



May 2015

Bank of Ireland Mortgage Bank v. Finnegan & Ward

Introduction

The decision of Murphy J. in the High Court in *Bank of Ireland Mortgage Bank v. Finnegan & Ward* delivered on the 20th May 2015 represents a challenge to the current Circuit Court regime in respect of the enforcement of security against residential property.

Background

The case concerned a Circuit Court appeal to the High Court following an order for possession of the defendants' residential dwelling in Kingscourt, Co. Cavan. The key issue on appeal was the jurisdiction of the Circuit Court to make the order sought by the plaintiff in circumstances where the evidence before the Circuit Court as to the rateable valuation of the subject property was a letter of provisional assessment of valuation (as opposed to a certificate of valuation) issued pursuant to the provisions of the Valuation Act 2001. The reason why a letter of provisional valuation was used was that the subject property had not been given a rateable valuation, having been constructed¹ subsequent to the commencement of the Valuation Act 2001. The Valuation Act 2001 came into effect in 2002 whereupon any new domestic premises was not rateable.

¹ The subject property was constructed in 2006

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▣ The High Court decision

The evidence before the High Court from the head of Valuation Services in the Valuation Office was that the Valuation Office would not be legally empowered to issue a valuation in respect of a 2006 domestic property because section 67 of the Valuation Act 2001 provides that such properties are not rateable. As such, the High Court held that as of the date of the initiation and hearing of the plaintiff's claim by the Circuit Court, by reason of the operation of the Valuation Act 2001, the subject property "were neither rated nor rateable and accordingly that the Circuit Court lacked the necessary jurisdiction to hear the plaintiff's claim".²

▣ A lacuna in the law

The High Court did note³ that this lacuna could have been avoided by the commencement of Section 45 of the Civil Liability and Courts Act 2004 (the "2004 Act") (which provided for an alternative jurisdictional limit for the Circuit Court based on market valuation of property):

"It appears to the Court that the State adverted to the lacuna in Circuit Court jurisdiction created by the enactment of the Valuation Act 2001, because in the Civil Liability and Courts Act 2004, the Oireachtas enacted the following at s. 45:

(1) Section 2 of the Courts(Supplemental provisions) Act 1961 is amended by the insertion, in subsection(1), of the following definition: 'market value' means in relation to land, the price that would have been obtained in respect of the unencumbered fee simple were the land to have been sold on the open market, in the year immediately preceding the bringing of the proceedings concerned, in such manner and subject to such conditions as might reasonably be calculated to have resulted in the vendor obtaining the best price for the land".

(2) The Third Schedule to the Courts (Supplemental Provisions) Act 1961 is amended in Column (3), by the substitution of-

(a) "market value" for "rateable valuation" in each place that it occurs, and

(b) "€3,000,000" for "£200" (inserted by section 2(1)(d) of the Act of 1981) in each place that it occurs.

The clear intention of this legislation was to base Circuit Court jurisdiction on "market value" instead of rateable valuation. By virtue of s. 1(2) of the 2004 Act, an order of the Minister was required to bring this provision into operation. Section 45 has not been commenced and so the position remained that the Circuit Court did not have jurisdiction to hear claims for possession of "domestic premises" which were not rated or rateable."

² At para 26

³ At para 31

▣ Judgment in favour of the borrowers

Describing the defendants' victory as “*pyrrhic*”, the High Court declined to state a case on the point to the Supreme Court as Murphy J. had no doubt as to the current state of the law. The seriousness of the judgment and the implications for practitioners were made clear at paragraph 35 of her judgment:

“It appears to the Court on the evidence, that the plaintiff and others have devised and used an ad hoc non-statutory process which is devoid of legal effect, for the purpose of persuading the Circuit Court that it has a jurisdiction which it does not in fact enjoy. This is a matter of serious concern to the Court. The standard letter issued by the Valuation Office in this and other cases may be derived from the type of letter issued by them in respect of rateable properties such as off licences which are in the process of being valued, but the fact is that the content of these letters, however unintentional, is misleading when applied to domestic premises. The letter states “I refer to your application for a certificate showing the rateable valuation for the above property. I regret that I am unable to issue such a certificate as the property is not as yet valued for rating purposes”. The clear import of the terminology used is that the property is rateable but not yet rated, when as the Valuation Office well knows, the property is by virtue of the Act not rateable at all. In so far as this practice may be ongoing it should cease forthwith.”

▣ Effect of the judgment

The scope of this judgment has been limited to a significant degree by the enactment of the Land and Conveyancing Law Reform Act 2009 (“**2009 Act**”) and the Land and Conveyancing Law Reform Act 2013 (the “**2013 Act**”) which acts give new jurisdiction to the Circuit Court which is not dependent on rateable valuation.

This case is however authority for the proposition that the lacuna identified by the Court in this case can be successfully relied upon by debtors to have possession proceedings struck out for lack of jurisdiction where the following situations apply:

- ▣ Possession proceedings of any domestic premises;
- ▣ Where the domestic premises was constructed post 2nd May, 2002⁴ (and so not rateable);
- ▣ The mortgage / charge is dated pre – 1 December 2009; and
- ▣ The possession proceedings were commenced in the Circuit Court before 31 July 2013⁵.

⁴ Houses built in the 1980s and 1990s have a rateable valuation, albeit that rates haven't been levied on domestic premises since 1978.

⁵ Proceedings issued before then do not have the benefit of the 2013 Act which extended the jurisdiction of the Circuit Court to mortgages created before 1st December, 2009.

In cases where the above criteria do apply and this lacuna is raised as a defence by a debtor financial institutions can simply re-issue fresh possession proceedings which will have the benefit of the 2013 Act.

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