

November 2021

Bulletin Brief

The High Court reiterates its position and proofs required for applications for possession.

It also provides useful reflection and 'run-through' of some of the common defences that tend to be raised by defaulting borrowers.

Shoreline Residential DAC and Pepper Finance Corporation (Ireland) DAC v David Jacob [2021] IEHC 654 (the "Proceedings").

Analysis of the judgment of Mr. Justice Barr dated 26th August 2021 (the "Judgment").

Practice Focus

- Circuit Court applications for orders of possession.

Background

- Shoreline Residential DAC ("**Shoreline**") sought an order of possession over the property known as Park House, Bree, Enniscorthy, County Wexford (the "**Property**").
- By facility letter dated 1st August 2007 (the "Facility Letter") Irish Nationwide Building Society ("**INBS**") provided a facility of €390,000 to the defendant (the "**Facility**").
- The Facility was demanded upon on 20th March 2017 for €505,887.02 including arrears.
- The Proceedings were issued on 25th April 2017 in the Circuit Court.

The defendant objected to the application for possession of the Property on eight primary grounds:-

1. The plaintiffs had not established jurisdiction in the Circuit Court;
2. The defendant had not been provided with adequate details of the debt alleged to be owed by him;
3. Nor the computation of the interest;
4. The plaintiffs had redacted certain documents concerning the transfer of loans from one entity of another;
5. The plaintiffs failed to respond to a “Formal Offer” made in the course of the proceedings;
6. The plaintiffs failed to engage in mediation;

7. The plaintiffs had acted in breach of the “Distance Selling” Regulation 1989 and the “Unfair Contract Terms Regulations” 1995;
8. The plaintiffs’ evidence was inadmissible, as hearsay.

The Court’s findings:-

In examining the defendant’s objections, Justice Barr concluded:-

1. The Jurisdiction of the Circuit Court

The Circuit Court proceedings were brought pursuant to s. 3(2) the Land and Conveyancing Law Reform Act 2013 (the “**2013 Act**”), which applies to principal private residences and mortgages created prior to 1st December 2009.

- Both parties agreed the Property was the principal private residence of the defendant;
- The mortgage was created prior to 1st December 2009;

- The Property was not subject to the Family Home Protection Act, 1976;
- There was no contradictory evidence led on behalf of the defendant that the property had a value in excess of €3 million.

Accordingly, the Circuit Court had clear jurisdiction to deal with the matter.

2. & 3 No adequate details of the level of debt or interest were provided (the O'Malley defense)

The court was not satisfied with the substance of the defendant's argument in this regard where:-

- The defendant was provided with statements of account from 2014 to 2017;
- The defendant did not challenge the averments in the Circuit Court affidavits relating to the default or the level of arrears;

- The defendant had not made any mortgage repayments since 2013;
- The defendant had not challenged the accuracy of the global figures.

Significantly, Justice Barr differentiated between an application for summary judgement for liquidated sum (where this argument may have some merit) and an application for an order for possession.

Justice Barr confirmed to seek an order for possession, the plaintiff must establish:-

- The plaintiff is the owner of the charge;
- The right to seek possession has arisen and is exercisable on the facts;
- The plaintiff only has to establish that there is some money due and owing to it;
- That is made the necessary demand for payment of the total sum and for delivery of possession and
- The borrower has refused to provide these.

4. Redacted transfer documentation

The court was critical that the transfer documentation was heavily redacted, however, the relevant parts relating to the defendant were not redacted and therefore, the defendant's right and ability to defend himself in this application had not been adversely affected by the redaction of the material.

5. The "Formal Private Offer"

Justice Barr took the view that the defendant was entitled to make whatever offer he wished to settle the proceedings, he was not entitled to demand a response to this offer. *"Even if they did receive his offer, they were not obliged to either accept it, or respond to it. The making of an offer by one party to litigation, cannot force the other party to accept that offer"*

6. Failure to engage in mediation

Justice Barr stated the failure of a party to accept an invitation to engage in mediation is not a bar to it obtaining relief from the court.

7. The "Distance Selling" and "Unfair Terms in Consumer Contract" Regulations

The court rejected the defendant's defence in circumstances where:-

- The deed of mortgage was signed before a solicitor and at the benefit of the solicitor's advices; and
- The terms of the Facility Letter were very clear.

8. Hearsay Evidence

The court rejected the defendant's hearsay argument, in circumstances where the court is *"entitled to act on the documentary evidence that has been put before it by the plaintiffs, as the documentary evidence is not specifically challenged by the defendant"*. The mere assertion of generally hearsay is insufficient. The hearsay defence must relate to a particular document or documents or facts.

Key Takeaways

In a highly contested application, the High Court found:-

1. To obtain an order of possession, the plaintiff must establish:-
 - the plaintiff is the owner of the charge;
 - the right to seek possession has arisen and is exercisable on the facts;
 - the plaintiff only has to establish that there is some money due and owing to it;
 - that is made the necessary demand for payment of the total sum and for delivery of possession; and
 - the borrower has refused to provide either of these.
2. The *'O'Malley'* defence is not a defence in applications for possession.
3. A defendant cannot force a plaintiff to accept or respond to a formal offer.
4. In this case, failure to respond to an invitation to mediation is not a bar to obtaining court relief.
5. It is not enough to raise hearsay generally, the hearsay defence must apply to particular documents or facts.

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