THE SUPREME COURT

S:AP:IE:2020:000038

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Baker J.

BETWEEN/

BANK OF IRELAND MORTGAGE BANK

Plaintiff/Appellant

- AND –

PETER CODY

Defendant

- AND –

HEATHER CODY

Defendant/Respondent

Judgment of Baker J. delivered the 14th day of April 2021

1. This appeal concerns the statutory provision for the grant of summary possession found in s. 62(7) of the Registration of Title Act 1964 ("the Act of 1964"). It is the appeal of Bank of Ireland Mortgage Bank ("the Bank") of the order of Simons J. made on 28 February 2020,

setting aside an order for possession of certain registered lands in County Wexford for the reasons set out in his written judgment delivered on 31 January 2020 ([2020] IEHC 34).

2. By ancillary order Simons J., for the reasons set out in his second written judgment delivered 28 February 2020 ([2020] IEHC 99), refused the application of the Bank to remit the proceedings to plenary hearing, and gave the parties liberty to apply in the event that further proceedings for possession were taken against the second defendant pursuant to s. 62(7) of the Act of 1964.

3. The first defendant, Mr. Cody, took no part in the action before the Circuit Court and has not engaged with this appeal. Ms. Cody therefore is the sole respondent.

4. Briefly, the Bank sought possession pursuant to a charge registered against lands at Kilmurray, County Wexford comprised in Folio 25003F. The charge was created by instrument of 12 January 2007 to secure two loans said to have been granted on the conditions set out in letters of loan offers of September and October 2005, for the total amount of €650,000. On 21 December 2007 the charge was registered as a burden on the folio. The Bank is the owner of the charge. The lands are in joint names, the loans were said to have been advanced to Mr. and Ms. Cody jointly, and the charge has the appearance of being executed by both of them.

5. The premises is the principal private residence of Ms. Cody, but was not at the time of the Circuit Court hearing the family home of the couple. It is part of Ms. Cody's case that at the material time her former husband did not reside there.

6. A separate charge registered earlier on 20 June 2007 in favour of another Bank of Ireland entity is not in issue in these proceedings.

7. The loans were called in on 10 June 2016, and on 28 June 2016 the Bank demanded possession. Thereafter proceedings were had in the Circuit Court and on 12 February 2019 the Circuit Judge made an order for possession with a stay of execution for 15 months. Simons J.

was hearing the appeal from that Circuit Court order as a judge of the High Court on Circuit under Part IV of the Courts Act 1936, as amended.

8. The proceedings in the Circuit Court under s. 62(7) were brought by civil bill grounded on affidavit, and Ms. Cody in her replying affidavits made allegations that the documentation on foot of which the loans were made and the charge created was executed without her knowledge or consent. The Bank argues that she did no more than make generalised assertions insufficient to establish a ground to refuse possession at a summary hearing.

9. Simons J. dismissed the proceedings as he considered that the Bank had not proved the case on the facts, and thereafter in his second judgment declined to adjourn the summary proceedings for possession to plenary hearing in accordance with Order 5B, r. 8(2) of the Circuit Court Rules, on the grounds that he had no jurisdiction at that stage to adjourn the proceedings to plenary hearing, and that he had become *functus officio*.

10. The Bank also appeals that part of the order by which Simons J. limited the entitlement of the charge holder to bring further proceedings for possession and argues that this part of his order was wrong in law and procedure.

11. Ms. Cody was not represented before the High Court but she is now represented by solicitor and counsel, the leave to appeal being conditional upon the Bank being responsible for the reasonable costs of such representation.

The issues in the appeal

12. The appeal raises a number of questions concerning the jurisdiction to grant summary judgment in possession cases, and while the appeal to this Court is from a decision of Simons J. sitting in the exercise of his statutory jurisdiction hearing an appeal from the Circuit Court, the principles to be considered will apply to proceedings in the Circuit Court, of which the appeal to the High Court was a *de novo* hearing.

13. The issues in the appeal may conveniently be grouped as follows:

(a) whether the trial judge was correct that the Bank had not established its claim, and that Ms. Cody had deposed to sufficient facts to repudiate the execution of the loan documentation or instrument of charge, and the drawdown of the secured monies;

(b) whether the trial judge was correct to refuse to adjourn the Bank's application for possession to plenary hearing and whether he treated or was entitled to treat counsel's election not to apply for a plenary hearing as conclusive of his jurisdiction;

(c) allied to this, the point in the process where the jurisdiction of a court to adjourn summary possession proceedings to plenary hearing ceases;

(d) whether the trial judge was correct to conclude that his refusal to make an order for possession on foot of the civil bill, meant by implication that the Bank be restricted from bringing further proceedings against the respondent pursuant to s. 62(7) of the Act of 1964.

Section 62(7) Registration of Title Act: summary proceedings

14. Section 62(7) of the Registration of Title Act 1964 makes provision for the summary disposal of an action seeking possession of registered land:

> "When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession."

15. The jurisdiction conferred by that section applies to proceedings for possession by the registered owner of a charge once monies secured by the charge have become due. The

subsection does not identify what is meant by the making of an application "in a summary manner", but the Court is given a discretion, if it so thinks proper, to order possession of the land to be delivered up, the consequence whereof is that the owner of the charge thereupon becomes a mortgagee in possession.

16. In *Bank of Ireland v. Smyth* [1993] 2 IR 102, [1993] ILRM 790, Geoghegan J. rejected the notion that s. 62(7) confers a wide discretion which enables a court to refuse an application for possession on grounds of sympathy. He thought the words "may, if it so thinks proper" simply mean that the court should apply equitable principles in considering the application for possession, but not "sympathetic factors" and thus ensure that the application is made *bona fide* with a view to realising the security:

> "The words 'may, if it so thinks proper' in s. 62, sub-s. 7 mean no more, in my view than, that the court is to apply equitable principles in considering the application for possession. This means that the court must be satisfied that the application is made *bona fide* with a view to realising the security." (p. 111)

17. The procedure was explained in the decision of this Court in *Irish Life and Permanent v. Dunne* [2015] IESC 46, [2016] 1 IR 92, in which it held that any court seeking to make an order for possession under s. 62(7) must first ask itself whether, as a matter of law, it can properly be said that the monies are secured and are due.

18. The subsection is contained within s. 62 of the Act which makes provision for the creation of charges on registered land and for remedies on default of the loan thereby secured. The charge is deemed by s. 62(6) to operate as a mortgage by deed within the meaning of the Conveyancing Acts 1881-1911. The Land and Conveyancing Law Reform Act 2009 makes some changes to the statutory provisions, most of which are not relevant to this judgment. Section 62(7) was repealed by that Act and replaced by s. 97(2) which makes no mention of the application being brought by summary means. Section 62(7) was expressly saved by s. 1

of the Land and Conveyancing Law Reform Act 2013 as respects a mortgage created prior to 1 December 2009. Section 3 of that amending Act of 2013 provides that proceedings for possession of the principal private residence of the mortgagor or his or her spouse or civil partner shall be brought in the Circuit Court.

19. This judgment concerns one of the procedures for enforcement of the security provided expressly by the 1964 Act and the Rules of the Circuit Court.

The Procedure

20. Applications for summary possession in the Circuit Court are governed by O. 5B of the Rules of the Circuit Court S.I. No. 264 of 2009, as amended, which applies to any proceedings in which the plaintiff claims *inter alia* recovery of possession of land on foot of a legal charge. The Order provides for the commencement by a detailed civil bill in the prescribed form to contain a special endorsement which shall "state specifically and with all necessary particulars the relief claimed and the grounds thereof".

21. The civil bill does not stand alone but is to be accompanied by a verifying affidavit in prescribed form by which the deponent shall verify and support the claim in the civil bill.

22. A defendant intending to defend proceedings enters an appearance in the prescribed form within ten days and the defence is by way of a replying affidavit setting out that defence.

23. The procedure therefore does not contemplate the service by either the plaintiff or defendant of a *pro forma* pleading and the defence is not a mere traverse of the claim.

24. The contents of the affidavit grounding the civil bill for possession are set out in Form 54 of the Rules and it is apparent that considerable detail is required of the property, of those in possession or occupation, of the security, loan agreement, arrears, and with regard to the Central Bank Regulatory Codes. Equally, in light of the requirements of O. 5B r. 5 and 6, the defendant must set out his or her defence on affidavit, and having regard to the fact that the

matter is heard on affidavit, save where oral evidence is admitted in accordance with r. 6, the affidavit of defence must set out and swear to facts which support a defence.

25. Order 6 contemplates that the proceedings are to be heard on affidavit and that oral evidence may be adduced only by leave of the judge in specific circumstances or where a notice to cross-examine the deponent is on affidavit. It is useful to quote this in full:

> "6. (1) No party shall have the right in proceedings to which this Order applies to adduce any evidence otherwise than by affidavit, except—
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> (a) by leave of the Judge,
>
> (b) where permitted in accordance with rule 7(4) or rule 8(1), or
>
> (c) where the proceedings have been adjourned for plenary hearing in accordance with rule 8(2).
>
> (2) Any party desiring to cross-examine a deponent who has sworn an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the Court."

26. The civil bill is listed before the County Registrar who may make an order for possession where an appearance has not been entered nor an affidavit setting out a defence delivered. The County Registrar may also rule a consent order for possession, or any order on consent including an order striking out the proceedings, granting possession with or without a stay or subject to any other conditions.

27. The County Registrar may not determine any contested issue of law or fact, and once he or she is satisfied that that affidavit of defence has disclosed a *prima facie* defence, the County Registrar is mandated by r. 7(2) to transfer the civil bill to the judges' list at the first opportunity.

28. Rule 8 provides an extensive set of procedural and substantive powers in the court, including the power to settle the issues to be tried, to permit evidence as to fact to be given orally or by affidavit, or partly orally and partly by affidavit. The power to adjourn to plenary hearing is set out in r. 8(2) as follows:

> "The Judge may, where he considers it appropriate, adjourn a Civil Bill listed before him under this Order for plenary hearing as if the proceedings had been originated otherwise than in accordance with this Order, with such directions as to pleadings or discovery as may be appropriate."

29. Rule 8(2) is important for the second part of this appeal.

30. Further powers, not relevant to this appeal, permit the adjournment of the proceedings where it appears likely that the mortgagor is likely to be able to pay arrears or to remedy any breach of obligation arising under the charge.

31. Order 28 of the Rules of the Circuit Court permits the grant of summary judgment even after an appearance has been entered or a defence delivered in certain other kinds of claims including those for debt or liquidated sums, for the delivery of a chattel, for the performance or enforcement of a trust, or for ejectment including where the relationship of landlord and tenant exists between the parties.

32. The procedure provided by O. 5B of the Rules of the Circuit Court, while it has some similarity to O. 28, has a number of differences. It does not require that a plaintiff aver on affidavit to a belief that the defendant has no *bona fide* defence to the claim or that an appearance or defence, if any had been delivered, was solely for the purposes of delay. Nonetheless the grounding affidavit must set out the full proofs to obtain judgment. Options available to the court under O. 28 r. 5 permit a judge to enter judgment unless the defendant *prima facie* has a good defence or pays into court such sum as may be deemed sufficient to

entitle him to defend. The options available when the court does not enter judgment are expressly provided for in O. 28 r. 7 as follows:

> "Where the Judge does not order judgment to be entered for the plaintiff he may:
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> (a) Dismiss the application, or
>
> (b) give the defendant leave to defend unconditionally, or subject to such terms as to giving security, or as to the time and mode of trial, or otherwise, as he may think fit, or
>
> (c) with the consent of all the parties, treat the hearing of the application as the trial of the action, and dispose of the same in a summary manner."

33. Order 28 seems to envisage a difference between the hearing on consent of the trial in a summary manner and the giving of leave to defend, and O. 28 r. 7(c) makes a distinction between the "trial of the action" and the hearing of a motion for summary judgment.

34. A defendant to possession proceedings under O. 5B does not need leave to defend, but defends by affidavit evidence or, where leave is given, by oral evidence. Thus the procedure under O. 5B provides for the hearing of the trial of the action on affidavit but gives the judge power to adjourn to plenary hearing without constraint, such that the proceedings will thereafter continue as if they had originated otherwise than in accordance with the order.

35. The Circuit Court action for summary possession mirrors and is broadly similar to the procedure in the High Court under O. 38 of the Rules of the Superior Courts ("RSC") which governs proceedings commenced by special summons. An action for summary judgment under O. 37 RSC is more akin to the procedure provided by O. 28 of the Rules of the Circuit Court.

Historical context

36. This form of procedure is not new, and the statutory provision for the making of an order for possession of registered land in summary proceedings has a long history. The need for legislative intervention arises by reason of the fact that a mortgagee of unregistered land

takes an assurance of the legal title (whether by the conveyance of the fee simple or by creation of an interest by sub demise), and the legal estate carries with it the right to possession, albeit constrained by the terms of the security, including an agreement either express or implied that possession will not be taken if the terms of the security are met. But in regard to registered land since the Local Registration of Title Act 1891 a security is created by a charge over the lands in favour of a lender, and the key difference is that there is no conveyance or transfer of the lands to the lender, simply an entry in the Register of the charge on the folio.

37. The Act of 1891 had granted to charge holders all the rights of a mortgagee. However, the statutory provision that the owner of a charge has the powers of a mortgagee under s. 19(1) of the Conveyancing Act 1881 is limited by the fact that the charge creates no estate in the property. The Court of Appeal of Northern Ireland (Andrews L.J.) in *Northern Ireland v. Devlin* [1924] 1 I.R. 20 held that the court had no jurisdiction to put a registered charge holder into possession of property as they had no legal or equitable estate in the land. (see the comments of Dunne J. in *Start Mortgages Ltd v. Gunn* [2011] IEHC 275 at para. 46.)

38. Glover at p. 166 of his A Treatise on the Registration of Ownership of Land in Ireland (Falconer, 1933) considered that the proposition that the owner of a charge had no right to possession did not need authority and noted that the requirement that the owner of a charge would obtain a court order for possession was neither to "the advantage of the mortgagor or mortgagee; the expense and inconvenience falls on both". He called for an amendment of the Act to enable an owner of a charge to obtain possession to facilitate the realisation of a security.

39. This lacuna led to the enactment of s. 13 of the Registration of Title Act 1942, which provided a statutory entitlement to a charge holder to apply for possession in a summary manner, later re-enacted by s. 62(7) of the 1964 Act.

40. A charge of registered land can carry an express right to possession as was found in *Gale v. First National Building Society* [1985] IR 609 where Costello J. upheld the right of an

owner of a charge to enter into possession on foot of a contractual licence by which it was entitled to take possession on default of payment and subject to a proviso that the power did not become exercisable unless a default had occurred for three months. Many modern charges do contain a right to possession but, as no estate or interest passes, no right to take or be in possession without court order exists at common law and none was created by the scheme of the 1964 Act, or by the previous Registration of Title Act 1891 and the amending legislation. The charge registered against the folio of Mr. and Ms. Cody does contain a contractual right to take possession on default, but a court order is now required by reason of s. 97(1) of the Act of 2009, which provides that a mortgagee may not take possession of mortgaged property without a court order, except with the written consent of the mortgagor.

41. The procedures governing the grant of possession by summary means was analysed in some detail in the case of *Re Jacks* [1952] IR 159 where what was under consideration was whether the action was commenced by summary summons, or whether a motion for judgment before the Land Judge was required. The Supreme Court divided on the issue, the majority holding that the correct procedure was the commencement of an action by summary summons.

42. That the availability of a summary type process is desirable in the interests of justice, and that there be a relatively inexpensive, accessible and quick process to provide relief in certain cases where no defence exists was considered by this Court in the decision in *Prendergast v. Biddle* (Unreported, Supreme Court, 21 July 1957)), where Lavery J. (Maguire J. concurring), dealing with summary judgment in claims for debt, thought summary disposal desirable "in order to enable speedy justice to be done", where the issues are simple and capable of being easily determined. This reflects the idea that expedience and the efficient use of court resources is in the interests of the administration of justice generally, and can in many cases benefit the individual interests of the parties by avoiding lengthy and costly actions.

43. The judgment of McKechnie J. in *Ulster Bank v. Beades* [2019] IESC 83 (with whom the other members of this Court agreed) provides guidance on why summary procedures are desirable in the interests of justice:

> "When properly invoked and applied, an aggrieved party cannot be heard to have a complaint that his Constitutional or Convention rights to a fair trial has been abridged. This is because the nature of the case and the evidence adduced not only permits, but indeed demands a conclusion at that point. Furthermore, if a defendant cannot meet the threshold set out in the case law so as to have the proceedings remitted to plenary hearing, it follows that justice is best served by entering judgment for the plaintiff. Finally every judge in every court is by the Constitution and the Convention obliged to ensure fairness of process: in light of these safeguards I am entirely satisfied that when properly applied the summary procedure is robust and suitable for use."

44. He added that, where properly utilised, there is nothing fundamentally wrong with summary procedures:

> "It is envisaged as being a speedier process and a more efficient manner of dealing with cases to which it applies: in addition, there is less cost and expense involved. However, whatever its virtues may be, it must be acknowledged that where judgment results at this point in the proceedings, the overall process falls short of the more complete hearing inherent in the plenary process. Where appropriately utilised however, there is nothing fundamentally wrong with this procedure."

45. For these reasons the procedure by which possession of land can be obtained summarily in s. 62(7) does not offend the requirements of fairness to a defendant: see for example the analysis of MacGrath J. in *KBC v. Brennan* [2020] IEHC 247 at para. 38.

46. In light of the above, it can be said that, when a court is considering the limited question of whether a plaintiff has proven that the legal right to possession has arisen, there are

circumstances in which the nature of the case and the evidence adduced demand a conclusion at that point.

47. To say that an action is to be brought in a summary manner does not mean that the solemnity of the process, the verification of the facts, or the relevant laws of evidence are not applied with the same robustness as in other litigation. What is denoted by the expression is a process by which a lengthy action with oral evidence is avoided and, at least in straightforward or commonplace actions, this is a perfectly appropriate way of seeking possession where no difficult issues of fact arise for consideration. The proceedings are not to be treated as a sort of shortcut or a less satisfactory administration of justice. The process is still a trial of a claim in which the burden lies on the plaintiff to establish its case. It may be, as in many or most possession claims, that the proofs are relatively familiar and readily identifiable, but that does not mean that the defendant is to be denied the right to defend, and the process is judicial and not administrative.

48. This approach is consistent with, and supported by, the statutory provisions which make entries of ownership on the Register of Titles conclusive of ownership.

Section 31 Registration of Title Act 1964: conclusiveness of the Register

49. The owner of a charge who seeks to obtain possession pursuant to s. 62(7) has to prove two facts:

(a) That the plaintiff is the owner of the charge;

(b) That the right to seek possession has arisen and is exercisable on the facts.

50. The summary process is facilitated by the conclusiveness of the Register as proof that the plaintiff is the registered owner of the charge is a matter of the production of the folio, and, as the Register is by reason of s. 31 of the Act of 1964 conclusive of ownership, sufficient evidence is shown by that means: see the discussion in the Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352. The judgment of the Court of Appeal *inter alia* held that the

correctness of the Register cannot be challenged by way of defence in summary possession proceedings, and that a court hearing an application for possession pursuant to s. 62(7) of the Act of 1964 is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and the right to possession has arisen and become exercisable.

51. The Register reflects the ownership of land and burdens affecting the interest of the registered owner. The Register may contain errors and provision is made for rectification on the grounds of actual fraud or mistake: s. 31(1); or where an administrative error is made in registration of an instrument: s. 32. Some interests affect without registration: e.g. under s. 72. A challenge to the correctness of the Register is brought by an action for amendment or rectification in which *inter alia* the Property Registration Authority would be a defendant or notice party, and such proceedings would almost invariably include other defendants or notice parties such as prior registered owners or other persons asserting an interest. If such proceedings are in being then that might amount to a ground to adjourn the action for possession, or indeed to list it to run after the rectification or amendment proceedings have been concluded (see the judgment in *Tanager DAC v. Kane* at para. 86), but no such proceedings have been commenced or threatened in the present case. Section 31 means that in possession proceedings the proof on foot of which a plaintiff claims an entitlement to possession takes as its conclusive starting point the registration on a folio of a charge of which that plaintiff is shown to be legal owner on account of entry on the register.

52. The statutory provisions which make the Register conclusive evidence of title to the charge were not raised in the hearing before Simons J. but the conclusiveness of the Register means that one of the proofs required to establish the claim for summary possession was met by evidence of the registration of the charge on the folio, and this appeal must therefore be seen

to concern whether the debt had become due and whether the right to seek possession had arisen and become exercisable.

Family Home Protection Act 1976

53. Counsel for the respondent argues that the fact that the premises were the family home of the couple has the effect that the Bank failed to pass the preliminary hurdle of establishing that the security could not be created without the express and informed consent of Ms Cody by reason of the statutory protection afforded to the family home under the Family Home Protection Act 1976 ("the Act of 1976"). I propose to consider this point first as counsel has argued that it provides a full answer to the appeal

54. Ms Cody was not represented in the hearing before Simons J. but she was represented by solicitor, senior and junior counsel on the appeal. Although her notice of response to this appeal was prepared without their input, she mentions that the premises is her "family home" in many places in her replying pleading, but without specific reference to the Act of 1976 which is raised expressly for the first time in the written legal submissions now filed on her behalf.

55. It is also worth noting that at para. 13 of her second affidavit sworn 21 December 2018, Ms. Cody expressly said that the Bank did not have any signed "family home declaration". It seems to me she did there raise a general argument regarding protection for her home, although the provisions of the Act of 1976 were not argued by either side in the High Court.

56. Her counsel now argues that the provisions of s. 3 of that Act arise because the possession proceedings are those envisaged by s. 3 of the Land and Conveyancing Law Reform Act 2013 which applies when a mortgagee seeks possession of land which is a principal private residence of the mortgagee or relevant person without whose consent a conveyance would be void by reason of the Act of 1976, or the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. It is argued therefore that the question of the consent of Ms. Cody arises as part of this appeal and that the effect of s. 3 is to place an evidential burden on the

appellant in the light of the fact that the Bank is "on notice" of the assertion by Ms. Cody that the loans and security were obtained fraudulently, and that therefore the Bank has to establish that she did consent to the loans and the creation of security. Counsel for the appellant argues in reply that it is not appropriate that any issue under the Act of 1976 should fall for consideration now, as it was not raised either in the Circuit Court or on the appeal before Simons J.

57. My view is that the provisions of the Act of 1976 do merit some consideration in this appeal having regard to the link expressly made in s. 3 of the Land and Conveyancing Law Reform Act 2013 to that Act, and while I am not persuaded that Ms. Cody had in her mind the provisions of the Act of 1976 when she made reference to her "family home" and indeed used that expression in bold or capital letters in many places in her replying notice, the interests of justice, as explained in *Lough Swilly Shellfish v. Bradley* [2013] 1 IR 277, would best be served by some consideration of the effect, if any, of the Act of 1976 on the proceedings. This is especially so as it is difficult to decouple the argument on the possession proceedings from the fact that the premises are the principal private residence of Ms. Cody, was at one point in time the family home of the couple and the point is not an entirely new point and fairly does arise on the appeal, and some consideration of the Act of 1976 would benefit the appeal.

58. Section 3 of the Act of 1976 provides as follows:

> "3(1) Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2) and (3) and section 4, the purported conveyance shall be void."

59. It is sometimes said that the section has no application to a jointly owned family home and authority for that proposition is said to be found in the decision of this Court in *Nestor v. Murphy* [1979] IR 326.

60. Section 3(1) in its terms does not exclude from its avoidance provisions any conveyance or purported conveyance of jointly held land, and the judgment of Henchy J. on a claim by a purchaser for specific performance of a contract for sale executed by a husband and wife, joint tenants of the relevant premises, rejected the argument that the contract for sale was void on account of s. 3(1) because the wife had not given a separate written consent to the contract prior to execution. He noted that a literal appraisal of the subsection might be thought to give support to the argument that a separate consent of the wife to the contract entered into by her husband was required to satisfy the subsection. As Henchy J. said, the purpose of the subsection was to give a right of avoidance to a spouse who was not a party to the transaction, the protection being to the non-disposing spouse from the disposition by the other spouse of an interest in the family home. As both parties had joined in the contract, protection for the spouse whose consent was argued to be a necessary statutory element for validity was not needed. The purpose being the protection of the family home, it would have led to a pointless absurdity if a separate consent was required when both spouses had entered into a contract of sale which on its face came within the section. That literal reading, he held, would defeat the obvious intention of the legislation.

61. Henchy J. did not say that the subsection did not apply to jointly held land, but the import of his decision was that, as what was agreed to be sold was the entire interest in the family home, both husband and wife had to contract to sell their respective interests, and therefore the transaction could not be described as a contract or purported contract or conveyance by one spouse without the joinder of the other. To say that the section does not "apply" to jointly held land is no more than shorthand for that more general proposition, which must flow from the fact that if property is held jointly, both joint owners must join in a conveyance when the entire is sold, and each must execute a contract for sale, either personally or through an authorised agent.

62. It goes without saying, as it would in regard to any agreement, whether for the sale of land or otherwise, that the contract must be one freely entered into by a person or persons with an understanding of the nature and effect of the agreement. This Court's decision in *Bank of Ireland v. Smyth* [1995] 2 IR 459 is authority for this proposition, if authority is needed.

63. I do not consider that the provisions of the Act of 1976 elevate the burden or standard of proof on the Bank to prove its claim in the present case. If, as is asserted by the respondent, the Bank was on notice of the fact that the husband and wife did not reside together, and that the premises intended to secure the loan agreements had been or were a family home or were the principal private residence of one spouse only, the question becomes more one of whether that spouse or owner or co-owner agreed to the creation of the security interest, and did so with knowledge of its import and nature.

64. That is a question of fact and the mere assertion of fraud does not shift the burden of proof or elevate the standard to be met, nor does the fact that the premises are or were a "family home" within the meaning of the Act of 1976.

65. The argument of the respondent that the Act of 1976 provides a complete answer to the claim should be rejected.

Had the plaintiff established its case?

66. Order 5B requires a plaintiff to set forth a *prima facie* case for an order for possession, and Simons J. accepted, correctly in my view, that the evidence adduced on affidavit had "sufficient indications of reliability" (para. 42). He refused the application of Ms. Cody to adduce further evidence pursuant to s. 37(2) of the Courts of Justice Act 1936, and although the appeal was to be treated as a *de novo* appeal, it was therefore determined on the evidence before the Circuit Court.

67. Certain background facts do not give rise to dispute: The Bank's charge is one to secure "present and future advances repayable with interest", and the signatures of Ms. Cody affixed

to the two letters of loan offer/acceptance and the instrument of charge identify her by her maiden name, and have the appearance of having been signed by her and her signature is recorded as having been witnessed. Ms. Cody swore in all five affidavits before the Circuit Court and exhibited a number of documents she obtained from the Bank through a data request under the Data Protection Act 1988. She swears in different parts of her affidavits that her signature or purported signature was witnessed when she was not present, and that loans and securities were created in her name jointly with that of her husband without her knowledge or consent. The letters of loan offer were sent to the business address of the firm of solicitors in which Mr. Cody was then a partner, and Simons J. commented (at para. 25) that the affidavit evidence did not confirm that the special conditions in the loan offers had been satisfied or whether the monies had been received.

68. This part of the appeal concerns whether the High Court judge erred in his approach to the evidence and whether he misdirected himself in treating the averments by Ms. Cody in her affidavits as enough to displace the *prima facie* evidence of the loan agreements. The appellant argues that her affidavits taken together amount to no more than generalised assertions and are wholly uncorroborated and do not meet the test in the authorities and in particular that recently considered in *IBRC v. McCaughey* [2014] 1 IR 749, or in *RAS Medical v. Royal College of Surgeons* [2019] IESC 4.

Options available to a court hearing an application for summary judgment

69. Before analysing the factual matters in contention in the present appeal it is useful to examine the range of responses available to a court in an action for summary judgment with a view to positioning the facts and arguments in the present case within that range.

70. On one end of the range are cases where a plaintiff establishes its claim on the affidavit evidence, as the defendant is not able to persuade the judge either that the evidence is incomplete or that there is a basis on which a credible defence exists. That approach to both

the law and the facts is established in the authorities and a court hearing a claim for summary judgment, whether that be for summary judgment for debt or for summary possession, must be satisfied that the plaintiff has established its claim and that the defendant has not put forward a basis for a credible defence either on the facts or on the law.

71. By way of illustration, the recent decision of the Court of Appeal in *Doyle v. Houston* [2020] IECA 86 was a judgment mortgage suit where, in the light of the conclusiveness of the Register by reason of s. 31 of the Registration of Title Act 1964, Costello J., with whom the other members of the court agreed, held that the judgment was well charged against the interest of the defendant. She also rejected the argument regarding jurisdiction in the light of s. 3 of the Land and Conveyancing Law Reform Act 2013, and held that the judgment mortgage had been registered on foot of a certificate of taxation validly made, and that the plaintiff had proved her case on the evidence and was entitled to well charging relief on a summary basis.

72. Another illustration of that class of cases is the judgment of Laffoy J. in *Allied Irish Banks Plc v. Richard McKenna and Another* [2013] IEHC 194 where, having regard to her conclusion that no issue of fact remained to be resolved on a special summons heard on affidavit, and that the error in the grounding affidavit concerning the loan agreement had been plausibly explained and the bank evidence cross-examined on behalf of the defendants, she held that the plaintiff had established its case and that allegations raised by the defendants did not inhibit the entitlement of the plaintiff to summary possession on foot of the mortgage.

73. That judgment illustrates how factual disputes are capable of resolution in summary proceedings, albeit that was a case where witnesses were cross-examined, and legal arguments, depending on the degree of complexity, may be resolved on a summary basis if the trial judge is satisfied that this may fairly be done: see *ACC Loan Management Ltd v. Dolan* [2016] IEHC 69 where it was possible to resolve the arguments concerning the validity of guarantees on a summary basis.

74. At the other end of the range of possible results are cases where a defendant either positively establishes a defence either at law or on the merits, or persuades the judge that the plaintiff has not established its proofs. The claim will then fail. Most of the examples are cases where the defendant has advanced an unanswerable legal defence, as for example in the judgment of Dunne J. in *Start Mortgages v. Gunn* where the repeal of s. 62(7) of the Act of 1964 by s. 8 of the Land and Conveyancing Law Reform Act 2009 meant that there was no legal basis in some of the claims there under consideration on which the court could grant possession.

75. Another example is the judgment of Laffoy J. in *GE Capital Woodchester Home Loans Ltd v. Reade and Another* [2012] IEHC 363, and supplemental decision [2012] IEHC 459, where she accepted the argument of the defendant that the plaintiff had not established its case on the evidence as the plaintiff could not show compliance with the charge provisions that required formal demand to render the monies due and payable. The claim was dismissed as that defendant had positively established that the monies secured had not become due, the power of sale had not become exercisable, and therefore the plaintiff was not in a position to rebut that argument.

76. Many applications for summary judgment would fall between these two extremes and will involve the proffering of evidence or argument by a defendant by way of defence which is not sufficient to rebut the evidence of the plaintiff to enable the judge to make a positive finding against the plaintiff, but which offers enough doubt as to the truth or completeness of the plaintiff's evidence, or credibly presents reasonable arguments or evidence that a defendant has a basis of defence which merits further scrutiny, evidence or argument. In that instance the trial judge is constrained by the inability to decide between contested affidavit evidence of fact, or resolve complex questions of law, the action cannot therefore be disposed of summarily and will be adjourned to plenary hearing.

77. What is contemplated by s. 62(7) is a trial on affidavit or a mixed trial with or without oral evidence and with cross-examination as the case may be. The more complex the facts, the more detailed the cross-examination, and the more doubts that are raised the less likely it is that the matter can be dealt with summarily, and a speedy resolution may not be possible. In those circumstances the court has a power under Order 5B r. 8 to adjourn the civil bill for plenary hearing and to give directions, order discovery, etc. as may be appropriate.

78. In my view for the reasons I now turn to examine the matters averred to by Ms. Cody cannot be said to have established that the Bank had not made out its proofs, nor has she established either a factual or legal basis on which the trial judge could dismiss the action. Rather she made a number of averments and assertions which threw sufficient doubt on the veracity or completeness of the facts leading to the making of the loans to require that the action be adjourned to plenary hearing.

The facts in contention

79. Paragraph 5 of Ms. Cody's first affidavit makes a generalised broad assertion that the mortgage was part of a "systemic fraudulent practice" and that the loans were created in her name "without my knowledge or consent". Her third affidavit sworn on 4 January 2019 makes similar generalised allegations of fraud by her former husband and of collusion with the Bank including an averment at para. 28 that "there is evidence that my signature has been forged" on documentation supporting loans and securities. These averments taken alone would not be sufficient as the documentation exhibited by the plaintiff had at least the appearance of establishing otherwise, and the documentation exhibited in the affidavits from the authorised bank officials show loan offers with signified acceptance and a charge registered against the folio which must be treated for present purposes as conclusive.

80. Ms Cody avers in paragraph 6 of the first affidavit that she was not present when her signature was purported to have been witnessed by Bank of Ireland personnel, although the

documentation she exhibits is a mortgage protection declaration form and could not be regarded as a central document in the chain of documentation creating the loan. At para. 7 she says that the staff at her husband's former practice likewise purported to witness her signature when she was not present. She does exhibit one document on which she says her signature was forged, but again that document, a notice of interest or cessation of interest in a fire policy, is not a central document in the chain of documents by which the loan or security were created. However, she went somewhat further and in her third affidavit she says, at para. 8, that she never received any statements for the mortgage accounts, and that all documentation and all statements were sent to an address at which she did not live and which was either the address of her husband's legal practice or his separate residential address, and the discrepancy or doubt arises because the address used on some of the documentation is an amalgam of both. She makes these averments by reference to the documents exhibited by the Bank in the form of letters of loan offer, signature at the foot whereof was deemed to be acceptance.

81. At para. 8 of her first affidavit she says that she could not prepare a defence without sight of the Bank documentation, and no offer was made to furnished this to her, nor was any further documentation added to the suite of documents on foot of which the Bank moved, and in this she echoes the point made by Clarke J. (as he then was) in *GE Capital Woodchester Ltd v. Aktiv Kapital Asset Investment Ltd.* [2006] IEHC 195, [2007] ILRM 203 that sometimes a court considering an application for summary judgment must have regard to the fact that a defendant may not have the relevant evidence to support a credible defence but can show a credible basis that such facts exist. See also the Court of Appeal decision in *Templecrone Co-Operative Agricultural Society Limited v. McLoughlin* [2015] IECA 14 where there was a credible basis to suggest that discovery might produce such evidence. In a similar vein in her affidavit of 31 December 2018 her main request was for an adjournment until the court order of 10 April 2017 for disclosure of the documents the subject of the data protection request had

been complied with. Her fifth affidavit too was sworn to support her application for an adjournment of the Circuit Court hearing. Ms. Cody does not put forward a broad statement that there may well be documentation which would assist her defence, but she does say that until she obtains the original and a full suite of documents, she is not in a position to say more at this stage in the process by way of defence.

82. I am far from saying that every defendant who argues or who avers on affidavit that further information is required to defend a claim for possession has thereby put an onus on the owner of the charge to establish further evidence by affidavit, but there is no substantive replying affidavit at all from the Bank to deal with her assertion that she needed sight of Bank documents and none at all to the second, third, fourth and fifth affidavits of Ms. Cody, the last of which was sworn on a date in February 2019, the precise day of swearing not being clear in the copy on the papers.

83. These averments could not be described as broad and generalised averments, but are more properly to be seen as supportive of her general averment that she had not received or seen the relevant documentation or the loan accounts or statements relevant to the loans and mortgage over the years. It is curious that thereafter the Bank did not seek to adduce further evidence that the loan offers and mortgage and other relevant documentation had in fact been sent to Ms. Cody or to the address at which she resided, nor was any evidence adduced that her husband had acted on her authority or behalf. Instead Mr Pullan's affidavit contains no further averment of fact and it consists primarily of legal argument as to what was not contained in Ms. Cody's replying affidavit and an averment (at para. 6) that nothing therein discloses a defence to the claim. The balance of the affidavit evidence is concerned with updating the debt figures.

84. At the least her averments provide some, albeit not determinative, evidence to support the general statement contained in her first affidavit that the loan and securities were created without her knowledge or consent.

85. Counsel for the appellant argues that the affidavit evidence of Ms. Cody amounts to no more than generalised assertions with no credible basis or other corroborative evidence either to throw sufficient doubt on the claim of the plaintiff that monies were borrowed and fell into arrears, or that those loans were secured by a registered charge on foot of which the Bank sought possession.

86. It is pointed out that Ms. Cody does not deny that the monies advanced were received by her or her husband, she does not say she was coerced into signing, and that even though she denies that the charge binds her interest in the lands, she does not deny that she signed the loan documents, but rather relies on an absence of proper witnessing, the precise relevance or importance of which it is argued is nowhere asserted.

87. In my view, the replying supplemental affidavits furnished on behalf of the Bank did not deal adequately with the assertions made in the affidavits of Ms. Cody, and whilst it cannot be said that she anywhere expressly denied having executed the documents, Simons J. took the view, and in my view was entitled to do so, that the implication to be drawn from her affidavit evidence was that the fact that her signature was not witnessed on the documents amounted to an assertion that the documents were not hers. She has presented a picture of a series of events to support her statement that she did not know of the transaction, which taken together throw some and not an unreasonable level of doubt on the sufficiency of the evidence adduced by the Bank. It is in my view relevant that she was not represented when the affidavits were prepared, and that she sought to adjourn the hearing to obtain further documentation by discovery or data request.

88. Further, it is apparent from an examination of the documents exhibited by the Bank in support of its claim that special condition (iii) of the first loan offer of 8 September 2015 suggests that the appellant Bank was aware of the marriage breakdown. While of itself this cannot be read as fully supportive of Ms. Cody's general averment that she was unaware of the loan or securities, it does add some weight to her general denial, and means in my view that she had by the combination of her evidence and assertions in affidavit raised more than an implausible or generalised or vague denial, and she did present a sufficient basis to support a request for further enquiry which, taken with the fact that the Bank did not positively respond to her assertions, was broadly sufficient to make summary disposal unsatisfactory.

89. Simons J. was met with evidence he found credible that the documents, and in particular the signatures on the loan agreements and charge, were not as they appeared, what was described by Clarke C.J. in *RAS Medical v. Royal College of Surgeons* at para. 90 as "contested questions of fact" which he considered he could not decide in favour of the Bank. Having recited the basis of the Bank's claim and the dispute raised by Ms. Cody in her affidavits, he concluded that the Bank had not discharged the onus of proof upon it as moving party and that its case had failed. He had relied largely on the fact that the Bank had not sought to cross-examine Ms. Cody on her affidavit and, relying on para. 88 of the judgment in *RAS Medical v. Royal College of Surgeons* in which Clarke C.J. found that it is incumbent on a party that wishes to assert that evidence tendered by an opponent lacks credibility or reliability to cross-examine that witness, held that as a consequence the Bank was not competent to argue that her evidence lacked either reliability or credibility.

90. It is not for this Court to consider whether it would have so found, and the correct approach to the facts at this level of appeal is to determine whether the trial judge had sufficiently considered the evidence, assessed it in the light of the standard of proof required to be met, and made a decision as to whether the proofs are met.

91. In my view he did have sufficient facts and his conclusions are adequately supported by those facts and the inferences he drew from the facts and absence of rebuttal by the Bank, and for that reason and in deference to his detailed analysis of the facts, I would not reverse his conclusion that Ms Cody had made out a credible case that she had a stateable defence to the claim.

92. This consequence is fortified by the fact that summary proceedings commenced by the Bank against both Ms. Cody and her former husband have resulted in the consent order of 28 February 2020 that the claim for judgment against Ms. Cody be adjourned to plenary hearing and in which directions for pleadings and other management steps have been made. The Master of the High Court had made an order on 5 May 2019 adjourning the motion for judgment to plenary hearing, that decision was appealed by the Bank and on consent the appeal was dismissed. There is for that reason an acknowledged *bona fide* dispute yet to be determined regarding the indebtedness of Ms. Cody to the Bank. There might also be a potential unfairness if that claim is to proceed to plenary hearing while the possession proceedings are disposed of summarily, as the arguments are broadly similar. That approach was adopted by Kelly J. in *Anglo Irish Bank Corporation Ltd. v Sherry* 2010 IEHC 271 because of the similarity in the evidence and arguments.

The second judgment: dismiss or adjourn to plenary hearing?

93. This conclusion would have in most cases led to a decision to adjourn the hearing to plenary hearing, and Simons J. before he reserved his judgment invited the Bank to make application for an adjournment to plenary hearing, an invitation he thought was inexplicably declined. Thereafter he reserved his decision, delivered his written judgment concluding the Bank had not proved its case and the matter giving rise to the second judgment then evolved.

94. Having concluded that the appeal against the order for possession was to be allowed the trial judge very properly permitted the parties to consider his written judgment before

dealing with the costs of the proceedings, and on 21 February 2020 at the adjourned hearing an application was made on behalf of the Bank to have the appeal remitted to plenary hearing. Simons J. refused and concluded that as he had finally determined the appeal in his first judgment he did not have jurisdiction to then remit the matter to plenary hearing and that the sole matter left for determination after he had delivered his first judgment was the question of costs. He did not consider that any circumstances existed that permitted him to revisit his judgment, such as envisaged in *Bailey v. Commissioner of An Garda Siochána* [2018] IECA 63. He also rejected the suggestion that he had in his first judgment merely found that there was a conflict of evidence that he could not resolve, as in the first judgment he had unequivocally found that the Bank had not proved its case. He thought he had no role to "come to the rescue of a plaintiff who had failed to establish its proofs", especially as the plaintiff had been represented and the defendant had not. As discussed above, I do not consider that this was correct as Ms. Cody had not done enough to permit the dismissal of the claim.

General observations on adjournment to plenary hearing

95. Order 5B r. 8(2) provides that the judge hearing summary proceedings for possession on foot of the procedure created thereby may "where he considers it appropriate" adjourn a civil bill for plenary hearing and the proceedings are then to be continued as if they had originated otherwise than in accordance with the order. The rule is silent as to the stage of the process at which this may be done. Whilst there are no constraints, whether of time or sequence, which can be said to govern the adjournment of a possession action to plenary hearing, certain matters that could have arisen in the course of the trial could fairly obviously lead a judge to do so, including an application on consent or a conclusion that the evidence was finely balanced and would benefit from cross-examination or further examination in chief.

96. The rule seems to contemplate that the trial judge may adjourn the proceedings to plenary hearing even in the absence of an application by either party, and there is nothing in

the rule that limits the judge from doing so of his own motion and the power is expressed as discretionary. The interests of justice in some cases will require a plenary hearing, notwithstanding the desirability at the root of s. 62(7) that there be a cost effective means of resolution, and the trial judge must on that account be seen as having a power to adjourn to plenary hearing even without request.

97. In *National Irish Bank v. Graham* [1995] 2 IR 244 the first ground of appeal was whether a special summons seeking possession by summary means ought to have been adjourned to plenary hearing. Finlay C.J. (at p. 249) found that there was no general principle or requirement of justice which made a plenary hearing necessary:

> "The purpose of a plenary hearing instead of a summary judgment in a case of this description is for the purpose of resolving a dispute of fact which remains between the parties and the determination or resolution of which is necessary for the decision in the case."

98. Dunne J. in *Anglo Irish Bank Corporation plc v. Fanning* [2009] IEHC 141 relied on that dicta of Finlay C.J. that the power to remit special summons proceedings to plenary hearing is a discretionary order.

99. The parties cannot by their choices constrain this discretion, and in the present case the fact that the Bank refused the offer to adjourn to plenary hearing was not determinative of the matter. The procedures available, such as cross-examination, an application to adjourn to plenary hearing, an application for the admission of oral evidence etc, are procedural steps to assist both sides to a dispute and the court in coming to a view of the evidence. But it is for the court to decide itself whether it can reach a conclusion on the evidence, and how and whether other procedures would assist or should be brought to bear in the interests of justice and to enable a decision to be made. That counsel for the Bank had opted not to elect to have

the matter heard by plenary action could not constrain the discretion of the High Court, and I do not think Simons J. made his decision on that basis.

100. The adjournment to plenary hearing is a matter ultimately for the judge hearing the summary action and the discretion to do so is not constrained by the choices made by the parties. This is illustrated by *Bayworld Investments v. McMahon* [2004] IESC 39, [2004] 2 IR 199 in which this Court rejected an argument that a special summons seeking access to documents be remitted to plenary hearing. The defendants had not requested a plenary hearing prior to the commencement of the hearing and served notices to cross-examine the witnesses of the plaintiff a few days before it commenced. McCracken J. considered that the defendant had not been curtailed in any way from raising any relevant points at the hearing and that the trial judge was correct in determining the proceedings under the special summons process.

101. The jurisdiction is one vested by the Rules of the Circuit Court, but may properly be said to be one that exists in any case heard on affidavit. It is perhaps the default position in any case where the affidavit evidence is evenly balanced, where there is a conflict on the affidavits between the parties which cannot be or has not been resolved by way of further affidavit, where the court considers that a matter raised on affidavit, particularly one raised in defence, might have such a bearing on the outcome that its credibility deserves to be fully tested, or where a judge considers that in the light of certain averments which are credible, but not dispositive, it would be either difficult or unfair to resolve the matter without giving both sides the opportunity to further advance that evidence or, where necessary, to test it. The adjudicative function is not a matter of box ticking or a purely logical engagement with a checklist of proofs that must be met by a plaintiff. Certain evidential presumptions or burdens can make the task of adjudication at times appear almost effortless, but the fact remains that a judge met with evidence, whether contested or not, must weigh that evidence, assess its veracity, credibility, and importance for the purposes of proving those matters that are required to be established.

In a case where the action is heard on affidavit, courts are vigilant to consider the option to adjourn the matter for plenary hearing. The vigilance derives from the fact that affidavit evidence of its nature is often in terms which have a tone of certainty which is not always found in oral testimony, particularly where that is cross-examined, and because the affidavits are often drafted by lawyers with a view to the legal test.

Application to present appeal

102. I consider that Simons J. fell into error in not adjourning the action to plenary hearing. As can be seen from my analysis of the affidavit evidence, Ms Cody did not positively establish a defence to the claim, and did not rebut the evidence of the Bank regarding the grant of the loans. She has not commenced proceedings to have the charge set aside. At best she raises questions which are not answered, but the Bank had established a *prima facie* case and she did not displace its evidence, and her averments fall short of denying her signature on the documents or that she received the money. She did raise questions and they were sufficient to be more than generalised assertions, but her evidence and arguments are well short of the sort that enabled a court to dismiss the claim of the Bank, as happened in the cases mentioned above at paras. 74 and 75 above.

103. The respondent argues that an adjournment to plenary hearing was unfair as it amounts to giving the Bank an opportunity to mend its hand. But Ms. Cody did not either positively establish a defence or persuade Simons J. that the Bank had not met its proofs, and was not therefore entitled to an order dismissing the claim. Simons J. did not accept her assertions that the documents were the result of a fraud or that they were not her documents, and it is worth repeating that she did not make a positive averment that the signatures were not hers, and that even had she done so the resolution of that factual dispute could not have been fairly done without giving the parties the opportunity to test the evidence. Rather she raised a sufficient doubt to prevent the grant of judgment on a summary basis and without a plenary hearing.

104. An additional factor in the present case is that the Bank asked Simons J. to adjourn the matter to plenary hearing after he had dismissed the action. As Simons J. noted, O. 5B r. 8(2) provides for the adjournment to plenary hearing of an action "at any stage during the course of proceedings" and, while the language of the rule is not dispositive, it does not contemplate the adjournment after judgment is delivered. I accept that the order of the court had not been drawn, but the decision of the judge was pronounced in his written judgment and that decision was that the Bank had not established its claim, which accordingly had to be dismissed. Laffoy J. in *GE Capital Woodchester Home Loans Ltd v. Reade and Another* permitted the revisiting of the finding that the letters of demand were insufficient but confirmed her first conclusion in the supplemental judgment. The application of the Bank was not an application of that type.

105. I agree with Simons J. that once he had concluded that the claim was not proven he had determined the action and was no longer competent to adjourn that action to plenary hearing, but for the reason explained I do not consider that he was correct to dismiss the claim without a further hearing.

Plenary hearing in the High Court ?

106. Because of the conclusion he reached Simons J. did not have to consider whether an adjournment of the appeal to plenary hearing is to the Circuit Court or to the High Court in its appellate jurisdiction. Little assistance is afforded by the Act or the Rules, but it seems to me that from first principles the power is to adjourn to plenary hearing the hearing of the appeal. The adjournment therefore is to trial by plenary hearing before the High Court exercising its appellate jurisdiction, i.e. the High Court vested by statute with the same jurisdiction as the Circuit Court. An argument that adjournment is back to the Circuit Court fails in my view to recognise that the order under appeal was the determination of an action for possession, albeit an action heard on affidavit, and that the action had concluded in the Circuit Court. The remittal

to the Circuit Court for hearing would involve the High Court judge adjourning back to the Circuit Court an action which had already been disposed of by that court.

107. Where an action has concluded in the Circuit Court, a High Court judge hearing a statutory appeal is the sole court then vested with the right to determine the appeal. There is no statutory jurisdiction to remit to the Circuit Court, and no such jurisdiction is required to be implied. Indeed, it would in my view potentially lead to an injustice, and a failure to recognise the finality for which s. 39 of the Courts of Justice Act, 1936 provides, were the High Court judge hearing the appeal to remit an action to the Circuit Court for rehearing, when in turn the decision from that remitted hearing would be open to a further appeal. The aim of finality would suggest an alternative interpretation. It must be different with regard to an interlocutory order made in the Circuit Court and dealt with by appeal to the High Court but that proposition derives from the nature of an interlocutory order which does not conclude the action.

108. I would conclude that the power to adjourn summary possession proceedings to plenary hearing cannot be a power to remit the matter to the Circuit Court for further hearing. Rather the power is one to adjourn to plenary hearing in the High Court exercising its statutory appellate jurisdiction, as that court continues to have seisin of the evidential and legal matters raised in the appeal, and has sole jurisdiction by virtue of the fact that the Circuit Court action has concluded.

109. This conclusion underlines the difference between an action completed in a summary manner on affidavit, and an interlocutory motion, and the fast-track process by which summary judgment may be obtained in a mortgage suit provides for the hearing of an action on affidavit, and once that action has been heard the Circuit Court cannot be revisited with jurisdiction to hear the matter as if it had been commenced by equity civil bill on title.

The mode of hearing of the plenary action: "special leave" under s. 37(2)?

110. In the light of that conclusion it is necessary to make some observation regarding the mode of hearing the appeal by plenary action. The High Court judge considered that the provisions of s. 37(2) of the Courts of Justice Act 1936 precluded the adjournment to plenary hearing because the Bank had not sought or given any reasons why "special leave" would be granted to adduce further evidence on the appeal.

111. The hearing of all Circuit appeals is done by rehearing of the action or motion, as the case may be. Section 37(2) provides that in appeals from the Circuit Court in civil cases heard without oral evidence "special leave" of the appeal judge is required to adduce new evidence:

> "37(2) Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal."

112. It might seem self-evident that a judge who considers that an action for possession is to be adjourned to plenary hearing would implicitly have accepted that new or different evidence was required, or at least that the existing evidence required to be tested by cross-examination or that new evidence could emerge, and the grant of special leave does not seem to me to be a statutory impediment which is to be interpreted restrictively, as the adjournment of an action to plenary hearing will almost invariably require the giving of directions as to pleadings, the preparation of an issue paper, discovery, interrogatories, particulars or even in certain cases witness statements and the evidence emerging would be "new" or different, more detailed or nuanced. There would be little point in making orders for discovery if the delivery of particulars

and interrogatories of "new" or different evidence that emerged was not admissible without "special leave".

113. Order 5B r. 8(2) provides that a civil bill adjourned for plenary hearing is to proceed as if it had originated otherwise than in accordance with this order, and that would seem to infer that special leave could then not be required for the admission of fresh evidence, as none would have been required had the proceedings been commenced by ordinary or equity civil bill in the normal way.

114. In many or most cases adjourning to plenary hearing would be pointless if that hearing was to proceed on the self-same evidence as that produced on affidavit, albeit given orally. The purpose of an adjournment to plenary hearing is not merely to facilitate the testing of evidence, as that may be done within the framework of the summary proceedings by the service of a notice to cross-examine (see *RAS Medical v. Royal College of Surgeons*). The adjournment to plenary hearing must in my view envisage that more and different evidence will be adduced, usually orally, and without the limitation that made the adducing of such further evidence conditional upon leave of the court. It is consistent with the fact that the appeal is a complete rehearing, and that the determination of the decision of the High Court on an appeal under Part IV of the Act is final and conclusive, as the power of the High Court judge hearing the statutory appeal could result in an injustice when that court was, for reasons of lack of evidence or because he or she found the evidence to be inconclusive, unable to determine the matter in a way that did justice between the parties.

115. Further, in an action adjourned to plenary hearing the evidence previously proffered by affidavit is then, save where otherwise agreed by the parties, to be adduced by oral testimony in accordance with Order 39 rule 1 RSC, and subject to the limited discretion of the trial judge to permit proof by affidavit as considered by this Court in *Phonographic Performance (Ireland) Ltd. v. Cody* [1998] 4 IR 504, and the recent decision in *Whelan v. Allied Irish Banks plc.*

[2014] IESC 3, [2014] 2 I.R. 199 where part of the evidence was adduced on affidavit. Thus all the evidence at the plenary trial will be "new" to that extent, and the course of the plenary trial could not be constrained by s. 37(2). Evidence given orally will almost always be different even if the differences are one of emphasis or tone.

116. I am satisfied in those circumstances that s. 37(2) does not impose a restriction on the admission of new and additional evidence in the hearing of an appeal adjourned to plenary hearing in accordance with O. 5B r. 8(2). The hearing of the action should proceed in the High Court by plenary hearing and subject to directions, further pleadings, issue paper or submissions as the judge shall determine.

Conclusion and summary

117. The arguments and evidence of Ms. Cody were not sufficient to displace the *prima facie* evidence of the Bank that the right to seek possession by reason of default in payment of the money secured by the registered charge had arisen and become exercisable. She did however make more than generalised and bald general assertions and her affidavits were sufficient to entitle her to a trial of the action for possession on a plenary basis.

118. I would for that reason allow the appeal and order that the action for possession now proceed before the High Court by way of appeal under Part IV of the Act of 1936, and without any requirement that either party be required to seek special leave to adduce such evidence as they may deem appropriate at the hearing. The order restricting the right of the charge holder to commence further proceedings for possession against Ms. Cody must as a consequence also be set aside.