dated 11th August, 2014, and the follow up letter from the Arrears Support Unit of the plaintiff dated 20th January, 2015, as exhibited at exhibits I and J to the affidavit sworn by Ms. O'Callaghan. Thus, it is clear that the defendants had some engagement with the plaintiff in relation to the matter.
- (f) The Court can have regard to the fact that if these loans had not in fact been transferred to the plaintiff, but were part of the "*excluded business*" retained by KBC Mortgage Bank, this would mean that the plaintiff has engaged in a fraudulent action to recover possession on foot of loans and a charge that were not in fact transferred to it, when there was no reason for it to do so, because if that were the

true state of affairs, the debt and the charge remained at all times the property of the plaintiff's sister company, KBC Mortgage Bank. The Court is entitled to have regard to the absurdity of that state of affairs in finding them to be improbable.

36. Having regard to all of these matters, the Court is satisfied on the balance of probabilities that the original loan and the two top up loans made by IIB Homeloans Limited to the defendants, were part of the business of KBC Mortgage Bank which was transferred to the plaintiff.
37. In relation to the second ground of defence, being that the defendants do not have any recollection of ever executing any deed of mortgage/charge in favour of the plaintiff or its predecessor in title, IIB Homeloans Limited, the Court is of the view that this is irrelevant. They did not deny their signatures as appearing on the document exhibited in Ms. O'Callaghan's affidavit. Those signatures were witnessed by their own solicitor. The fact that they may not at this remove have any recollection of signing the document, is neither here nor there. There is no point of substance in this ground of defence.
38. The third point raised on behalf of the defendants was in relation to the typographical error in the name of the lender as appearing in the indenture of mortgage/charge. In *Bank of Scotland PLC v. Fergus*, Finlay Geoghegan J. cited with approval the decision of Clarke J. (as he then was) in *Moorview Developments Limited v. First Active PLC* [2010] IEHC 275, where a company had been described in a guarantee as being "*Moorview Properties Limited*", whereas the relevant company was "*Moorview Developments Limited*", the learned Judge stated as follows at page 6 of his judgment:

"[3.5] This aspect of the case concerns what has, in some of the case law, (see for example East v. Pantiles (Plant Hire) Ltd (1981) 263 E.G. 61) been described as "correction of mistakes by construction". As is clear from East v. Pantiles (Plant Hire) Limited and from the speech of Lord Hoffman in ICS v. West Bromwich B.S. [1998] 1 WLR 896, two conditions must be satisfied in order for such a correction to occur. First, there must be a clear mistake. Second, it must be clear what the correction ought to be.

[3.6] It is also clear from the speech of Lord Hoffman in ICS Limited v. West Bromwich B.S. [1998] 1 WLR 896 that a correction of the type with which I am concerned is not a separate branch of the law, but rather an application of the general principle that contractual documents should be construed according to their text but in their context. That context may make it clear that the words used in the text are a mistake. Thus, a reasonable and informed person may conclude that the words used are an obvious mistake and may also be able to conclude what words ought to have been used. In those circumstances, as a matter of construction, the court will, as it were, construe the contract as if it had been corrected for the obvious mistake. The reason for so construing the contract in that way is that the proper principles for the construction of contracts lead to that construction in any event. I am satisfied that those cases, most recently restated by the House of Lords in

Chartbrook Limited v. Persimmon Homes Limited [2009] UK HL 38, 2009 1 AC 1101, represent the law in this jurisdiction."

39. I am satisfied that having regard to the principles of law as set out in *Bank of Scotland PLC v. Fergus* and to the principles enunciated in the cases cited therein, that it is appropriate in this case to disregard what is a clear typographical error by insertion of the figure "2" directly after the name of the lender, being "*IIB Home Loans Limited*". I am entirely satisfied that as the address of that company was "*2 Hume Street, Dublin 2*", the error is merely that the "2" from the first portion of the address has been incorrectly put beside the end of the word "*Limited*". It is clear from all of the surrounding documentation that the charge was intended to be given to IIB Homeloans Limited. Accordingly, there is no substance in this ground of defence.
40. Finally, in relation to the issue as to whether IIB Homeloans Limited held a banking licence at the time when they gave the loans to the defendants and at the time when they accepted the charge from them, if the defendants wished to make the case that the granting of such loans, or the acceptance of a charge by that company was an illegal or unlicensed activity, because such activity constituted banking business, which required the holding of a banking licence, that was a matter for the defendants to establish in evidence. The defendants bore the burden of proof in that regard. They have not discharged the onus of proving that either IIB Homeloans Limited did not hold a banking licence at the relevant time, or if they did not, that they were required to do so in order to grant the loans which they did to the defendants, or to accept the security which they did from the defendants. There is no evidence before the Court that such activities constitute banking business such as to require the entity conducting such activities to hold a banking licence. In these circumstances, the Court cannot hold that there is any substance in this ground of defence.
41. Having regard to the findings made herein, the Court is satisfied that the defendants have not raised any arguable grounds of defence to the plaintiff's application herein. The simple facts are that the defendants do not deny that they received the loans as set out in Ms. O'Callaghan's affidavit, nor do they deny that they defaulted on repayment of the loans, nor do they deny that they executed the deed of mortgage/charge in respect of their repayment of such loans; nor do they deny that they have not made any repayment on the loans since July 2015. In these circumstances, the Court must find that there is an unanswerable case put forward by the plaintiff that it is entitled to possession of the property in respect of which it holds the charge. Accordingly, the Court dismisses the defendants' appeal and affirms the Order made in the Circuit Court.
42. The Court hereby orders that the plaintiff is entitled to recover from the defendants possession of all that and those the property contained in folio 16901F, County Cavan, more commonly known as Blenacup, Cavan Post Office, Cavan, County Cavan. As this is the primary residence of the defendants and given that this judgment is being delivered in the month of December, 2019, the Court will place a stay on the execution of the Order for possession for a period of twelve weeks from perfection of the High Court Order.