Appendix FF

No. 2

O. 58, r. 18(1)

SUPREME COURT

Respondent's Notice

Supreme Court record number	**S:AP:IE:2018:000189**

[Title and record number as per the High Court proceedings]

Permanent TSB plc formerly Irish Life & Permanent plc	**V**	**Gerry Burns and Ann Burns (2015 183 SP)**

Date of filing	**2 January 2019**
Name of respondent	**Permanent TSB plc formerly Irish Life & Permanent plc**
Respondent's solicitors	**Belgard Solicitors**
Name of appellants	**Gerry Burns and Ann Burns**
Appellants' solicitors	**N/A**

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	**N/A**

The respondent was served with the application for leave to appeal and notice of appeal on date
20th December 2018

The respondent intends :

	to oppose the application for an extension of time to apply for leave to appeal
	not to oppose the application for an extension of time to apply for leave to appeal
X	**to oppose the application for leave to appeal**
	not to oppose the application for leave to appeal
X	**to ask the Supreme Court to dismiss the appeal**
	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	

Respondent's Representation

Solicitor			
Name of firm	**Belgard Solicitors**		
Email	**mmgallagher@belgardsolicitors.ie, info@belgardsolicitors.ie**		
Address	**Block B** **Cookstown Court** **Old Belgard Road** **Tallaght** **Dublin 24**	**Telephone no.** **Document Exchange no.**	**(01) 464 9100** **DX 104019 Tallaght**
Postcode		**Ref.**	**A2105**

How would you prefer us to communicate with you?

	Document Exchange	X	**E-mail**
X	**Post**		**Other (please specify)**

Counsel			
Name	**Gavin Miller BL**		
Email	**gavinmiller@campus.ie**		
Address	**Law Library** **Four Courts** **Inns Quay** **Dublin 7**	**Telephone no.** **Document Exchange no.**	**(01) 817 7421** **DX 812177**
Postcode			

Counsel			
Name			
Email			
Address		**Telephone no.** **Document Exchange no.**	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
Telephone no.	
e-mail address	

How would you prefer us to communicate with you?

	Document Exchange		**E-mail**
	Post		**Other (please specify)**

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

N/A

3. Information about the decision that it is sought to appeal

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

The Respondent disputes that the Appellants have set out at Section 4 of the notice of appeal "a concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5."

Accordingly, the Respondent relies upon the facts as found by the High Court and set out in the ex tempore judgment of Ms. Justice Ní Raifeartaigh delivered on the 16th January 2017. The Respondent further relies upon the findings made by the Court of Appeal and set out in the ex tempore judgment of Ms. Justice Irvine delivered on the 28th November 2018. Both of these ex-tempore judgments are appended to this Respondent's Notice.

In order to assist this Court however, a summary of the factual issues and findings of the High Court and Court of Appeal are as follows.

The Respondent ("the Bank") issued a Special Summons dated the 2nd July 2015 seeking possession of three investment properties that had been mortgaged by the Appellants ("the Borrowers") as security for a loan. The Bank relied upon an grounding affidavit of Jacqueline O'Brien sworn on the 8th July 2015 which averred that the Bank advanced the sum of €457,500 to the Appellants on foot of a Letter of Approval - Particulars of Mortgage Loan dated the 24th April 2007, the terms of which were accepted by the Borrowers. By way of security for the mortgage loan facility, the Borrowers executed a deed of mortgage/charge dated the 23rd September 2007 in favour of the Bank over (i) 10 Court Crescent, Main Street, Ballinamore, County Leitrim (ii) 15 Bruce Manor, Arva, County Cavan and (iii) 17 Church Manor, Carrigallen, County Leitrim ("the mortgaged properties"). The mortgage/charge was registered in the Registry of Deeds against properties (i) and (ii) referred to above on the 11th November 2008 and on Folio 16003F County Leitrim which comprises property (iii) on the 7th May 2010. The Borrowers defaulted in terms of the loan facility and failed to make the monthly repayments in the terms thereof resulting in the Total Debt becoming immediately repayable. The Bank's solicitors demanded that the Borrowers repay all sums then due and owing and/or deliver up vacant possession of the mortgaged properties both of which the Borrowers failed to do.

None of the above evidence was contested by the Appellants.

A replying affidavit was sworn by the First Named Appellant on the 30th May 2016 which contended that the Bank had no locus standi to maintain the proceedings because

the loan had been securitised, that the mortgaged properties had been placed in an "irrevocable private contract trust" and the copy documents supporting the Bank's application for possession were insufficient to establish the entitlement of the Bank to the relief sought. A supplemental affidavit was sworn by Jacqueline O'Brien on behalf of the Bank on the 29th June 2016 which confirmed that the mortgage had been de-securitised on the 15th August 2014, asserted that there was no documentary evidence that the mortgaged properties had been placed by the Borrowers in a trust or when this had occurred and that the Bank's consent had not been sought to the creation of the trust in accordance with the terms and conditions of the mortgage. A second replying affidavit was then sworn by the First Named Appellant on the 4th October 2016 which contended that the Bank was obliged to put evidence before the Court that the Appellants' mortgage had been securitised and then de-securitised, that the Bank's proofs were incomplete and that the Appellants were entitled to defend the proceedings on the basis that the mortgaged properties had been placed in a "private irrevocable contract trust".

Ms. Justice Ní Raifeartaigh delivered her judgment on the 16th January 2017 granting the Respondent possession of the mortgaged properties on the grounds that the Appellants had not demonstrated a fair and reasonable probability that they might successfully defend the proceedings at a plenary hearing.

The decision of the Court of Appeal in this case was in the form of an ex tempore judgment delivered by Ms. Justice Irvine (with Ms. Justice Baker and Ms. Justice Whelan concurring) shortly after the conclusion of the hearing on the 28th November 2018.

Ms. Justice Irvine found that the Respondent's proofs in terms of its entitlement to the order for possession were fully complied with by Ms. O'Brien on behalf of the Bank in its grounding affidavit and that the High Court Judge was correct when she concluded that there was no arguable ground of defence to be advanced on the basis that the proofs were inadequate.

Ms. Justice Irvine found that the High Court Judge was correct when she concluded that the Bank had the locus standi to bring the proceedings.

Ms. Justice Irvine found that whether or not the loan was securitised at any stage is irrelevant given that the Bank remained the legal owner of the mortgage and the registered owner of the charge and the circumstances pertaining to the securitisation of the loan could never have provided the Appellants with a potential defence to the proceedings.

Ms. Justice Irvine found that the mortgage deed in any event provides for securitisation so the High Court Judge was correct in law when she rejected as providing the Appellants with any possible real or bona fides defence any reliance upon the securitisation of their loan.

Ms. Justice Irvine found that the submission that the High Court Judge should have remitted the proceedings to plenary hearing based upon the affidavit of the First Named Appellant sworn on the 4th October 2016 that the mortgaged properties had been placed in a private irrevocable contract trust was unstateable in circumstances where (i) this was a bald averment unsupported by any evidence such as producing a copy of the trust or how it came into being or corroboration from another party as to its existence (ii) there was no evidence that the mortgaged properties were transferred to the trust prior to the execution of the mortgage (iii) even if the trust was created, all the Appellants could have transferred was the equity of redemption and (iv) the trust could

not have been validly created without the consent of the Respondent in accordance with Clause 5.11 of the mortgage.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)-

* the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
* it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

The reasons set out herein are framed by reference to the principles applied in the Determination of this Court in *Price Waterhouse Cooper (A Firm) v Quinn Insurance Ltd. (Under Administration)* [2017] IESC 73.

The judgment of the Court of Appeal in respect of which leave to appeal is sought does not involve a matter of general public importance. On the contrary, this action involved the private law enforcement of a contractual right contained in a mortgage agreement. As such, the application in the High Court and the Court of Appeal was entirely straightforward.

The Appellants have failed to identify any matter of general public importance arising from the judgment. This is clearly a case where in which the default position now provided for in Article 34 of the Constitution that all appeals will be determined finally by a decision of the Court of Appeal is applicable. There are no exceptional reasons why the Appellants should be granted leave to appeal to this Court.

The Respondent will address each of the reasons set out by the Appellants in Section 4 and 5 of the Application for Leave to Appeal and Notice of Appeal document.

<u>Failing to have regard to European Law and ECHR provisions regarding the right to a fair trial and legal representation</u>

In respect of the assertion that "*The Honourable Judges failed and/or neglected to have regard to European law and ECHR provisions regarding the right to a fair trial and legal representation*", it is submitted that the Appellants have not explained in their Application for Leave to Appeal and Notice of Appeal document how the Court erred by reference to any formulated or identifiable point of law in respect of these

matters.

It is further submitted that it is well established that proceedings commenced by Special Summons are capable of being properly determined on affidavit in a summary manner and should not be subject to a full plenary hearing unless the Appellants disclose a bona fide or arguable defence in their affidavits. In the premises, the Court of Appeal simply applied settled case law when assessing the merits of the affidavits filed on behalf of the Appellants.

Without prejudice to the above, it is submitted that this is a wholly inappropriate matter to ask this Court to determine in circumstances where this claim was not made in the first instance in the High Court. The First Named Appellant was also not permitted by the Court of Appeal to make these arguments when he attempted to do so at the hearing of the appeal in circumstances where (i) the High Court Judge had not been asked to adjudicate upon same and (ii) they did not form part of the Appellants' Notice of Appeal in the Court of Appeal nor in their written legal submissions

In the circumstances, the matter as it arises in this case is not one of general public importance and it is not in the interests of justice that there is an appeal to this Court in respect of this issue.

Failure to Document Securitisation or De-Securitisation of Loan

In respect of the assertion that "*The Learned Judges erred in failing and/or neglecting to have regard to the failure of the plaintiff to fully document their purported assignment of the loan & related securities to Fastnet 7*", it is submitted that the law in relation to securitisation is well settled and that the Court of Appeal correctly interpreted and applied the relevant case law (namely, *Freeman v Bank of Scotland plc* [2014] IEHC 284 and *Wellstead v Judge Michael White* [2011] IEHC 438). Given that both of those decisions are authority for the proposition that as a matter of law the original lender retains the right to enforce the security even if the loan is securitised to a third party, the judgment of the Court of Appeal does not contain any errors of procedure and/or errors of law.

Further, the Appellants state at Section 5 of their Application for Leave to Appeal and Notice of Appeal document "*that it is a matter of general public importance that the burden of proof required in possession proceedings be properly enforced in order that justice and equity be done and be seen to be done.*" However, this Court has held at paragraph 10 in *PWC v Quinn Insurance* that to satisfy this test it is necessary first that the point be stateable. In light of the foregoing authorities cited above with regards to securitisation, it is submitted that the Appellants' contention that the Respondent needs to fully document the securitisation transaction in order to satisfy the burden of proof required in possession proceedings is simply unstateable.

Accordingly, this issue is not of general public importance or a matter that needs to be addressed in the interests of justice by this Court. The Appellants have put forward no arguable basis for an appeal to this Court.

Failure and/or Neglecting to Compel the Plaintiff to Produce the Loan Offer Letter

In respect of the assertion that "*The learned judges erred in failing and/or neglecting to compel the plaintiff produce the loan offer letter and related supporting documentation the subject matter of these proceedings.*", it is submitted that the decision of the Court of Appeal is confined to a consideration of the issues arising

between the parties and does not consider broader matters of general public importance.

In particular, the judgment of the Court of Appeal noted at paragraph 9 that "*neither Mr. Burns nor his wife deny that they entered into a loan agreement to borrower the sum of €457,000 on the terms and conditions agreed to by their agent, Mr Gallagher, on their behalf, on the 24th April 2007. Neither did they deny that they agreed to provide security for the loan pursuant to the indenture of mortgage and charge.*" The judgment further states at paragraph 23 that "*the bank's entitlement to possession is not precluded by the fact that it was not in a position to produce the original letter of offer signed by Mr and Mrs. Burns. The documentation exhibited by the bank was more than sufficient to allow the court conclude that there was a binding loan agreement in the terms pleaded by the bank.*"

Accordingly, any consideration by the Court of Appeal as to what documentation it was necessary for the Respondent to adduce as evidence to entitle it to possession relates to an issue that is particular to the Appellants. This finding is not of general application, much less of general public importance.

Tracker Mortgage

In respect of the assertion that "*The learned judges erred in failing and/or neglecting to have regard for the fact the herein mortgage & charge was a tracker mortgage.*", it is submitted that this is a wholly inappropriate matter to ask this Court to determine in circumstances where this claim was not made in the first instance in the High Court or in the Court of Appeal.

The matter as it arises in this case is not one of general public importance and it is not in the interests of justice that there is an appeal to this Court in respect of this issue.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal): **(1) and (2) It is denied that the Learned Judges erred in fact and in law in failing to properly enforce the burden of proof required in possession proceedings. It is further denied the Learned Judges erred in fact and in law in not fully complying with European law as set out in Article 3(1) of the European Convention on Human Rights Act 2003 and Article 10 of the European Convention on Human Rights and in failing to have proper regard to the above principles.** **(3) The judgment of the Court of Appeal is not contrary to Article 41 of the Constitution, Article 6 of the European Convention on Human Rights and Section 3(1) of the European Convention on Human Rights Act 2003.**
Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person: **Gavin Miller BL**

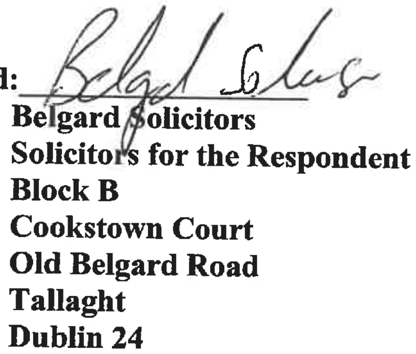
6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court: **N/A**

Are you asking the Supreme Court to:				
depart from (or distinguish) one of its own decisions? **If Yes, please give details below:**		**Yes**	X	**No**
make a reference to the Court of Justice of the European Union? **If Yes, please give details below:**		**Yes**	X	**No**

Will you request a priority hearing?		**Yes**	X	**No**

If Yes, please give reasons below:



Signed:______________
Belgard Solicitors
Solicitors for the Respondent
Block B
Cookstown Court
Old Belgard Road
Tallaght
Dublin 24

Please submit your completed form to:

The Office of the Registrar to the Supreme Court
The Four Courts
Inns Quay
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.

Appendix

Ex Tempore Judgment of Ms. Justice Ní Raiferataigh delivered 16th January 2017

Bill No: 2015/183SP

THE HIGH COURT

BEFORE THE HONOURABLE MS JUSTICE ÚNA NÍ RAIFEARTAIGH

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16 January 2017

PERMANENT TSB plc (formerly IRISH LIFE & PERMANENT plc)

v.

GERRY BURNS and ANN BURNS

(Transcript produced without detailed log notes)

Permanent TSB plc (formerly Irish Life & Permanent plc) v. Gerry Burns and Ann Burns
16 January 2017

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(Transcript produced without detailed log notes)

1 JUDGE: Good afternoon, ladies and gentlemen.
2 COUNSEL: Good afternoon, Judge.
3 REGISTRAR: The High Court matter for judgment, Permanent TSB v. Burns.
4 JUDGE: Yes. This is a matter which came on before me some weeks ago, I think
5 before Christmas in fact. So, in this case proceedings commenced by way of special
6 summons issued on the 24th of July 2015 seeking orders for possession in respect of
7 three properties which were mortgaged by the defendants to the plaintiffs pursuant to
8 a deed of mortgage and charge dated the 23rd of September 2007. The three
9 properties were respectively a townhouse, number 10, Riverside, Main Street,
10 Ballinamore, Co Leitrim, number 15, Bruce Hill Manor, apparently also known as
11 Bruce Manor or Bruce Hill, Arva in Co Cavan, and the property comprised in folio
12 16003F known as 17 Church Manor, Carrigallen, Co Leitrim. I'll come to the
13 affidavit of Ms Jacqueline O'Brien but she avers that 10 Riverside is also known as
14 10 Court Crescent. The proceedings were grounded upon an affidavit sworn by a
15 Jacqueline O'Brien on the 8th of July 2015. Ms O'Brien averred that she was a
16 manager with the plaintiff. In the first instance she exhibited a letter dated 24th of
17 April 2007 whereby the plaintiff agreed to make a loan facility of a sum of €457,500
18 available to the defendants over a period of 25 years, repayable by monthly
19 instalments, which letter further provided for a charge over two of the properties
20 described above. Ms O'Brien averred that the defendants accepted the terms and
21 conditions of the letter of approval and the sum was advanced by the plaintiff to the
22 defendants. That's the sum of €475,000. This fact of the advancement of the sum of
23 money has not been denied by the defendants, by Mr Gerry Burns who swore an
24 affidavit. I'll come to his affidavits in due course. By way of security, the
25 defendants executed an indenture of mortgage and charge in favour of the plaintiff
26 on or about the 23rd of September 2007 over the three properties referred to above.
27 This document was exhibited by Ms O'Brien. On the 29th of June 2012 IL&P plc,
28 which was the bank with whom the mortgage had been agreed, changed its name to
29 PTSB or Permanent TSB plc and the certificate of incorporation on change of name
30 from the Companies Office has been exhibited by Ms O'Brien in her affidavit. Ms
31 O'Brien avers that the indenture of mortgage and charge was registered as a charge
32 with the Registry of Deeds in respect of 10 Court Crescent and 15 Ballinamore on
33 the 11th of November 2009 and the indenture of mortgage and charge exhibited
34 bears the Registry of Deeds stamp. She also exhibits folio 16003F which shows a

1 mortgage and charge registered as a burden in respect of 17 Church Manor. Ms
2 O'Brien avers that from the examination of the accounts the defendant defaulted and
3 that no repayments were received after 12th of July 2012 and that as of 7th of July
4 2015 a sum of €478,132.55 was due and owing by the defendants to the plaintiff.
5 She exhibits the statement of account showing the relevant figures and again I note
6 in passing it is not being denied that there was a default. Ms O'Brien exhibits the
7 letter dated the 18th of February 2014 pursuant to which the plaintiff sought vacant
8 possession of the mortgaged premises. She avers that the properties do not comprise
9 a family home or primary residence of the defendants. She avers that she is advised
10 that there were tenants living in two of the properties in question and that the third
11 was vacant.
12
13 In a replying affidavit dated the 30th of May 2016, Mr Gerry Burns claimed that the
14 plaintiff had no standing in the matter because the loan was securitised and in that
15 regard he exhibited a letter from PTSB dated the 5th of September 2012 confirming
16 that the loan had been securitised. He also claims that the plaintiff had failed to
17 document or validate the debt and had failed to produce documents to prove their
18 claims. He averred that the properties the subject matter of the proceedings had been
19 properly lawfully placed in an irrevocable private contract trust. The affidavit also
20 referred to a Miscellaneous Provisions Act without identifying the year of same and
21 referred to a failure to produce a bill in commerce. The affidavit also claimed that
22 the indenture of mortgage and charge exhibited by the plaintiff was unsigned and
23 unverified by both parties. Ms O'Brien swore a further affidavit on the 29th of June
24 2016. Inter alia she averred that the defendants' mortgage was de-securitised on the
25 15th of August 2014 and remained so as of the date of her affidavit. She averred that
26 the plaintiff did not give any prior written consent to the alleged private trust and she
27 pointed out that clauses 5.11 and 5.13 of the plaintiff's mortgage conditions clearly
28 required such consent. Ms O'Brien avers that it is evident from the exhibited
29 indenture of mortgage and charge that the document was signed by the defendants,
30 and I have looked at the document myself and at page 22 of my booklet of
31 documents the signatures appear to be present. A further affidavit was sworn by Mr
32 Gerry Burns on the 4th of October 2016 in which he complains that there was no
33 deed of novation or deed of assignment or re-assignment in relation to the
34 securitisation issue. He said that because the former CEO of IL&P had been

1 convicted of fraud in the criminal courts so by implication had the plaintiff and that
2 the plaintiff did not come to court with clean hands. The affidavit repeats his view
3 for the need for a true bill in commerce and also refers to article 3 of an American
4 uniform commercial code. He also encloses a further affidavit sworn on the same
5 date, the 4th of October 2016, in which he says that the properties have been
6 properly lawfully and permanently placed in a private irrevocable contract trust.
7
8 As to the issue of securitisation, the sworn evidence of Ms O'Brien is that the
9 mortgage was first securitised and then de-securitised. The plaintiff in these
10 proceedings is the same entity as that with which the defendant entered into the
11 mortgage agreement. The only difference is the change of name which has been
12 properly proved by the plaintiff with the certificate from the Companies Office I've
13 already referred to. It would not in any event affect the situation even if the
14 mortgage had been securitised. I was referred by counsel to certain authorities and I
15 have read those and I can say that the cases of Freeman and Freeman v. Bank of
16 Scotland plc [2014] IEHC 284 and the case of Wellstead v. Judge White and another
17 [2011] IEHC 438 make it clear that the fact that a mortgage has been securitised is
18 not in any way a bar to proceedings of the present kind where the persons in question
19 have accepted the entitlement of the bank to securitise the loans and that
20 securitisation did not in any way affect the obligations of the those persons as far as
21 repayment was concerned. In the present case I note paragraph 6.7 of the terms and
22 conditions and 6.8 which indicate that, "Permanent TSB at any time may without the
23 consent of the mortgagee transfer the benefit of the mortgage to any person and from
24 and after such transfer ..." and then the usual conditions are set out, and at 6.8,
25 "Permanent TSB may at any time transfer or deposit or grant a sub-mortgage of the
26 mortgage to any person as security for money borrowed by Permanent TSB" and so
27 therefore at the time of the entry into the mortgage it was accepted that the mortgage
28 could be securitised, but as I say in any event the mortgage was de-securitised and
29 the plaintiffs seeking to recover in these proceedings is in fact the same entity as that
30 with whom the mortgage was originally taken. As regards the placing of the
31 property into a trust, the plaintiff has not given the date of any such event. There is
32 therefore not any evidence before the Court that any such event took place before the
33 indenture of mortgage and charge was signed and further if the defendant sought to
34 place the property into a trust after this date, the mortgage and charge would in any

1 event be the first charge upon the properties in question and any such purported
2 transaction would not be valid as against the plaintiff. The defendant complains that
3 the plaintiff has not proven their case but on the contrary, as I have set out, the
4 plaintiff has done so through the affidavit of its manager which exhibits all the
5 documents usually set out in such proceedings. It is noteworthy that the defendants
6 have not denied fundamentals such as the fact of acceptance of the monies loaned,
7 the creation of the mortgage and charge, the default and they simply do not engage
8 with the charges as shown on the Registry of Deeds and Land Registry.
9
10 The other matters raised on behalf of Mr Burns or by Mr Burns can be shortly
11 disposed of. Mr Burns appears to be unaware that the American code USC is of no
12 legal authority in this jurisdiction. I do not accept the suggestion that the conviction
13 of the former CEO of IL&P, Mr Denis Casey, has any relevance to the present
14 proceedings. Any suggestion that all employees of Permanent TSB -- that all
15 evidence of such employees in these courts should now be rejected as a result of his
16 conviction is absolutely without foundation in Irish law. Again, the suggestion that
17 the concept of a true bill in commerce has some relevance to the proceedings is also
18 without foundation in Irish law. In all the circumstances, having considered the
19 affidavits and the various points raised by Mr Burns both in his affidavit and in oral
20 argument on the last occasion, I am satisfied that the defendant has not made out any
21 good arguable defence and I will grant the reliefs sought. Is there any application in
22 respect of costs?
23 COUNSEL: Yes, Judge. The plaintiff will apply for its -- I am seeking the costs of
24 the proceedings. There's also just one issue just in relation to the tenants who are
25 residing in the properties and this is in relation to the execution of a stay with regards
26 to those persons in occupation. The practice of the Chancery Special Summons list
27 has been that in circumstances where there may be tenants in the property is that a
28 practice has developed whereby the Court makes the orders for possession as against
29 defendants, who are the registered owners of the properties and also makes a
30 direction that the borrowers -- or sorry, that the tenants are to vacate the properties
31 within a certain period of time. It has been stated to be 28 days but I can -- we can
32 discuss that more fully in a moment, Judge.
33 JUDGE: And I'd like to hear Mr Burns on that as well.
34 COUNSEL: Yes. That -- so, that an order -- so, that the Court has made an order for

1 possession as against the defendants and that the Court is also directing that the
2 occupants are to leave the property within a period of X weeks and that that is then to
3 be communicated to the tenants so that the -- it's to be hoped therefore that on foot of
4 that communication and that direction that the tenants will vacate the building rather
5 than making formal orders as against them at this stage.
6 JUDGE: Certainly.
7 COUNSEL: Yes. So, I would ask the Court to make that order as well as the
8 substantive order as against the defendants and obviously we can discuss in relation
9 to those tenants and an appropriate period in relation to vacation of the property.
10 JUDGE: Mr Burns, do you have any view as to how long the tenants should be
11 given to vacate the properties?
12 MR BURNS: I have nothing to do with the tenants that's in the property. The
13 properties have been leased as far as I know or have been made aware b+y counsel
14 here by trust. So, it's in the hands of the trustee. So --
15 JUDGE: Do you have anything to say in relation to costs?
16 MR BURNS: At this moment in time I would reserve the costs because I would feel
17 that I will be appealing the application.
18 JUDGE: Well, the reserved costs is normally until the hearing of an action. It's a
19 slightly different procedure.
20 MR BURNS: Right. Well, I'll be objecting to costs at the moment.
21 JUDGE: You're opposing any order for costs being made against you?
22 MR BURNS: Possibly. Yes.
23 COUNSEL: I'd simply say that costs follow the event, Judge, and I would ask for
24 the Court to make an order for the plaintiff's costs to be taxed in default of
25 agreement.
26 MR BURNS: Judge, if I could just say it has been stated in my affidavit that the
27 plaintiff had no subject matter of jurisdiction as far as I was concerned, right? And
28 hence because the property has been placed in a private irrevocable contract trust,
29 right, it's my understanding that there's a number of issues you have raised here and I
30 would want to go through them --
31 JUDGE: You can certainly appeal. There's no difficulty. You can certainly appeal
32 against the decision. That's the appropriate avenue if you consider that the Court has
33 made any errors of law.
34 MR BURNS: Yes. Yes, we certainly will be doing that.

1 JUDGE: Thank you, Mr Burns. Well, I'll make an order for costs in favour of the
2 plaintiffs because the normal rule that costs follow the event should apply and I will
3 direct that the tenants are to vacate the property within -- I'll make it two months
4 given the circumstances and there may be an issue as to how they're to be put on
5 notice. I think simply if the order of the Court can be -- I'll just ask my registrar but
6 it may be that we can send it by correspondence by registered post to the properties
7 themselves.
8 COUNSEL: Yes. Again, the practice would be that the plaintiff's solicitors would
9 write to those tenants notifying them of the making of the order as against the
10 defendants --
11 JUDGE: And enclosing a copy of the perfected order.
12 COUNSEL: Yes and --
13 JUDGE: Perhaps that's best, yes.
14 COUNSEL: -- which would include that direction.
15 JUDGE: Yes. Well, that seems like a sensible approach. So, I'll give two months
16 for the properties to be vacated.
17 COUNSEL: Thank you, Judge.
18 JUDGE: And I think that completes everything. Thank you.
19
20 Court adjourned
21
22

Úna Ní Raifeartaigh
5 Sept 2017

1 Certified to be a complete and correct transcript of the record of the proceedings
2 herein*:
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10 Office Manager
11 WordWave International Ltd trading as DTI.
12
13 (*The absence of a dedicated logger in court to provide a detailed log may result in
14 speaker names being omitted or unconfirmed.)

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Appendix

Ex Tempore Judgment of Ms. Justice Irvine delivered 28th November 2018

THE COURT OF APPEAL

Record Numbers: 2017/69

Irvine J.
Whelan J.
Baker J.

No Redaction Needed

BETWEEN/

PERMANENT TSB PLC FORMERLY IRISH LIFE AND PERMANENT PLC

PLAINTIFF/RESPONDENT

- AND -

GERRY BURNS AND ANN BURNS

DEFENDANTS/APPELLANTS

JUDGMENT *(ex tempore)* of Ms. Justice Irvine delivered on the 28th day of November 2018

1. This is an appeal brought by the appellants, Mr. Gerry Burns and Mrs. Ann Burns, against an order of the High Court of the 16th January 2017.

2. By her order Ms. Justice Ní Raifeartaigh made an order requiring Mr. & Mrs. Burns to deliver up possession of three mortgaged properties namely:-

   (i) No. 10, Riverside, Main Street, Ballinamore, County Leitrim; ("the first property")

   (ii) No. 15, Bruce Hill Manor, Arva, County Cavan ("the 2nd second property")

   (iii) 17, Church Manor, Carrigallen, County Leitrim ("the third property").

3. The within proceedings were commenced by special summons dated the 2nd January 2015 and grounded upon the affidavit of Ms. Jacqueline O'Brien sworn on the 8th July 2018.

4. In her affidavit Ms O'Brien set out the background to the proceedings in the following manner.

5. Ms O'Brien asserts that by letter of loan offer of the 24th April 2017, Irish Life and Permanent plc agreed to make available to the defendants the sum of €457,500 on the terms therein set forth. She maintains that the defendants accepted that offer and that the sum of money concerned was duly advanced. The loan facility was secured by an indenture of mortgage and charge dated the 8th November 2006 and the same was registered in the Registry of Deeds against the defendants' interests in the first and second properties and as against their interest in the third property as a burden on folio 16003F the county of Leitrim.

6. According to Ms O'Brien, the defendants defaulted in their repayment obligations with the result that by letter of the 10th December 2013 they were called upon to discharge the entire sum then outstanding on foot of a loan agreement both in respect of principal and interest. In circumstances where they failed to meet that demand, by letter of the 18th February 2014 the bank, through its solicitors, called upon the defendants to deliver up possession of the premises which they failed to do. According to Ms. O'Brien without possession of the properties concerned the plaintiff would be unable to exercise its statutory power of sale.

7. In the course of her affidavit Ms O'Brien exhibited:

(i) the letter of approval of loan dated the 24th April 2007 signed by Mr Burns' solicitor, Mr Gallagher, which sets out the terms of the loan offer;

(ii) the indenture of mortgage and charge dated the 23rd September 2007;

(iii) the Irish Life and Permanent plc mortgage conditions;

(iv) proof of registration of the Indenture of Mortgage as a charge on all three properties;

(v) copy letters dated the 10th of December 2013 and the 18th February 2014 sent to each defendant; and

(vi) a mortgage statement of account dated the 7th July 2015.

8. In addition to the aforementioned matters Ms O'Brien, in her affidavit, explained that Irish Life and Permanent plc changed its name to Permanent TSB plc on the 29th June 2012 and in this regard she exhibited the Certificate of Incorporation on Change of Name from the Companies' Registration Office.

9. In an affidavit sworn by Mr. Burns on the 3rd May 2016, he contended that the plaintiff had no *locus standi* to maintain the proceedings because the loan, the subject matter of the proceedings, had been securitised. He also maintained that he and his wife were the registered owners of the three properties both in law and equity but that the properties had been placed in what he described as an "irrevocable private contract trust". According to Mr Burns, the copy documents supporting the plaintiffs' application were insufficient to establish the entitlement of Permanent TSB plc to the relief sought. However, in my view, what is of particular importance is that neither Mr Burns nor his wife deny that they entered into a loan agreement to borrow the sum of €457,500 on the terms and conditions agreed to by their agent, Mr Gallagher, on their behalf, on the 24th April 2007. Neither did they deny that they agreed to provide security for that loan pursuant to the indenture of mortgage and charge.

10. In response to Mr Burns's affidavit, Ms. O'Brien in a supplemental affidavit of the 29th June 2016, confirmed that the defendants' mortgage was de-securitised on the 15th August 2014 and that this remained the position as of the date of her affidavit. She also stated her belief as a matter of law that even if the defendants' mortgage remained securitised this would not disentitle the bank to an order for possession. Ms. O'Brien further maintained that in her grounding affidavit she had exhibited all of the documentation necessary to support the order for possession sought.

11. As to Mr. Burns' assertion that the properties in respect of which the order for possession was sought were the subject matter of an irrevocable private contract trust, that was, she complained, no more than a bald assertion for which there was no proof. No documentation supporting the existence of any such trust had been exhibited and its alleged date was unknown. She pointed out in her affidavit that, in any event, the bank's consent had not been sought to the creation of such a trust as would have been required under clause 5.11 and 5.13 of the plaintiffs' mortgage conditions which were incorporated into the indenture of mortgage and charge of the 23rd September 2007.

12. In his second affidavit sworn on the 4th October 2016 Mr. Burns contended that the bank was obliged to put evidence before the court to establish that the defendants' mortgage had been securitised in the first place and then later de-securitised. He protested that the bank's proofs where incomplete and that it was not entitled to an order for possession. Although legal submissions should not be committed to affidavit, I note nonetheless that Mr Burns did not take issue with Ms. O'Brien's statement that even if the mortgage was still securitised that the defendants' obligations remained the same with the result that the plaintiff would remain entitled to seek possession.

13. Mr Burns also sought to counter Ms O'Brien's assertion as to the banks entitlement to possession by referring to the fact that the former CEO of Irish Life & Permanent had been convicted of fraud. He also reiterated his entitlement to defend the proceedings on the basis that the properties, the subject matter of the proceedings, had "been placed in a private irrevocable contract of trust" and for that reason were not amenable to an order for possession. I would here note that Mr. Burns did not contest Ms. O'Brien's statement that the bank's consent was not sought to the creation of the alleged trust.

Judgment of the High Court judge.

14. In her judgment the High Court judge, having considered the submissions of the parties, took the view that the plaintiff was entitled to the order for possession sought and that the defendants had not demonstrated a fair and reasonable probability that they might successfully defend the proceedings at a plenary hearing. It is from that decision that Mr. and Mrs. Burns appeal.

Submissions

15. Both parties have delivered helpful written submissions to the court and the court has also today had the benefit of oral submissions from the parties which I will now summarise.

Submissions of the appellants

16. The submissions advanced by Mr. Burns are that:

1. First, the proofs before the High Court judge were insufficient to permit her make an order for possession. He states that the bank had not validated the outstanding debt insofar as it had failed to produce the letter of loan offer signed by himself and his wife and he states that he should have been entitled to a plenary hearing by reason of that fact;
2. second, he stated that the bank was not entitled to possession because it was accepted that it had securitised their loan and there was no evidence that it had been de-securitised. He maintains that a notice of re-purchase should have been exhibited. That being so, he maintains that he may reasonably argue that he has a defence to the proceedings based upon clause 6.7 of the Permanent TSB mortgage conditions. The right to bring possession proceedings, he maintains, had been transferred to the beneficiary of the securitisation

agreement and he maintains that only the transferee could maintain proceedings for possession; and

3. third, he argues that he had put evidence before the court concerning the creation of what he describes as a private irrevocable contract trust. The evidence in favour of the trust was contained in an affidavit sworn by him on the 4th October 2016 and it was accordingly arguable by way of defence that the plaintiff had no entitlement to possession of the properties by reason of that trust.

Submissions of the respondent

17. On behalf of the bank it is submitted that:

1. First, in circumstances where Mr and Mrs Burns had not denied entering into a loan agreement on the terms pleaded and had not denied receiving the monies and signing the indenture of mortgage and charge, the absence of a copy of the original letter of loan offer signed by the defendants was not fatal to the bank's entitlement to possession;

2. second, it is argued that the defendants had not denied Ms O'Brien's sworn statement that the defendants' loans had been de-securitised. In those circumstances there was no need for the bank to put any evidence before the court. Further, regardless of whether or not the properties remained securitised, according to counsel, the bank was still entitled to possession. It remained the legal owner of the mortgage and the registered owner of the charge and, further, in executing the mortgage Mr & Mrs Burns had in any event agreed to the banks entitlement to securitised the loan; and

3. finally, it is argued on behalf of the bank that the evidence concerning the creation of the trust of private irrevocable contract of trust was no more than a bald averment. All that had been produced by Mr Burns was an affidavit which was referred to in another affidavit. Further, there was no evidence that the trust was created prior to the creation of the mortgage. Insofar as a trust may have been created after the mortgage was executed, the prior consent of the bank had not been obtained as was required under clause 5.11. and any purported transfer could only have been in respect of the equity of redemption. The plaintiff's mortgage would, in any event, rank in priority to any such trust even if it had been created. So, whatever the dealings between the defendants and any third parties concerning this alleged trust, the same could not deny the bank its entitlement to possession as against the defendants.

The relevant principles

18. I will now refer to the principles which apply on an application for summary judgment. And, when I refer to summary judgment I am, of course, including within that term the bank's application for possession on foot of a special summons grounded on affidavit.

19. Whilst the plaintiffs' application was for an order for possession of the premises set out in the special summons rather than for judgment in a liquidated sum, the circumstances in which a defendant may successfully argue for an entitlement to defend the proceedings and have them remitted to a full plenary hearing are the same. This is because a special summons application for possession is, in effect, an application made in summary form. That this is so is readily apparent from decisions such as that of Dunne J. in *Anglo Irish*

Bank Corporation plc against Fanning [2009] IEHC 141 which has been referred to in the course of the submissions today.

20. Provided that a plaintiff's proofs are in order, before proceedings will be referred for a plenary hearing, the defendant must be in a position to demonstrate, as was advised by Murphy J. in *First National Commercial Bank v. Anglin* [1996] 1 I.R., that there is a fair and reasonable probability of them having a real and *bona fide* defence to the claim. It is common case from the authorities that for this purpose a defendant is not entitled to rely upon bald averments which are unsupported by evidence. However, it is not for the court to seek to decide between the defendants' or the plaintiff's version of events. Rather, it must consider whether what is proposed by the defendant has the potential to provide them with a real and *bona fide* defence.

21. Many decisions have cautioned against the dangers of shutting out a defendant from defending the proceedings on an application for summary judgement. The decision such as that of Hardiman J. in *Aer Rianta v. Ryanair* [2001] IESC 94 exemplifies that position. In that case Hardiman J. stated that before refusing a plenary hearing the court should ask itself whether it is very clear that the defendant has no defence and only if that question is answered in the positive should a plenary hearing be refused.

22. It is also common case that there are many authorities which state that it is open to a High Court judge to deal with issues of law on an application for summary judgment once they are not of a complex nature and where there is no risk of visiting an injustice on either party and examples of that type of *jurisprudence* are to be found in cases such as *McGrath v. O'Driscoll* [2007] 1 ILRM:-

<u>Discussion and conclusions</u>

23. Having considered the submissions of the parties, I am, first of all, satisfied that the plaintiff's proofs, in terms of its entitlement to the order for possession, were fully complied with by Ms O'Brien on behalf of the bank in its grounding affidavit. This is particularly so in circumstances where Mr and Mrs Burns never denied on affidavit that they had entered into a loan agreement on the terms alleged by the bank. The bank's entitlement to possession is not precluded by the fact that it was not in a position to produce the original letter of loan offer signed by Mr and Mrs Burns. The documentation exhibited by the bank was more than sufficient to allow the court conclude that there was a binding loan agreement in the terms pleaded by the bank. The bank had exhibited the letter of approval in respect of the mortgage loan which is dated the 24th April 2007. This contains all of the terms of the agreement contended for by the bank and the document is signed by Mr Gallagher, the solicitor then acting as agent on behalf of Mr and Mrs Burns. The court was also furnished with the indenture of mortgage in charge dated the 23rd September 2007 signed by Mr and Mrs Burns.

24. All of the other required exhibits were also made available such as the letter calling for repayment of the loan and the letters demanding possession. So, in my view, the High Court judge was quite correct when she concluded there was no arguable ground of defence to be advanced on the basis that the proofs were inadequate.

25. In light of the fact that the plaintiffs' proofs were clearly in order, the question this court must ask itself is whether the High Court judge erred in law and in fact in concluding, as she did, that the defendants had not established the probability that on the facts asserted by them they had a *bona fides* and credible defence to the proceedings. I will deal with these in turn.

26. Although not argued today, I am first of all satisfied that the High Court judge was correct when she concluded that Permanent TSB plc had the *locus standi* to bring the

proceedings. This was an argument which was raised by Mr Burns in the High Court and it was dealt a fatal blow by the affidavit of Ms O'Brien wherein she exhibited the certificate of change of name to establish that Permanent TSB plc is one and the same legal entity as its predecessor, Irish Life and Permanent plc. and that all that happened was that there was a change of name.

27. As to the securitisation proposed ground of defence, the defendants first maintained that they might defend the proceedings on the basis that the loan had been securitised by the bank and remained securitised at the time the bank sought possession. Later, in light of Ms O'Brien's averment that the loan had been de-securitised, they then maintained that they might nonetheless defend the proceedings on the grounds that the bank had failed to provide proof that the loan had first been securitised and later de-securitised.

28. However, what the defendants fail to appreciate is that whether or not the loan was securitised at any stage is irrelevant and the circumstances pertaining to the securitisation of the loan could never have provided them with a potential defence to the proceedings.

29. Mr Miller B.L. is correct in his legal submission that as a matter of law, the original lender retains the right to enforce the security even if the loan is securitised to a third party, although they may later have to account to the transferee for any sums recovered.

30. There is ample authority for that proposition in the decisions relied upon in the course of argument today such as the decision in *Freeman v. Bank of Scotland plc* [2014] IEHC 284 and the decision in *Wellstead v. White* [2011] IEHC 438.

31. It is beyond doubt that the bank remained the legal owner of the mortgage and the registered owner of the charge. Clause 6. 7(d) is, in my view, of no application because there has been no transfer of the mortgage to any third party.

32. I should also state that whilst technically irrelevant in light of the foregoing, the mortgage deed in any event provides for securitisation. Accordingly, the High Court judge

was correct in law when she rejected as providing the defendants with any possible real or *bona fides* defence any reliance upon the securitisation of their loan.

33. Regarding the trust, insofar as the defendants contend that the High Court judge should have remitted the proceedings to plenary hearing based upon the affidavit of Mr Burns dated the 4th October 2016 that on some unspecified date the three properties, the subject matter of the proceedings, had been placed in a private irrevocable contract of trust, that is a submission which is, in my view, unstateable.

34. First, what is stated by Mr Burns in his affidavit of the 4th October 2016 is nothing more than a bald averment unsupported by any evidence. The defendants did not produce a copy of the trust. They did not seek to validate the existence of such by explaining how such a trust came into being. Neither did they seek to support the existence of such a trust by providing any corroboration from a party as to its existence. One would expect that a deed of trust concerning three properties would have been prepared by a solicitor and for stated legal reasons. In this case, however, not even the date of the deed is advised by Mr Burns notwithstanding the fact that he has sworn to the creation of this trust in his affidavit.

35. Second, there was no evidence that the properties were transferred to any such trust prior to the execution of the indenture of mortgage. That being so, even if any trust was created, in circumstances where it is accepted that Mr and Mrs Burns signed the indenture of mortgage, all that they could have transferred to the trustee was the equity of redemption. Furthermore, that trust could not have been validly created without the consent of the bank by reason of clause 5.11 which states:-

> " not without the prior written consent of permanent TSB to make any disposition of the property the subject to the mortgage nor create or purport to create any rent charge affecting it."

36. Accordingly, even if the trust exists, it could not be valid and the trustee would in any event have taken subject to the bank's charge which would have had priority.

37. So, for all of those reasons, I am satisfied that there is no basis upon which it can be argued that the High Court judge erred in law in making the orders which she did on the evidence before her.

29/11/18

No Redaction Needed

A COPY WHICH I ATTEST

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FOR REGISTRAR