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Recent Cases on Enforcement of Security of interest to Owners and Prospective Purchasers of Irish NPL Portfolios

Introduction

It is anticipated that a number of significant non-performing loan (NPL) portfolios will be divested by banks operating in the Irish market over the coming year. The likely cost and timing of realising security over secured real estate assets is a significant consideration for potential buyers of NPL portfolios when assessing entry into this market and the pricing of proposed bids. In light of the additional issues that generally arise in the context of enforcement over residential real estate assets, an understanding of the potential issues in relation to enforcement is even more critical for owners and potential buyers of NPL portfolios comprising residential property.

This note is intended to provide a useful overview of recent cases and developments in this area, with a particular focus on issues which are of relevance to both home loans and loans secured over buy-to-let residential properties.

Recent Developments in relation to the Enforcement of Security

1. Personal Insolvency Arrangements

Under the personal insolvency regime, debtors may apply for a Personal Insolvency Arrangement (PIA) in respect of debts of up to

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€3 million (which must include some element of secured debt) and, if approved by the Court, the terms of the PIA are imposed on the relevant secured creditor or owner of the secured debt. As the personal insolvency legislation[1] was designed to help debtors remain in their homes, in cases where the relevant debt is secured by a principal private residence, the Courts must give weight to proposals which would allow the debtor to stay in their home, provided that it is satisfied that the proposed PIA would not be unfairly prejudicial to any of the interested parties.

The following two recent decisions are of particular interest in showing the approach that the Courts are likely to take when considering the impact of PIAs on the interests of secured lenders.

The 2017 decision in ***Re Callaghan (A Debtor)***[2] has confirmed that "warehousing" of debt is not precluded by the personal insolvency legislation and is an alternative that may be validly proposed by creditors. However, the case also made clear that such proposals are only reasonable if they are sustainable and based on an anticipated ability to ultimately repay the warehoused amount.

In this case, a debtor couple's proposed PIA involved a large write-down of the debt secured on their principal private residence. On the other hand, the secured creditor, KBC, proposed instead to write off only a small proportion of the debt and then split the secured debt evenly into two equal portions, with one portion to be serviced with certain specified repayments by the debtors and the other portion to be placed in a "warehouse" account bearing 0% interest. Under KBC's proposal, it would only be permitted to enforce its security in respect of this warehoused debt after the survivor of the debtor couple had died. KBC's counterproposal would thus have provided security of tenure for the debtors, while reserving KBC's right to recover the vast majority of the original secured debt at the end of the term.

The Court held that the debtors' proposed PIA provided a better resolution, on the basis that KBC's proposal was not predicated on an ability to repay and was capable of creating insolvency for the debtor's estate at the end of the term. A positive aspect of the decision, from the perspective of lenders or holders of NPL loans, is that the Court rejected the debtors' argument that warehousing of the debt beyond the term of the PIA was not permitted under the regime. However, the decision indicates that, in order to be approved by the Court, a warehousing proposal must offer a solution to indebtedness that is likely to be achieved.

Given that there was no expectation that the debtors would ultimately be able to pay the warehoused amount, the KBC proposal was not considered reasonable or fair to the debtors. Since a PIA is a once in a lifetime solution, and the KBC proposal could result in insolvency in the future, it was considered to be against the statutory scheme.

(Please see our more detailed case summary at the following link: ***Re Callaghan***)

[1] Personal Insolvency Act 2012 (as amended)
[2] *Re Callaghan (A Debtor)* [2017] IEHC 332

Another 2017 judgment, ***Re Hayes (A Debtor)***[3], makes it clear that the courts will assess an objection raised by a secured creditor to a PIA differently depending on whether that creditor is the a bank (or other originating lender) or, alternatively, a loan purchaser or other special purchase vehicle that had acquired the secured debt.

In that case, the debtors' PIA proposed a fixing of the interest rate over the entire term of the relevant loan, and not just the period of the PIA, at a rate that Shoreline Residential DAC, who had acquired the loan from IBRC, described as a "*radical departure even from the most competitive rates available on the open market*".

It was held in the High Court that this proposal was not unfairly prejudicial to Shoreline and that, since Shoreline was not an originating lender but rather an investment fund which had purchased the relevant loan in a loan portfolio, the fairness of the rate was to be tested against the expected return of its investment at the time the loan was purchased, rather than by reference to future lending rates of a secured lender. The Court further elaborated that the asset value of the loan would be more accurately compared to that of a bond and, therefore, in order to establish that the return on the investment was unfairly prejudiced, a comparison would need to be made by reference to the bond markets and not the domestic lending market.

Accordingly, potential purchasers of NPL portfolios should bear this decision in mind during any bid/purchase process involving debtors that are natural persons who might seek to agree a PIA with their creditors. It would seem advisable for such purchasers to ensure that they are in a position to provide evidence of how the acquired debt was priced and to provide details of how the terms of a PIA would result in a loss to their anticipated investment return.

(Please see our more detailed case summary at the following link: ***Re Hayes***)

2. Where a Secured Property is subject to a Tenancy

Where a security holder enforces its security over a tenanted property, such enforcement will, in the majority of cases, involve the appointment of a receiver. The receiver will, as a general principle, step into the shoes of the debtor as landlord. If the tenant breaches the terms of the tenancy or does not cooperate with or looks to frustrate or obstruct a receiver, the receiver can terminate the tenancy and assert his/her rights to recover rents and/or possession of the secured property for the purpose of exercise of the receiver's statutory powers or his/her contractual powers under the security holder's security. If the tenanted property is residential, the receiver will have to have regard to the provisions of the Residential Tenancies Act 2004 to 2015 (the **RTA**) in relation to the landlord's obligations when terminating the residential lease.

However, in certain circumstances, it may also be open to the security holder to deny the existence of a purported lease where the mortgagor/chargor granted the relevant lease without the consent of

[3] *Re Hayes (A Debtor)* [2017] IEHC 657

the security holder (or their predecessors) in breach of the terms of the relevant security. On that basis, a security holder could seek a determination from the Court that the lease is void as against the security holder and other orders, including an order for vacant possession of the secured property.

Where these circumstances may arise and an enforcing security holder looks to maintain that the lease/tenancy is not binding, it is important for that security holder, and any appointed receiver, to proceed carefully so as not to inadvertently act in a way that prevents them from denying the existence of the tenancy. Irish case law, including ***Kenneth Fennell and ACC Bank PLC v N17 Electrics (In Liquidation)***[4] and ***Murphy v. Hooton***[5], recognises that a tenancy can become binding on a security holder or their receiver, notwithstanding the absence of any prior consent to the tenancy which is required under the relevant security, if the security holder or receiver subsequently takes actions which prevent them from denying the existence of the tenancy, such as by demanding rent from the tenant.

The High Court recently looked at this aspect in the context of residential property in ***Paul Collins v Joan Cummins and Francis (Franny) Moore***[6], where the existence of a lease/tenancy of residential property was inadvertently acknowledged by a receiver by virtue of the receiver purporting to terminate a tenancy, rather than consistently denying the validity of that tenancy. The High Court held in that case that service of a statutory notice of termination of tenancy under the RTA by a receiver was found to be an acknowledgment of the tenancy.

Accordingly, where a security holder or its receiver claims that a purported residential tenancy of a secured property is invalid for lack of security holder consent and on that basis brings an application (including seeking injunctive relief) against the mortgagor and/or the tenant for vacant possession, the tenant would have a strong defence to that action if the residential tenancy has been acknowledged, on the basis that the Court has no jurisdiction to deal with such a case in the first instance. Any dispute in relation to a residential tenancy should instead have to be referred to the Residential Tenancies Board (**RTB**), as required by Section 182 of the RTA. Generally, determinations under the RTB regime are seen to be more tenant-friendly and it could take significantly longer to get such a determination than to have an interlocutory injunction heard. If a tenant does not then obey a determination of the RTB in favour of a receiver, realisation of the property will be further delayed by the requirement to get a Circuit Court order enforcing the determination.

On foot of this recent decision, it would be prudent for enforcing security holders, their receivers and any appointed property agents to consider carefully the issuing of correspondence under the RTA in any circumstances where they dispute the validity of a residential tenancy.

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[4] *Kenneth Fennell and ACC Bank PLC v N17 Electrics (In Liquidation)* [2012] IEHC 228

[5] *Murphy v. Hooton* [2014] IEHC 266

[6] *Paul Collins v Joan Cummins and Francis (Franny) Moore* [2015] IEHC 354

3. Code of Conduct on Mortgage Arrears (CCMA)

The CCMA is a code of conduct issued by the Central Bank of Ireland governing the manner in which certain security holders and/or their servicers[7] must engage with debtors in, or facing, mortgage arrears in circumstances where the mortgage loan of the debtor is secured by their primary residence (or by the only residential property in the state owned by that debtor).

In general terms, the CCMA applies to security holders that are authorised/regulated by the Central Bank of Ireland. Even where the security holder is unregulated, the CCMA will apply to servicers who manage and administer those mortgage loans for the security holder in circumstances where the loans held by the unregulated entity had been originated by regulated entities (i.e. thus capturing servicers acting for unregulated purchasers of loan portfolios from Irish banks/regulated entities).[8]

In general, the CCMA requires regulated security holders and servicers to wait for at least 8 months before taking legal action for repossession of the principal primary residence of a debtor and to operate a Mortgage Arrears Resolution Process (MARP) when dealing with mortgage arrears and pre-arrears debtors.

Whereas a number of prior cases[9] had suggested that various failures to comply with the CCMA might impact upon a security holder's ability to enforce and secure possession and had generally been difficult to reconcile, the 2015 Supreme Court decision in ***Irish Life and Permanent PLC v Gemma Dunne and Kevin Dunne***[10] has brought welcome clarity to the interaction between the CCMA and the entitlement of a security holder to obtain possession of a secured primary residence.

The Supreme Court held that failure to comply with the CCMA is a regulatory matter only, and does not interfere with the lender's private rights against the mortgagor. However, the Court held that "*where the breach of the CCMA involves a failure by the lender to abide by the moratorium, but in no other case, non-compliance with the Code affects the lender's entitlement to obtain an order for possession*".

In another 2015 case, ***Ken Fennell v Con Creedon and Pamela Creedon***[11], it was established that, following compliance with the MARP process, a secured creditor seeking possession of a primary residence is not required to seek a court application for repossession in all cases. Rather, the Court held that the CCMA does not prevent other means of repossession, including the

[7] Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (as amended)
[8] It should also be noted that legislative enactments have recently been proposed which could result in purchasers of loans which were originated by regulated entities, themselves having to become regulated, so change is likely in that regard in the coming months. This could extend the application of the CCMA directly to such loan purchasers and not just their servicers. Please see our note on the proposed legislative enactments at the following link: Loan Sales in Ireland – Proposed Regulatory Changes
[9] See in particular *Stepstone Mortgage Funding Limited v. Fitzell* [2012] IEHC 142
[10] *Irish Life and Permanent PLC v Gemma Dunne and Kevin Dunne* [2015] IESC 46
[11] *Ken Fennell v Con Creedon and Pamela Creedon* [2015] IEHC 711

appointment of a receiver to take possession, and that such other measures could be taken by the secured creditor if they are allowed for by the terms of the security document.

The debtors argued that, because the receiver had been appointed over their primary residence, the CCMA applied and that the secured creditor could thus only take possession through formal possession proceedings. In the first instance, the Court was not convinced that the CCMA applied in the circumstances, as the relevant loan was a commercial loan for the purpose of acquiring and refurbishing three residential investment properties, with the debtors subsequently moving into one of the properties four years later without Bank consent or agreement. In any event, the Court concluded that, even in circumstances where the CCMA applies, *"it would seem that the Court has no power to prescribe the method by which a financial institution seeks to enforce its security over a primary residence which is the subject of a mortgage."*

It should be noted that for the enforcement of security over primary residences (and other "housing loan mortgages", i.e. credit agreements to consumers that are secured over a dwelling) where the security was executed on or after 1 December 2009, legislation dictates in any event that a court order will need to be obtained in the Circuit Court before the secured property can be sold.[12] However, the decision in *Fennell v Creedon* is significant for all security over primary residences created prior to 1 December 2009, where court orders are not required. Typically, the majority of security comprised in Irish NPL portfolios will have been put in place prior to that date.

Fennell v Creedon is authority that where pre-December 2009 security provides adequate receiver powers, a receiver can be appointed over a primary residence. While possession proceedings will be required wherever a debtor remains in occupation or is opposing enforcement or sale, a receiver would be in a position to enter into possession of a vacant or abandoned primary residence pursuant to such security, or alternatively to enter by consent or agreement, and effect a sale on a contractual basis, without requirement for a court proceedings or court sanction.

In ***ACC Bank plc v Niall Quinn***[13] the Courts have also showed an unwillingness to afford a debtor the protections of the CCMA where the debtor has moved into an investment property without notice to the secured lender and seeks to claim that it is their primary residence.

The debtor had obtained loans for the purchase and improvement of two residential investment properties and the loan documents included, as a condition precedent to drawdown, a requirement that confirmation of the proposed rental income be submitted in advance to the creditor. The debtor argued that the CCMA should apply on the basis that he had subsequently moved into one of the secured properties, but the Court ruled against the debtor, stating that *"the Plaintiff considered the projected rent from the property in assessing the viability of the lending. The fact that the Defendant decided to use the property as his primary residence for periods of time, without any written notice to the Plaintiff, does not entitle him to have the Code applied."* The loan documents had made clear

[12] Section 100 (2) of the Land and Conveyancing Law Reform Act, 2009
[13] *ACC Bank plc v Niall Quinn* [2014] IEHC 677

that the creditor only intended the loan to be for residential investment property and not for any other purpose, and the condition precedent in relation to rental income reinforced this position.

The High Court accepted that *"there may be situations where a lender acquiesces in the use of a property as a primary residence, which has been mortgaged for commercial purposes, and which was not intended to be the primary residence of the borrower. In that case the code would apply. For that to arise there would have to be cogent evidence advanced that the lender had notice that the property was being used as the primary residence of the borrower."* However, the Court found no such evidence in this case and indeed concluded that *"the written documentation suggests the exact opposite"*.

Accordingly, for a debtor to avail of the protections of the CCMA where a secured property has subsequently become their primary residence, the creditor would need to have been put on notice and to be viewed as having consented or acquiesced to that position. This requirement for notice is of comfort to security holders, but they should still be vigilant in responding quickly upon receiving any such notice, in order to counter arguments that they had assented to the debtor's actions.

4. Enforcement where registrations of security/transfers have not completed in the Land Registry

In a number of recent cases, arguments have been raised by debtors, with some success, impugning a security holder's right to appoint a receiver or obtain an order for possession of a secured property in circumstances where the secured property comprised registered title (i.e. a folio had been opened for the secured property) and either the relevant charge has not been registered in the Land Registry or an acquiring security holder was not yet registered as the owner of a charge over the secured property (i.e. has not been named as the charge-holder on the relevant folio at the Land Registry). These cases have been the focus of much attention for purchasers of NPL portfolios, particularly in light of the relatively long periods that it is taking for the Land Registry to process and complete registration applications in respect of the security transfer deeds that are executed upon completion of loan sales.

The 2017 decision in ***Patrick J. Woods v Ulster Bank Ireland Limited, James Meagher and Adrian Trueick***[14] has ameliorated the position by confirming that, if a secured creditor (including any loan purchaser) appoints a receiver over real property pursuant to its contractual powers to do so in the mortgage/charge, then that appointment of the receiver is valid even where the charge itself may not yet have been registered on the folio, albeit that the secured creditor (and its receiver) is not entitled to exercise any statutory powers until registered as owner of the charge on the folio.

While this case related to enforcement of security by the originator of the relevant loan and security, by necessary extension the same contractual right would permit the purchaser of a loan portfolio to

[14] *Patrick J. Woods v Ulster Bank Ireland Limited, James Meagher and Adrian Trueick* [2017] IEHC 155

appoint a receiver before registration of the purchaser as owner of the originating charge has completed in the Land Registry.

This decision affirms the position in *Kavanagh & Bank of Scotland plc v McLaughlin & McLaughlin*[15] and it resolves some of the confusion that had arisen from the decision in *Harrington v Gulland Property Finance Limited & Stephen Tennant,*[16] in which the High Court had found that the debtor had made an arguable case that the receiver was not validly appointed on the basis that the purchaser of the loans and the relevant charge was not yet registered as owner of that charge in the Land Registry.

There have also been a number of recent cases concerning the due registration in the Land Registry of bulk transfers of security over registered property. Transfers of Land Registry charges by financial institutions to third party loan purchasers are generally effected by way of executing and registering the prescribed Land Registry form, Form 56, which specifies each individual charge and results in the charge-holder's name being updated on each relevant folio when registration of the form completes. However, the Courts have recently dealt with a number of cases where bulk transfers of security had been effected by operation of law rather than by deed and the transfers had not been registered on each individual folio.

The Supreme Court case of ***Tom Kavanagh and Bank of Scotland PLC v Patrick McLaughlin and Roseann McLaughlin***[17] concerned debtors who were challenging the appointment of a receiver by Bank of Scotland plc (BOS) over properties that had originally been secured in favour of Bank of Scotland (Ireland) Limited (BOSI) but which had transferred to BOS under a cross-border merger some years previously in 2010.

In the High Court, it had been found that the transfer of assets from BOSI to BOS on foot of the cross-border merger did not require that BOS be registered as the owner of the charge on the relevant folio. However, the Supreme Court found that, in order for BOS to avail of the statutory rights and powers conferred on charge-holders over registered property, BOS must comply with the requirement that it be registered as owner of the charge on the folio. The Supreme Court found that in this case the appointment of the receiver was still valid, as it was made pursuant to contractual powers in the security document, rather than in reliance on a statutory power. However, if the secured creditor had sought to rely on some statutory right (such as the power to overreach subsequent registered judgment charges) or a power that was not contractually provided by way of the security document (such as a power to sell the property), it could not have done so.

The potential ramifications of the decision in *Kavanagh v McLaughlin* are illustrated by the interim ruling, in November 2017, in ***Tanager DAC v Rolf Kane***[18], which also involved charges over

[15] *Kavanagh & Bank of Scotland plc v McLaughlin & McLaughlin* [2015] IESC 27
[16] *Harrington v Gulland Property Finance Limited & Stephen Tennant* [2016] IEHC 447
[17] *Tom Kavanagh and Bank of Scotland PLC v Patrick McLaughlin and Roseann McLaughlin* [2015] IESC 27
[18] *Tanager DAC v Rolf Kane* [2017] IEHC 697

registered property acquired by BOS from BOSI as part of the security transferred by operation of law under the 2010 cross-border merger.

In 2013, subsequent to the cross-border merger, BOS had sold a portfolio of its loans to Tanager DAC. An application was made by Tanager for an order of possession over the defendant's family home. BOS had not been registered as owner of the charge, with the merger and transfer of assets from BOSI to BOI having taken effect by operation of law and no application having been submitted to the Land Registry in respect of that transfer. However, a Form 56 was executed by BOS in respect of the subsequent transfer in favour of Tanager and was registered in the Land Registry. Tanager argued, as registered owner of the charge, that section 31 of the Registration of Title Act, 1964 provides that the register is conclusive and therefore its title as owner of the charge could not be challenged.

It should be noted in the first instance that the High Court has only made an interim ruling in this case and that the case is due to be heard by the Court of Appeal in mid May 2018.

In this interim ruling, Noonan J did make certain findings which are concerning to potential purchasers of NPL portfolios. Firstly, he questioned whether BOS, as the unregistered owner of a registered charge, was entitled to transfer that charge without itself becoming registered. Secondly, he was of the view that notwithstanding section 31, the register could be rectified on the ground of mistake, and that an argument could be made that the PRAI was mistaken (in fact or law) in allowing the registration of Tanager as owner of the charge. This decision raises some uncertainty and has the potential to impact the enforcement of mortgages where there has been a transfer by operation of law to the current charge holder, or to a predecessor.

5. No Omnibus Applications for Orders for Substitution as Plaintiff

The 2016 case of ***Irish Bank Resolution Corporation Limited v Conor Kennedy and Cecily Kennedy***[19] has reaffirmed the position that omnibus applications cannot be made to the Irish courts for purchasers of loan portfolios to substitute themselves, in place of the vendor, as plaintiff in relation to multiple separate ongoing court proceedings in respect of the loan and security assets in a loan portfolio.

Mars Capital Ireland Limited had acquired a loan portfolio from IBRC. It subsequently sought an order substituting it as plaintiff in lieu of IBRC in the proceedings against the defendants and also in over 500 other sets of Circuit Court proceedings. The application was made by way of an omnibus application in the Circuit Court. The High Court upheld the decision of the Circuit Court to refuse the order, on the basis that dealing with a large number of cases by way of an omnibus application would leave the Court open to making mistakes and was thus not in the interests of the administration of justice, even if it appeared attractive from a costs perspective.

[19] *Irish Bank Resolution Corporation Limited v Conor Kennedy and Cecily Kennedy* [2016] IEHC 395

Individual applications must be made by a loan purchaser to substitute itself as plaintiff in respect of each relevant set of proceedings. However, it should be noted that, while this requires a large number of separate applications and therefore repetition in terms of the documentation submitted to the Courts, the Courts are amenable to dealing with the hearing of these applications in as efficient a manner as possible. The Courts will generally be willing to group the hearing of these applications and to deal with them in one sitting where possible. In that way, issues common to the cases need not necessarily be examined by the Courts more than once and full examination of the application papers is generally not required for every case.

6. Challenges to Enforcement based on Unfair Terms

A number of recent cases have highlighted the possibility that consumer debtors may challenge enforcement or defend enforcement actions on the basis of particular terms in their loan or security documents being in breach of the Unfair Contract Terms Directive[20], as implemented in Ireland by the Unfair Contract Term Regulations[21]. The Unfair Contract Terms Directive and Regulations are designed to protect consumers[22] against unfair terms, in particular when they enter into standard form contracts with regulated lenders and financial services providers. This recognises the potential for unfairness in circumstances where there is typically little opportunity for the consumer to negotiate the individual terms of the relevant agreements. Under the Unfair Contract Terms Directive and Regulations, contractual terms may be considered unfair where they cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

An important judgment in this area was given in by the High Court in 2016 ***Allied Irish Banks PLC v Peter Counihan and Mary Counihan***[23], in which Barrett J determined that the Court has a positive duty to assess whether a credit agreement between a bank and consumer contains unfair terms, even if that issue has not been raised by the parties.

The judgment cited the European Court of Justice case of *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaxia)*[24] as authority for this principle, with Barrett J. observing that the decision in that case would "*appear to contemplate a court, even in an adversarial system of justice, acting in an inquisitorial manner*" and supported the duty of the Court to assess the fairness of contractual terms of its own accord.

While the Court ultimately found that none of the relevant terms were unfair, this case points to the Unfair Contract Terms Directive and Regulations arising with greater regularity as a defence to enforcement action against individuals.

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[20] Unfair Contract Terms Directive 1993/13/EEC

[21] European Communities (Unfair Terms in Consumer Contracts) Regulations, S.I. No. 27 of 1995 as amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000, S.I. No. 307 of 2000 and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013, S.I. 160 of 2013.

[22] For the purposes of the Unfair Contract Terms Directive and Regulations in Ireland, a consumer is defined as "*a natural person acting outside his trade, business* or *profession*".

[23] *Allied Irish Banks PLC v Peter Counihan and Mary Counihan* [2016] IEHC 752

[24] *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragone i Manresa (Catalunyacaxia)* Case C-415/11

However, the subsequent 2017 High Court decision in ***Patrick Cronin v Dublin City Sheriff and Tanager DAC***[25] is more favourable from an enforcing creditor's perspective. In that case, the plaintiff sought to rely on the decision in *AIB v Counihan* to have a repossession order set aside because the lower courts had not assessed whether the terms of his mortgage were unfair and contrary to the Unfair Contract Terms Directive and Regulations. However, the Court took the view that the relevant comments by Barrett J. in *AIB v Counihan* were obiter and that the Court was not deciding the question of the extent to which the Unfair Contract Terms Directive and Regulations placed an obligation upon the Irish courts in repossession cases. Rather, the Court held that it would be contrary to principles concerning finality of court proceedings and an abuse of process to allow the debtor to maintain the proceedings arguing that terms were unfair where the arguments had not been raised in previous proceedings.

On the other hand, in another 2017 High Court case, ***EBS Limited v Trevor Kenehan and Bernadette Ryan***[26], Barrett J. again confirmed that the Court had jurisdiction to examine the fairness of mortgage terms of its own volition and found that it must be provided with all of the relevant contractual documents in order to be able to "*discharge its Aziz-Counihan obligations*". The debtors had indicated that their appeal would rely on arguments in relation to compliance with the Unfair Contract Terms Directive and Regulations, among a number of other defences. However, the creditor had not submitted in evidence key contractual documents expressly incorporated by the mortgage (being the EBS rules and the letter of loan offer) and, on that basis, Barrett J. held that the Court could not address the question of unfair terms, as it was required to do, and he refused to confirm the Circuit Court order for possession which had been obtained by the creditor.

On the basis of these recent cases, creditors taking repossession orders against consumers should be careful to anticipate defences under the Unfair Contract Terms Directive and Regulations and to submit to the Court all contractual documents that could be relevant to the Court's determination on such a defence.

7. Undue Influence and the Absence of Independent Legal Advice

A number of recent Court of Appeal decisions in 2016 and 2017 have been helpful from a creditor's perspective in clarifying that, unless a guarantor has an arguable defence that it gave a guarantee under undue influence, the creditor does not have a positive obligation to ensure or check that a guarantor has received independent legal advice. In these cases, it had been argued by guarantors that due to familial relationships between the principal debtor and a guarantor, such as that of parent/child or husband/wife, the Bank had a positive duty to check that the guarantor understand the nature of the liability they were undertaking and/or had taken independent legal advice as to the nature of the liability. The Court has rejected the contention that there is such a standalone duty for creditors which could provide guarantors with a defence to claims under their guarantees irrespective of whether undue influence can actually be shown to have arisen.

[25] *Patrick Cronin v Dublin City Sheriff and Tanager DAC* [2017] IEHC 685
[26] *EBS Limited v Trevor Kenehan and Bernadette Ryan* [2017] IEHC 604

The most recent of these decisions by the Court of Appeal, in ***ACC Loan Management Limited v John Connolly and Maurice Connolly***[27], concerned a father who had guaranteed the debts of his son to ACC Bank. The father, in defending a claim under the guarantee, did not raise an argument that he had entered into the guarantee by virtue of some undue influence or other wrongdoing by the son. However, he claimed that there was an arguable defence to the claim against him under the guarantee on the basis that the creditor had been on notice of the family relationship between him and the principal debtor and the creditor was therefore obliged to take steps to ensure that he, as guarantor, understood the nature of the guarantee and had freely entered into it.

The Court held that, while previous decisions such as the Irish High Court decision in *Ulster Bank Ireland Limited v Louis Roche and Sorcha Buttimer*[28] and the English House of Lords decision in *Royal Bank of Scotland v Etridge (No. 2)*[29], had set out principles in relation to the measures that a Bank should take in order to ensure that undue influence had not arisen, these only applied in circumstances where a finding of undue influence had been made. Accordingly, where there is no arguable defence of undue influence, these cases cannot be relied upon to suggest that there is any separate defence for a guarantor based on a failure by the creditor to take positive action to ensure that the guarantor understood the nature of the liabilities they were taking on. The Court of Appeal stated that its "*settled view is that … absent an express claim of undue influence or … misrepresentation, a bank is under no affirmative duty to ensure that a surety receives independent legal advice*".

This "*settled view*" was supported by other recent Court of Appeal decisions in ***Ulster Bank (Ireland) Limited v Walter de Kretser and Gillian Fox***[30] and ***The Governor and Company of the Bank of Ireland v Michael Curran & Maureen Curran***[31].

In *Ulster Bank v De Kretser*, a wife claimed that she had provided a guarantee under undue influence from her husband, the principal debtor. However, evidence showed that, while she was not involved in the day to day running of the relevant business and did not stand to make a substantive gain, she was a director of the relevant business and she was an experienced businesswoman, who had provided guarantees to the bank in the past in relation to a previous business that she had run. It was held that the evidence did not support a finding of undue influence and that there was no basis for suggesting that a presumption of undue influence arose in such circumstances.

Similarly, in *Bank of Ireland v Curran,* the guarantor was the mother of the principal debtor and she claimed that she had provided the guarantee under undue influence from her son, who stood to gain from the provision of such guarantee. The Court held that the test for undue influence should be considered in two stages: "*first … that but for the undue influence exerted by her son she would*

[27] *ACC Loan Management Limited v John Connolly and Maurice Connolly* [2017] IECA 119
[28] *Ulster Bank Ireland Limited v Louis Roche and Sorcha Buttimer* [2012] IEHC 166
[29] *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44
[30] *Ulster Bank (Ireland) Limited v Walter de Kretser and Gillian Fox* [2016] IECA 371
[31] *The Governor and Company of the Bank of Ireland v Michael Curran & Maureen Curran* [2016] IECA 399

not have entered the guarantee and, second, that the … creditor had actual or constructive knowledge that the guarantee was procured by undue influence". It was held that, where there was no credible evidence that the guarantor had been subjected to undue influence in the first instance, it was not relevant to consider the second question, as to whether the creditor should have been obliged to made inquiries to ascertain whether the guarantor had fully understood and was freely entering into the guarantee.

Conclusion

The recent case law outlined above provides further colour and clarity on how the Irish Courts will deal with a number of issues which have arisen with some regularity for creditors dealing with NPLs and for the purchasers of Irish NPL portfolios, with a particular focus on residential property issues.

Owners of NPL portfolios should bear these recent developments in mind in when considering or reviewing their enforcement strategies and these updates should also further inform potential buyers of NPL portfolios as to the nature of certain issues arising during their due diligence exercises and how to assess their potential impact.

We will, over the coming months, continue to review developments in case law in these areas as well as any legislative changes of relevance (including proposed new requirements for unregulated purchasers of consumer debt to be regulated) and we will provide further updates in this regard.

Should you have any queries or require any further information on these topics, please do not hesitate to contact Conor Houlihan, John-Hugh Colleran, Jamie Ensor or your usual Dillon Eustace contact.

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