



THE COURT OF APPEAL

Neutral Citation Number [2020] 81

Record Number: 2018/91

**Faherty J.
Haughton J.
Murray J.**

BETWEEN/

THOMAS MORRIN

**PLAINTIFF/
APPELLANT**

- AND -

MICHAEL CONDON AND RONALD WEISZ

**DEFENDANTS/
RESPONDENTS**

JUDGMENT of Ms Justice Faherty dated the 3rd day of April 2020

1. This case is an appeal of the Order of the High Court (O'Connor J.) dismissing the appellant's claims for declaratory reliefs in relation to lands comprised in Folios 24835F and 12327 County Kildare. For ease of reference, I will refer to the appellant as the plaintiff and the respondents as the defendants.

Background

2. The plaintiff was the registered owner of lands comprised in Folios 24835F and 12327 County Kildare. In December 2009, he borrowed €320,000 from Secured Property Loans Limited (hereinafter "SPL"). The second named defendant herein was at all material times SPL's managing director. SPL is a retail credit company authorised by the Central Bank. Its business is the provision of short-term loans of twelve months to borrowers who own property.
3. The loan obtained by the plaintiff in December 2009 comprised an amalgamation of loans previously taken out with SPL, including arrangement fees and interest due on those loans. The Commitment (Facility) letter which issued to the plaintiff and which was signed by him on 18 December 2009 provided that the loan was to be for a period of twelve months with the plaintiff undertaking to make monthly interest repayments of €4,800 per month with the principal sum to be paid off at the end of that period. At para. 19 of the Commitment letter the plaintiff was cautioned to obtain legal advice before

agreeing to the terms and conditions contained therein. The plaintiff's signature to the letter was witnessed by Mr. Fearghal White Solicitor of Coughlan White O'Toole Solicitors. According to evidence given by the plaintiff at trial, he took out the loans for the completion of property projects and to pay the Revenue.

4. By Deed of Charge dated 21 December 2009, the €320,000 loan advanced to the plaintiff was secured on Folio 24835F by way of a fixed charge to SPL, and on Folio 12327 by way of a second charge to SPL after a lien in favour of Ulster Bank. Ulster Bank held the lands certificate in respect of Folio 12327 for monies advanced to the plaintiff. The Deed of Charge contained a provision enabling SPL's powers as mortgagee to become immediately exercisable in the event of the failure of the plaintiff to discharge his obligations. As was the case with the Commitment letter, the plaintiff's signature on the Deed of Charge was witnessed by his solicitor Mr. White of Coughlan White O'Toole.
5. The charges created by the Deed of Charge in favour of SPL were duly registered in the Property Registration Authority ("PRA") on 5 January 2010 against both Folios as burdens owned by SPL.
6. It is common case that by 21 December 2010 the plaintiff was in arrears in respect of his repayments and, pursuant to the terms of the Mortgage Deed, the security held by SPL immediately became enforceable, including the entitlement of SPL to exercise its power of sale and other powers accruing to it pursuant to the provisions of the Land and Conveyancing Law Reform Act 2009 (hereinafter "the 2009 Act").
7. It is the case, however, that as of October 2010, the plaintiff was endeavouring to sell the lands and/or otherwise secure monies to pay off his indebtedness to SPL. An attempt by him to sell the lands by auction was unsuccessful. The plaintiff's aspiration was a sale of the lands with a buy back option for himself. His efforts in this regard were made known to the second defendant on 15 October 2010.
8. Discussions subsequently ensued between SPL and the plaintiff in the course of which it was indicated to him that SPL intended to go into possession of the lands. Ultimately, the plaintiff executed a suite of documents on 18 May 2011 whereby he consented to SPL taking possession of the lands. The documents included a Consent executed on 18 May 2011. The Consent was in the following terms:

*"I, Thomas Morrin, ...**HEREBY CONFIRM AND ACKNOWLEDGE** that I am the Registered owner of Folio No. 24835F County Kildare and No. 12327 County Kildare. I say that by a Deed of Mortgage made on the 21st day of December 2009, a mortgage all of the lands and premises comprised and described in Folio No. 24835F County Kildare and Folio No. 12327 County Kildare to Secured Property Loans Limited having its registered office at Drumcoura, Derrygoan in the County of Leitrim. I say that as a result of my default of the interest payments and past due date of the redemption of the said Loan to Secured Property Loans Limited, I am desirous of giving possession of the lands and premises comprised and described in Folio No. 24825F County Kildare and Folio No. 12327 County Kildare to the said*

*Secured Property Loans Limited. **I HEREBY FORMALLY CONSENT** to the said Secured Property Loans Limited entering into possession of the lands and premises comprised and described in [Folios] 24835F County Kildare and 12327 County Kildare and **HEREBY ACKNOWLEDGE** that when the said Secured Property Loans Limited enter into possession of same, they will be accordingly duly entitled to exercise immediately all their powers as a mortgagee in possession including the entitlement to sell the said property in order to discharge all sums due to them."*

9. By way of "Acknowledgement" also dated 18 May 2011, the plaintiff acknowledged that he was giving vacant possession to SPL and that it was entitled to exercise its powers of sale. He accepted that having given vacant possession to SPL, he was debarred from returning or entering upon the lands. He undertook to cooperate with SPL in its attempts to sell the lands.
10. The plaintiff also signed a further document on 18 May 2011 entitled "To Whom it May Concern" wherein he confirmed and acknowledged that of "[his] own free will and volition" he had offered to give voluntary possession of the lands to SPL. He went on to state that he had taken legal advice in relation to the matter and was satisfied "in the light of the said legal advice taken, to voluntarily give possession to [SPL]". He acknowledged that SPL "will be entitled to exercise immediately all their powers as Mortgagee in possession including the entitlement to sell the property in order to discharge all sums due to them..."
11. For the purposes of the "Consent", "Acknowledgment" and the "To Whom it May Concern" documents executed on 18 May 2011, the plaintiff had access to a solicitor, Mr. Barry McCormack of McCormack Solicitors. All the documents were witnessed by Mr. McCormack. Under cross-examination the plaintiff acknowledged that Mr. McCormack was his independent solicitor.
12. It is also the case that Mr. McCormack was appointed by SPL to have carriage of the sale of the lands. It appears that this arrangement was entered into to allow the plaintiff to have some form of supervision over the sale and to afford him an opportunity to do whatever he could to retain ownership of the lands, be it through a lease arrangement or buy back option, depending on what transpired. The "Consent" and "Acknowledgement" and other documents signed by the plaintiff were forwarded to SPL by Mr. McCormack under cover of letter of 18 May 2011.
13. It is not in dispute that on 30 March 2011, some six weeks or so prior to the suite of documents being executed by the plaintiff on 18 May 2011, SPL sub charged various charges (including its charges over Folios 24835F and 12327) to the second defendant in consideration of some €4.4m which had been advanced to SPL by the second defendant. The sub charge was signed on behalf of SPL by the second defendant in his capacity as a director of SPL and by Mr. Simon Power in a similar capacity. It was also signed by the second defendant *qua* beneficiary of the sub charge. The Sub Charge was set out on a "Form 67" "Charge for a principal sum (rule 52.113)". It read as follows:

"SECURED PROPERTY LOANS LIMITED, the registered owner of various charges as per the schedule attached in consideration Four Million Four Hundred Thousand Euro paid to it by **Ronald Weisz** hereby Sub-Charges all the property described in the Folios in the Schedule attached and agrees to make payment to Ronald Weisz with interest at the same rate as charged by Secured Property Loans Limited and on the same dates as Secured Property Loans Limited and Secured Property Loans Limited hereby covenants for payment of the principal sum and assents to the registration of the Sub-Charges as a burden on the said properties in the schedule attached..."

14. In evidence in the court below, the second defendant described the Sub-Charge as "a charge of a charge", with SPL retaining ownership of the "principal charge". The second defendant testified that the reason for the Sub-Charge was that he was owed some €4.4m by SPL.
15. The Sub-Charge over four properties was duly registered in the PRA in a new Folio 37S (part of the Register maintained by the PRA under section 8(b) of the Registration of Title Act, 1964 in respect of "incorporeal hereditaments" held in gross, and "other rights in land") which shows SPL's charges over Folio 24835F and 12327 at entries 1 and 2, and the second defendant was registered as sole owner of the Sub-Charge. The PRA also added the following to Folios 24835: "Note: the ownership of this charge has been sub charged and is now registered on folio KE37S", and to Folio 12327: "Note: The ownership of this charged (sic) has been sub charged and is now registered on Folio KE 27S".
16. Albeit that he had acknowledged, through the documentation which he signed on 18 May 2011, that he had given up vacant possession of the lands in Folios 24825F and 12327 to SPL, it appears that between May 2011 and July 2013, the plaintiff continued to use the lands, with SPL taking no tangible steps to sell the lands during this period. Furthermore, unbeknownst to SPL, the plaintiff rented out part of the lands to third parties for the purposes of potato growing. It is also the case that the plaintiff and the first defendant entered into a "bed and breakfast" arrangement whereby the plaintiff wintered cattle belonging to the first defendant on the lands. During this period also, the plaintiff was advising SPL of his plan to sell the lands for €500,000 with the option of a buyback. He was also offering to rent the lands from SPL. It appears that SPL was supportive of the plaintiff's endeavours in those regards. Furthermore, in May 2013, the plaintiff executed a Promissory Note which he sent to the second defendant promising to pay the bearer €535,500 on 20 May 2033.
17. As matters transpired, the plaintiff's efforts to sell the land were not successful. Ultimately, in or about May 2013, SPL indicated that it intended to put the lands up for auction. Sherry Fitzgerald Auctioneers were appointed to handle the sale. It appears that at this time, there was a proposal to cede back to the plaintiff some six acres of the lands which the parties had agreed to in principle.
18. The auction of the lands was scheduled for 3 July 2013. On the appointed date, several people turned up voicing their objection to the auction going ahead. Notices which were

distributed at the auction suggested the plaintiff had placed the lands in "the Tom Morrin Estate Trust". Other documentation produced at the auction suggested it had been placed in other trusts such as "the Charles Allen Trust" and "the John Quinn Estate Trust".

19. It is common case that the auctioneer's attempt to sell the lands by auction on 3 July 2011 had to be abandoned following disruptions caused by the individuals who turned up to the auction.
20. On 8 November 2013, by Deed of Transfer executed between SPL and the first and second defendants, SPL, for a consideration of €400,000, as "Vendor/Mortgagee in Possession pursuant to the ...Consent and Surrender of...Thomas Morrin dated the 18th May 2011 and pursuant to the statutory powers conferred on it by the Conveyancing Acts..." agreed to the sale of the lands in Folios 24835F and 12327 to the defendants as tenants in common "freed and discharged" from the charge held by SPL and from all burdens over which SPL's charges had priority.
21. According to the plaintiff, he was advised by the first defendant in the Spring of 2014 of the transfer. It is this Deed of Transfer of 8 November 2013 which gave rise to the within proceedings.
22. The proceedings issued on 24 May 2014. They were not served on the defendants until 26 May 2015. The plaintiff registered a *lis pendens* against the lands in Folio 24835F and 12327 on 6 June 2014.
23. In the general indorsement of claim to his plenary summons, the plaintiff sought:
 - (a) *a declaration/order that the Deed of Charge made between the plaintiff and defendants in respect of Folios 24735F and 12327 was rendered null and void "as a result of the Defendants' conduct and fundamental breach of contract";*
 - (b) *a declaration/order setting aside the Deed of Transfer dated 8 November 2013 and declaring the said transaction to be null and void;*
 - (c) *a declaration/order that the plaintiff was the sole beneficial owner of the lands, or in the alternative that any interest the defendants had in the properties was held in trust for the plaintiff; and*
 - (d) *an order directing the PRA register the lands in the sole name of the plaintiff.*
24. The plaintiff was not legally represented when the plenary summons was issued. However, by the time the statement of claim was delivered he had legal representation. In the statement of claim it was pleaded, *inter alia*, that SPL had never taken possession of the lands. It was also pleaded that at the time of the execution of the Consent of 18 May 2011 the plaintiff was under severe financial pressure and that it had been stated by the second defendant that if he signed the Consent SPL would not pressurise him to sell the properties for a period of time. It was also pleaded that the lands were sold at an undervalue. The reliefs sought in the statement of claim were:

1. *A declaration that the Deed of Transfer dated 8 November 2013 was null and void;*
 2. *A declaration that the plaintiff was the beneficial owner of the property and that the defendants held the property in trust for him pending his re-registration as owner;*
 3. *An order directing the PRA to register the properties in the plaintiff's sole name;*
and
 4. *Damages for negligence, trespass and breach of trust.*
25. The defendants duly entered a full defence and counterclaimed for injunctive relief against the plaintiff in circumstances where it was alleged that the plaintiff was trespassing on the lands. They also sought damages for, *inter alia*, trespass and slander of title.
26. The matter came on for hearing before the High Court on 28 January 2018.
27. In the course of his opening statement, counsel for the plaintiff advised the trial judge that one of the reliefs which had been sought by the plaintiff in the plenary summons, to wit, a declaration that the Deed of Charge dated 21 December 2009 had been rendered null and void as a result of the defendants' conduct, was not being proceeded with noting that this relief had not been sought in the statement of claim.
28. It was outlined to the trial judge that what was being sought was a declaration that the Deed of Transfer of 8 November 2013 was null and void and that the defendants held the lands in trust for the plaintiff. The basis put forward for the alleged invalidity was that the Sub-Charge by SPL to the second defendant on 30 March 2011 had the consequence of transferring the plaintiff's loans from SPL to the second defendant. It was argued that this being so, the Consent which the plaintiff had signed on 18 May 2011 should have been entered into between him and the second defendant (and not SPL) as the legal title to the charges registered on Folios 24835F and 12327 had passed from SPL to the second defendant. Counsel's argument was that in the absence of a Consent having been executed between the second defendant and the plaintiff, the Deed of Transfer of 8 November 2013 had no legal effect, since, SPL, not being the mortgagee in possession, could not have transferred the lands to the defendants. It was also contended that the lands had been sold by SPL at an undervalue.
29. In his opening submissions, counsel for the defendants disputed that SPL did not have title as of the date of transfer of the lands to the defendants. It was further disputed that SPL had transferred ownership of the loan or the security documentation or its rights as mortgagee to the second defendant.
30. On the second day of the hearing, counsel for the plaintiff confirmed to the trial judge that the plaintiff's claim was now crystallised in a document entitled "Heads of Claim". That document was formulated by counsel following directions given by the trial judge on the first day of hearing.

31. The newly formulated "Heads of Claim" outlined that the declaratory relief being sought was to the effect that that the Deed of Transfer dated 8 November 2013 was null and void by reason of the following:

- "(a) *The Lending Company transferring its charges on the lands to the Second Named Defendant, evidenced by registration of the Second Named Defendant's ownership of the charges on Land Registry Folio 35S County Kildare on 13th April 2011, equivalent to a securitisation arrangement whereby the legal title to the loans and security remains with the Lending Company while the beneficial interest passes to the Second Named Defendant. As a consequence, the Lending Company is no longer entitled, without the Second Named Defendant's involvement, to require the Plaintiff to give up possession of the lands to the Lending Company, as per the consent Form of 18 May 2011..., or to exercise a power of sale of those lands;*
- (b) *The consent form by which the Plaintiff consented the Lending Company taking possession of the lands was ineffectual insofar as the Lending Company failed to take possession of the lands within seven days of the date of execution of the consent form or at all as required by Section 97(1) of the Land and Conveyancing Law Reform Act 2009, so invalidating the sale of the property by the Lending Company to the Defendants by reason of Section 100(2) of the Land and Conveyancing Law Reform Act 2009."*

It was also confirmed to the trial judge that the plaintiff's claim that the lands had been sold at an under value was being withdrawn.

32. In putting forward the plaintiff's case, counsel for the plaintiff conceded that if the plaintiff failed to establish the claims made in the Heads of Claim, he had no title to the lands.

33. Having heard evidence from the plaintiff, Mr. Aidan Heffernan, auctioneer, and the defendants, in an *ex tempore* judgment of 31 January 2018, the trial judge determined the issues before him in the following terms:

"6. *The first issue raised by the plaintiff is that the suite of documents executed on 18th May, 2011, waived the rights of SPL to rely on the exclusion in the Mortgage Deed of s.97 of the Land and Conveyancing Law Reform Act 2009. I teased out with counsel before 13:00 today of what was sought to be advanced in this regard. I do not see any merits in the submission that the plaintiff can rely on the seven days mentioned in s.97(1) because the suite of documents are quite plain – possession was given over to SPL. The fact that the second defendant allowed the plaintiff to proceed to engage with another individual and to use the lands shows that the second named defendant representing SPL merely wanted its money back – the plaintiff had repaid previous loans with a certain familiarity, if not friendship, between the plaintiff and the second named defendant.*

7. *To apply and construe s.97(1) in the manner sought by the plaintiff concerning possession is a bridge too far. Despite the best efforts of counsel for the plaintiff, I*

see no merit or substance to the plaintiff's submission. Moreover, SPL has recited the basis of its ownership of the lands in the deed of transfer to the defendants. It is more for the defendants to take issue with SPL if there is a flaw in that transfer.

8. *The second issue relates to an understanding that the sub-charge in some way availed [the plaintiff] on the basis that the defendants had no good and clear title from the second named defendant who is the holder of the sub-charge over specified assets of SPL.*
 9. *Misguided ingenuity is a way of describing the plaintiff's submissions. The defendants have been transferred the lands and the plaintiff cannot piggyback on some alleged, if any, right of the second named defendant to enforce his sub-charge.*
 10. *The Court was informed by the second named defendant that his security in respect of the SPL's security over the lands previously owned by the plaintiff has been satisfied. The cross-examination of the second named defendant and the submissions with respect to securitisation of loans based on the judgment of McGovern J. in Freeman v. Bank of Scotland plc [2014] IEHC 284 (Unreported, High Court, 29 May 2014) (who did not find in favour of the claimants in that regard) are not relevant to the sub-charge here.*
 11. *This Court is not going to set out the details of securitisation which was dealt with in that judgment. Suffice to say that the plaintiff's claim that he can set aside the transfer from SPL to the defendants based on the sub-charge fails as he has no standing to advance that issue.*
 12. *Therefore, all the claims of the plaintiff which were narrowed down in the heads of claim produced yesterday are dismissed while the Court notes that the plaintiff abandoned the wider reliefs sought in the Statement of Claim."*
34. The plaintiff's grounds of appeal assert that the trial judge erred in law and in fact in:
- *Failing to conclude that the second defendant, due to his involvement (as 99 percent shareholder) with SPL failed to exercise or comply with ss.97,99, 100(1), (2), (3), and 103(1), (2), (3) of the 2009 Act.*
 - *Failing to conclude that the alleged transfer of land between SPL and the defendants is illegal and invalid.*
 - *Failing to conclude that the surrender document (the Consent of 18 May 2011) made between the plaintiff and SPL should have been made between the plaintiff and the second named defendant.*
 - *Failing to conclude that the surrender document made between the plaintiff and SPL was signed under duress and as such is null and void.*

- *Failing to conclude that the lands in Folio KE37S created an unlawful advantage to the second defendant which allowed for the unlawful transfer of the lands in Folios 24835F and 12327 to the defendants.*
 - *Failing to conclude that the defendants colluded in attempting to illegally and deceitfully obtain ownership of the lands contained in Folios 24835F and 12327.*
 - *Failing to conclude that the second defendant (as a 99 percent shareholder of SPL) acted illegally and deceitfully in attempting to obtain ownership of the lands in Folios 24835F and 12327.*
 - *Granting relief to the defendants in circumstances where the plaintiff was not given an opportunity to litigate in full before the Court of Appeal.*
 - *Granting relief in circumstances where the affidavits filed by the agents and representatives of the defendants are false and misleading and do not reflect the true sequence of events concerning possession and title over the lands in Folios 24835F and 12327.*
 - *Granting relief in circumstances where the oral evidence tendered by the second defendant was false and misleading.*
 - *Granting relief in circumstances where the trial judge refused to allow the plaintiff to refute and address the contents of the affidavits sworn by the defendant's agents or representatives.*
35. In written submissions, the plaintiff requests that either the matter be remitted for a full re-hearing in the High Court or that the Consent given by him on 18 May 2011 be set aside on the grounds of fraudulent misrepresentation, breach of Council Directive No. 93/13/EEC (on unfair terms in consumer contracts) ("the Unfair Terms in Consumer Contracts Directive"), insider trading on the part of the second defendant as managing director of SPL and conspiracy on the part of SPL under the directorship of the second named defendant to construct a bargain contrary to equitable principles.
36. When filing his appeal and furnishing his submissions the plaintiff was not legally represented. By the time of the hearing of the appeal hearing, however, he had secured legal representation. By and large, his counsel adopted the plaintiff's written submissions, the thrust of which were, essentially, that the actions of SPL and/or second defendant were not in compliance with what was provided in the Mortgage Deed and/or that parts of the Mortgage Deed require to be construed against SPL and the second defendant and in favour of the plaintiff such that actions taken subsequent to the execution of the Mortgage Deed, including the transfer by SPL to the defendants on 8 November 2013, cannot stand. Counsel also contended that the Consent document executed by the plaintiff on 18 May 2011, whereby he surrendered possession of the lands in Folios 24845F and 12327 to SPL, is devoid of legality because of what is alleged to be the vitiating effect of clause 20 of the Mortgage Deed on the said Consent.

37. Counsel for the defendants submits that the claims now being advanced on behalf of the plaintiff were not pleaded or made in the court below. It is not accepted that there was anything untoward in the second defendant becoming the owner of the Sub-Charge. It is denied that there was any defect or illegality in the creation of the Sub-Charge.

Considerations

38. The first thing to note is that in the High Court, the principal thrust of the plaintiff's then counsel's arguments was that following the Sub-Charge, SPL retained title to the charges as registered on Folios 24835F and 12327 but that there was a potential issue arising from what was described as a lack of "involvement" on the part of the second defendant *qua* sub-chargee in the Consent signed by the plaintiff on 18 May 2011 and the Deed of Transfer effected between SPL and the defendants on 8 November 2013. This argument was dismissed by the trial judge who concluded that the only person who could rightfully have any concern that a sub-charge had taken place was a potential purchaser from SPL as the mortgagee in possession. At trial, the plaintiff was unable to identify any possible benefit that might accrue to him if the Sub-Charge between SPL and the second defendant was found to be without legal effect.
39. In this appeal, as far as I can discern, the plaintiff does not really take issue with the trial judge's findings in the above regard. Rather, what he purports to do, in his written and oral submissions, is to advance arguments which were not canvassed before the High Court. These are, in summary:
- (i) *That one or other of the defendants are guilty of fraud or deceit;*
 - (ii) *That the Deed of Charge represents an unconscionable bargain and should be set aside;*
 - (iii) *That the defendants are in breach of the 1995 Act and the European Union (Unfair Terms in Consumer Contracts) Regulations 1995 ("the 1995 Regulations"); and*
 - (iv) *That SPL could not sub-charge without the knowledge of the plaintiff.*
40. In his grounds of appeal, the plaintiff also raised the issue of the lands having been sold at an undervalue and that his Consent of 18 May 2011 was executed under duress.
41. While there is no absolute bar preventing an appellate court from considering matters that were not decided by the High Court, the general position is that a party will not be allowed to raise issues that were not raised in the lower court save in an exceptional case in the interests of justice. The circumstances where a party might be permitted to advance a new point on appeal were examined in *Lough Swilly Shell fish Growers Co-op Society Limited v. Bradley* [2013] 1 I.R 227. At p.245 of his judgment, O'Donnell J. stated: -

"There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence

already given (as in K D. for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the Court nevertheless retained the power in appropriate cases to permit the argument to be made."

42. As regards the claims the plaintiff advances before this court, I note that while duress was pleaded in the statement of claim, it was not a matter that was pursued at the trial. As far as the allegation of a sale at undervalue is concerned, this claim was expressly withdrawn by counsel for the plaintiff on day two of the hearing. Accordingly, I am entirely satisfied that under the principles enunciated in *Lough Swilly Shell fish Growers*, the plaintiff is debarred from raising either of the above issues.

Alleged fraud on the part of the defendants and/or unconscionable bargain

43. As far as the allegations of fraud and deceit now being levelled against the defendants, principally the second defendant, are concerned, as I have said, none of these allegations features in the pleadings in the High Court, and no evidence was led in those terms.
44. The seriousness and import of allegations of fraud and deceit are reflected in the Rules of the Superior Courts ("RSC"). Order 19, r.5 (2) provides that in all cases alleging misrepresentation, fraud, breach of trust, wilful or undue influence, such claim must be set out in the pleadings. The plaintiff has not pleaded same.
45. Another claim now sought to be advanced *de novo* is the assertion that the Mortgage Deed itself represents an unconscionable bargain to which the trial judge failed to allude or deduce from the evidence advanced. It is submitted on behalf of the plaintiff that the trial judge erred in not having immediately set aside the Mortgage Deed by reason of unconscionable bargain as defined in *Lloyds Bank Limited v. Bundy* [1974] EWCA civ 8. It is contended that the unconscionable bargain visited on the plaintiff was compounded by the deceitful misrepresentations of the second named defendant to the plaintiff. Counsel argues that not only was SPL the stronger party in the contract, but its managing director (the second defendant) acted in his own interest in deceiving the plaintiff and the plaintiff's solicitor in obtaining the Consent of 18 May 2011 in circumstances where the Sub-Charge by SPL to the second named defendant had been concealed from the plaintiff and his legal advisor.

46. Counsel requests that this court, in determining the within issue, take account of the provisions of s.11 of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the 2001 Act"). This provides: -

"11(1) A person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office.

(2)(a) A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception procures the execution of a valuable security is guilty of an offence.

(b) Paragraph (a) shall apply in relation to—

- (i) the making, acceptance, endorsement, alteration, cancellation or destruction in whole or in part of a valuable security, and*
- (ii) the signing or sealing of any paper or other material in order that it may be made or converted into, or used or dealt with as, a valuable security, as if that were the execution of a valuable security.*

(3) In this section, "valuable security" means any document—

- (a) creating, transferring, surrendering or releasing any right to, in or over property,*
- (b) authorising the payment of money or delivery of any property, or*
- (c) evidencing the creation, transfer, surrender or release of any such right, the payment of money or delivery of any property or the satisfaction of any obligation.*

(4) A person guilty of an offence under this section is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

47. Notwithstanding that allegations of fraud and deceit were not pursued in the High Court, it is argued that this court should take account ("on the civil side") of the aforesaid provisions to find that the second defendant acted fraudulently and deceitfully in both procuring the Mortgage Deed as executed on 21 December 2009, and the Consent of 18 May 2011. Counsel contends that while these matters were not before him the trial judge should nevertheless have taken cognisance of the fraudulent aspects of the second defendant's dealings. Counsel also maintains that the trial judge erred in failing to find that clause 20 was inserted into the Mortgage Deed by the second defendant as a device to assist him to obtain the plaintiff's lands. As grounds for this assertion, counsel points to evidence given by the second defendant in the High Court wherein the second defendant refers to his entitlement to "protect" his loan.

48. Insofar as the plaintiff now seeks to put evidence before this court to substantiate the claim that the Mortgage Deed and/or the Consent of 118 May 2011 should be set aside on ground of fraud, it is by affidavit sworn by the plaintiff on 6 January 2020, wherein he exhibits a copy of Folio 375 under which the second defendant was registered as full owner of the Sub-Charge on 13 April 2011.
49. At para. 4, the plaintiff avers that the said exhibit meets the criterion of a "valuable security" document as specified in s.11(3)(a) of the 2001 Act.
50. In my view, the plaintiff advances not a scintilla of evidence pertaining to fraudulent conduct or deceit, as alleged by him against the second defendant. Nothing which has been put forward by the plaintiff approaches the test set out in *Lough Swilly Shell fish Growers* for this court to consider the arguments that are now sought to be canvassed. I agree with the submission advanced by counsel for the defendants that to now permit the ground that the trial judge erred in failing to set aside the Mortgage Deed would involve enlarging the original proceedings beyond an application to set aside the sale by SPL to the defendants on the basis that the Consent of 18 May 2011 and the Deed of Transfer of 8 November were, respectively, defective and null and void because of the non-involvement of the second defendant in their execution (the case made in the High Court) to the more radical suggestion that this court should unravel the Mortgage Deed itself and/or find that the Consent of 18 May is vitiated by alleged fraudulent conduct or the part of the second defendant. Not alone was this case not canvassed before the trial judge, but, more particularly, the trial judge was specifically alerted *via* the "Heads of Claim" to the case actually canvassed by the plaintiff in the High Court which was, effectively, that there was some frailty attached to the Deed of Transfer of 8 November 2013 by reason of the lack of involvement in the said Deed (and the earlier Consent whereby the plaintiff surrendered possession of the lands to SPL) on the part of the second defendant qua his status as sub-chargee following the Sub-Charge effected between him and SPL on 30 March 2011.
51. It is also contended on behalf of the plaintiff that as far as clause 20 of the Mortgage Deed is concerned, the principle of *contra proferendum* should be invoked to assist the plaintiff.
52. Clause 20 provides: -

"The Mortgagor shall not be entitled to assign, transfer or otherwise dispose of the benefit or the burden of this deed. The Mortgagee may (without the need for any further consent from or notice to the Mortgagor) assign, transfer, sub mortgage, sub-charge or otherwise grant interest in, or dispose the whole or any part of the benefit of this deed and its rights and obligations hereunder and it may provide any information concerning the Mortgagor and this deed to any actual or proposed assignee, transferee, sub-mortgagee, sub-chargee, or other grantee or disposee or successor and their respective officers, employees, agents and advisors. Any reference to the Mortgagee in this deed shall include any assignee, transferee, novatee, mortgagee, charge, grantee, or dispose and its successors who shall be

entitled to enforce and proceed upon and exercise all rights, powers and discretions of the Mortgagee under the deed in the same manner as if named herein."

53. The case advanced by counsel is that albeit that clause 20 provides SPL with the facility to sub-charge without the consent of the plaintiff, any such sub-charge cannot be done without his knowledge. It is submitted that the powers vested in SPL under clause 20 did not extend to concealing from the plaintiff the fact that a sub-charge had taken place. At the time he executed the May 2011 Consent, the plaintiff had not been made aware of the fact that SPL had sub-charged to the second defendant on 30 March 2011. In those circumstances, it is submitted that the benefit or protection for the plaintiff in having legal advice from his solicitor, Mr McCormack, prior to signing the Consent of 18 May 2011 was rendered nugatory since neither he nor his legal advisor were aware of the Sub-Charge.
54. It is contended that the obligation to disclose the Sub-Charge was all the more pertinent given that the second defendant was the managing director of SPL, the entity with whom the plaintiff had entered into the Deed of Charge in respect of the lands. While it is accepted that the Mortgage Deed states that a sub-charge can be effected "without the consent" of the borrower, it does not state that it can do so without the knowledge of the borrower. Counsel argues that had the Mortgage Deed intended to permit such sub-charge without the knowledge of the borrower it ought to have been expressly stated in the Deed, which was not done. Neither does the Mortgage Deed indicate any right bestowed on the lender to sub-charge the property to its managing director. Counsel contends that any provision in clause 20, or otherwise in the Deed, that does not allow for the plaintiff, as borrower, to be apprised of the intention to invoke the entitlement to sub-charge creates, in effect, an ambiguity in clause 20 such that the clause must be read against the party seeking to rely on it.
55. In aid of her submission that the principle of *contra proferendum* should be invoked, counsel cites *Analogue Devices B.V v. Zurich Insurance Company* [2005] IESC 12, *Rohan Construction Limited v. Insurance Corporation of Ireland Limited* [1988] ILRM 373, *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896 and *In re Sweeney & Kennedys Arbitration* [1950] I.R.85.
56. It is further submitted that the obligation to apprise the plaintiff of the Sub-Charge is borne out by the contents of the Commitment letter of 15 December 2009. This is so in circumstances where the letter expressly stated that the plaintiff was a "consumer" as defined in the Consumer Credit Act 1995 ("the 1995 Act"). It is submitted that there is no express term in the Mortgage Deed which removed SPL's obligation to retain the plaintiff within the protections afforded by the 1995 Act. Counsel argues that SPL, under the guidance of its managing director (the second defendant), breached the mortgage contract by sub-charging to a party who was not subject to the Financial Regulator and who was not a mortgage lender covered by the 1995 Act. It is contended that this breach provided motive to the second defendant and SPL to conceal the Sub Charge both from the plaintiff and his solicitor when the plaintiff was giving his consent for possession on 18 May 2011. It is alleged that all of this constitutes clear evidence of intent to deceive the

plaintiff in circumstances where the plaintiff acted on foot of representations made to him but minus the knowledge of the Sub-Charge which the second defendant had concealed. It is submitted that deceit occurred in this case as defined in *Forshall v. Walsh* [1997] IEHC 100,

57. I agree with the defendants' submission that the amplification which the plaintiff now seeks to make to his case, namely that the Sub-Charge is invalid in the absence of the plaintiff's prior knowledge, falls on the wrong side of the spectrum considered in *Lough Swilly Shellfish Growers* as to when a claim such as that as is now sought to be made might be entertained by an appellate court. The contention now being advanced runs in a manner diametrically opposed to the argument which was urged upon the High Court. As already referred to, what was claimed in the court below was that the Deed of Transfer of 8 November 2013 was defective because the second defendant was not a party to the transfer or the Consent of 18 May 2011 as, the appellant claimed, he ought to have been qua his status as a sub-chargee. The case was not made that the Sub-Charge itself was void or otherwise ineffective.
58. In any event, I am satisfied that the plaintiff's lack of knowledge of the Sub-Charge does not vitiate his Consent of 18 May 2011. On any reading, clause 20 of the Mortgage Deed provides for the making of a sub-charge without notice to the borrower. Clearly, without notice to the borrower encompasses that a sub-charge may be entered into without the borrower's knowledge. The plaintiff agreed to Clause 20 when he appended his signature to the Mortgage Deed on 21 December 2009 a time when he had the benefit of an independent solicitor. Moreover, he signed the Commitment letter on 18 December 2009, again with the benefit of a solicitor. Clause 4 of that letter specifically provides:
- "The Borrower agrees that the Lender has the right to cede, assign, sub mortgage or transfer the loan and its securities to any other party without approval from the Borrower provided that all its terms and conditions remain the same."*
59. I am also satisfied that there is no ambiguity in clause 20. There is, therefore, no basis upon which to set aside the Mortgage Deed, even if this Court were satisfied to allow such argument at this late stage, where no such argument was made in the court below.
60. As I have already alluded to, the plaintiff's other, and more fundamental, argument before this court is that from the outset, the second defendant's intent was to obtain ownership of the lands in Folio 24835F and 12327 and to that end he caused clause 20 to be inserted in the Mortgage Deed to, in effect, provide "cover" for the time when, ultimately, he would move to seek to obtain possession of the said lands.
61. Quite apart from reiterating my finding that the case as is now sought to be made was never made in the High Court, as I have said, there is, in any event, not a scintilla of evidence put forward of such Machiavellian intent on the part of the second defendant. As a matter of fact, as the evidence shows, between the end of 2011 and July 2013, the plaintiff was afforded the opportunity to himself enter into arrangements whereby he could ultimately procure a discharge of his indebtedness to SPL and hence retain his

lands, hardly consistent with the claim that the second defendant's objective from the outset was to secure the plaintiff's lands at any cost. To my mind, nothing in the evidence adduced in the court below could even remotely lead to the inferences which counsel for the plaintiff urges on this court. Nor has the plaintiff adduced such evidence before this court, save the bare assertion that that this court should somehow invoke, "on the civil side", the provisions of s. 11 of the 2001 Act, an argument which I have earlier rejected.

62. In aid of her submission that this court can review evidence of fraud which was not led in the court below, counsel for the plaintiff referred to *Takhar v. Gracefield Developments* [2019] UKSC 13, [2019] 2 W.L.R. 984. This case was cited as authority for the proposition that "fraud unravels all" and that, accordingly, the failure of a plaintiff to plead or adduce evidence of fraud at trial should not be a bar to the adducing of such evidence on appeal.
63. The facts in *Takhar* were as follows: Mrs. Takhar was the unsuccessful litigant in proceedings against Gracefield Developments and others wherein she sought to set aside certain transaction on the grounds of undue influence and other unconscionable conduct on the part of a Dr. Krishan and his spouse. Mrs. Takgar and the Krishnans were the directors and shareholders of Gracefield Developments into which legal ownership of certain properties owned by Mrs. Takhar had been transferred.
64. Mrs. Takhar's claims were rejected by the trial judge (Purle J.) who found that the parties had entered into a joint venture with regard to properties owned by Mrs Takhar which provided for the renovation and then sale of the properties with Mrs Takhar to get a previously agreed value of the properties post the sale, and with any profit over to be divided equally between Mrs. Takhar and the Krishnans.
65. The case which had been made by Mrs Takhar was that the agreement she had entered into was that the beneficial ownership of the properties would remain with her. In rejecting this claim, the trial judge relied heavily on a scanned copy of a profit share agreement which bore Mrs. Takhar's signature, which he found supported the claims made by the Krishnans. The original of the profit share agreement was not before the trial judge.
66. In advance of the trial, Mrs. Takhar had sought the permission of the trial judge to obtain evidence from a handwriting expert to examine the signature on the profit share agreement which had been attributed to her. That application was refused as it had not been made until the trial was imminent.
67. After the trial, Mrs Takhar instructed new solicitors and they procured a report from a handwriting expert. The expert concluded that there was strong evidence that Mrs Takhar's signature on the relevant document (and indeed other signatures attributed to her) had been transposed from previous forms.

68. Mrs Takhar instituted new proceedings seeking to set aside Purle's J.'s judgment. In the face of the defendants' claim that the proceedings were an abuse of process a preliminary trial took place on this issue.
69. The trial judge (Newey J) found that it was not an abuse of process. The defendants appealed. The English Court of Appeal upheld the trial judge. The defendants appealed to the UK Supreme Court. The UKSC dismissed the appeal. In the course of his judgment, Lord Kerr stated that the relevant principles to be applied were those as set out by the trial judge, stating:

"Newey J said [2015] EWHC 1276 (Ch) at [26] that the principles which govern applications to set aside judgments for fraud had been summarised by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners Ip [2013] 1 CLC 596, para 106:

"The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

I agree that these are the relevant principles to be applied. I also agree with Newey J's view (expressed at para 47 of his judgment) that Mrs Takhar's application to set aside the judgment of Judge Purle [2010] EWHC 2872 (Ch) has the potential to meet the requirements which Aikens LJ outlined. She should not be fixed with a further obligation to show that the fraud which she now alleges could not have been discovered before the original trial by reasonable diligence on her part. (at paras. 56-57)

70. Notwithstanding counsel's reliance on *Takhar*, the case does not assist the plaintiff in the within proceedings. Firstly, as can clearly be seen, *Takhar* concerned the relevant principles to be applied upon an application to set aside a judgment said to be obtained by fraud. This is not the case here, this matter being an appeal from the judgment of O'Connor J., a judgment which was rendered after the plaintiff's then counsel had clearly

and unambiguously set out the parameters of the plaintiff's claim, none of which alleged or even hinted at fraud on the part of the second defendant, or indeed the first defendant.

71. Even if I were to consider that the principles enunciated in *Takhar* to be somehow relevant to the present case, it remains the position that the height of the plaintiff's argument on the issue of fraud constitutes an invitation to this court (with reference merely to the 2001 Act) to find that the trial judge erred in failing to deduce fraud or unconscionability on the part of the second defendant. To my mind there is no merit in this argument absent any evidence of fraudulent conduct being furnished to this court and, more particularly, in the absence of any explanation as to why the alleged fraud was not canvassed in the court below.
72. In submissions, counsel for the plaintiff urged this court to adopt the approach of the Supreme Court in *Allied Irish Bank plc v. Ennis* [2019] IESCDET 225. In circumstances where the plaintiff had the benefit of a full plenary hearing with the opportunity to make his case, and the benefit of a considered judgment on the case made, I am satisfied that counsel's reliance on *Allied Irish Bank plc v. Ennis* [2019] IESCDET 225 is misplaced. To my mind, a salient factor in the decision of the Supreme Court to allow the defendant to appeal from the decision of the Court of Appeal was that the case involved an interlocutory application where judgment had been obtained against the defendant, a far remove from the present case where the plaintiff has had the benefit of a plenary hearing.
73. Therefore, for the reasons outlined above, I reject the plaintiff's contention that either the Mortgage Deed or Consent of 18 May 2011 is vitiated because he was not privy to the fact that a Sub-charge was entered into between SPL and the second defendant on 30 March 2011.

The impact of the Sub-Charge on SPL's transfer of the lands to the defendants

74. There is no Irish authority on the question of what impact the creation of a sub-charge has on a mortgagee's rights to subsequently enter into possession of the lands charged in its favour. Counsel for the defendants referred the court to the decision of the Court of Appeal of England and Wales in *Credit and Mercantile plc v. Marks* [2004] EWCA Civ 568. He submits that this case is authority for the proposition that the granting of a sub-charge does not divest the principal mortgagee of its rights against the mortgager.
75. In *Credit and Mercantile plc v. Marks*, the borrower alleged that the granting of a sub-charge by her mortgagee to Bank of Scotland deprived the mortgagee of its rights, including its rights of possession under the mortgage. On that basis the borrower alleged that an order for possession made against her was made without jurisdiction and should be set aside.
76. The English Court of Appeal considered the question whether there was any general principle that the granting by a charge of a sub-charge had the effect of either divesting the chargee of its rights against the charger by transferring them to the sub-chargee or alternatively, whether the sub-charge at least operated to suspend those rights during the

currency of the sub-charge. The Court of Appeal found that there was no such general principle, commenting at para. 38:

"...we do not think that any of the texts to which we have been referred supports a general proposition that, whenever there is a sub-mortgage, the principal mortgagee's rights against the mortgagers are transferred to the sub-mortgagee and lost by the principal mortgagee or in some way suspended otherwise than as provided in the sub-charge...In our view all depends upon the true construction of the sub-mortgage in the particular case."

77. Counsel for the defendants submits that, in the within case, the document which created the Sub-Charge in favour of the second defendant did not restrict in any way SPL's right to pursue any remedy arising under the terms of the Deed of Charge. He also argues that even if the Sub-Charge were to be found to be null and void for any reason, that cannot assist the plaintiff, as SPL, pursuant to the terms of both the Commitment Letter and the Mortgage Deed, was always entitled to obtain possession if the plaintiff defaulted on the loan.
78. First some general observations should be made in respect of sub-charges. Sub-charges are not a new form of security, and they have probably been a feature of commercial securitisation for as long as deeds of charge have been in use. They are a mechanism by which the lender who obtains security from a borrower but who may themselves need to raise money, either to make the initial lending or subsequently, can do so. They may involve a sub-charge of part only of the property the subject of the principal charge, and may secure a lesser sum and be for a different term. However there is nothing in principle wrong with creation of a sub-charge in respect of all the property and all the debt the subject of the principal charge, as was the case in *Credit & Mercantile plc v. Marks*, and as is the case in the Sub-Charge under consideration.
79. Secondly, there is an important distinction between a *transfer* of a charge, and a *sub-charge* that is given some statutory recognition. Section 62-67 of the Registration of Title Act, 1964 applies to charges. Section 62(1) provides that a registered owner of land may charge the land with the payment of money/interest, and "the owner of the charge shall be registered as such". Section 64 governs the transfer of charges, and subsection (1) provides –
- "(1) The registered owner of a charge may transfer the charge to another person as owner thereof, and the transferee shall be registered as owner of the charge".*
- Subsection (4) then provides –
- "(4) On registration of the transferee of a charge, the instrument of transfer shall operate as a conveyance by deed within the meaning of the Conveyancing Acts, and the transferee shall –*

- (a) *have the same title to the charge as a registered transferee of land under this Act has to the land, under a transfer for valuable consideration or without valuable consideration, as the case may be; and*
- (b) *have for enforcing his charge the same rights and powers in respect of the land as if the charge had been originally created in his favour."*

80. The creation and effect of sub-charges is not dealt with by the Act of 1964, but was addressed in the Land Registration Rules, 1972 in Rule 115 (now replicated by Rule 108 of the Land Registration Rules, 2012, which rescinded the 1972 Rules and came into effect on 1 February 2013 – see Rule 1; the new Rule 108 adopts exactly the same wording as the old Rule 115). Rule 115, prevailed at the time of the creation and registration of the Sub-charge, and states:

- "115. (1) The registered owner of a charge may charge it in the same manner as the registered owner of land may charge his land. Such a charge shall be described in the register as a sub-charge.*
- (2) *A sub-charge may be created, registered, transferred, disposed of and released in the same manner as a charge.*
 - (3) *On registration of a sub-charge or of any dealing therewith, the Registrar may, where he deems it expedient or conducive to clarity, transfer the title to the charge affected by the sub-charge to the register maintained under section 8(b) of the Act."*

Also of note is Rule 3(8) which requires entry in the third part of a Folio burdens and -

- "(b) the ownership of a registered charge, where it is not registered in the register maintained under Section 8(b) of the Act, and where the Authority permits, sub-charges on a registered charge and their ownership".*

81. From this it will be seen that by virtue of s.64 the transferee of a charge takes the title, rights and powers of the transferor, and effectively stands in their shoes as the new owner of that charge. The original chargee will no longer have any right or interest in the charge, and the transfer deprives them of any power to seek possession; it is the transferee of the charge who takes all the enforcement action. However the Act of 1964 does not apply this to a sub-chargee, and Rule 115 clearly envisages that the original chargee continues to be the owner of charge, subject to the sub-charge.

82. At the level of principle therefore, where there is a sub-charge the chargee under the principal charge continues to enjoy the rights and powers granted by that charge, including the power of sale, subject to any divesting of those rights or powers under the contractual terms of the sub-charge. Nothing in the Act of 1964, the amendment of that Act by the Registration of Deeds and Title Act, 2006, or the Land Registration Rules 1972 or 2012, would seem to alter this.

83. The Land and Conveyancing Law Reform Act, 2009 (as amended) does amend s.64(2) of the Act of 1964, but not in any way that is material (it restricts the transfer of a charge to the use of the form prescribed by the Land Registration Rules and not any other form). Part 10 concerns mortgages (which under s.3 includes "any charge or lien on any property for securing money or money's worth"); Chapter 2 largely re-enacts the provisions of the Conveyancing Act, 1881 relating to the powers and rights of the mortgagor; and Chapter 3 deals with the obligations powers and rights of the mortgagee. These provisions apply to a mortgage made after 1 December 2009, and so would have applied to both the Mortgage dated 21 December 2009 and the Sub-charge created in 2011. I address these later in this judgment, but of importance to the present discussion is that I cannot discern any statutory provision that derogates from, still less removes, the contractual or statutory rights of a mortgagee/chargee to seek possession or sell the property even where there exists a sub-charge whereby the chargee has sub-charged the entirety of the property secured. In particular sections 97-102 governing the taking of possession, and the statutory powers of a mortgagee to sell, do not differentiate between a mortgagee/chargee or sub-mortgagee or sub-chargee, and it would seem to follow that in principle the chargee who sub-charges continues to be entitled to enforce the charge and sell the property.

84. It would logically follow from this that if the chargee was in default under the terms of the sub-charge then the sub-charge would have a remedy in the first instance against the chargee. It is beyond the scope of this judgment to consider whether, in such circumstances, the subchargee could have enforcement rights directly against a chargor, but that might depend on whether or not the chargor was in default.

85. It is notable that in *Credit & Mercantile plc v Marks* the sub-charge to the Bank of Scotland related to the entirety of the security under the principal charge, and covered all sums owed by Ms. Marks under the principal lending, and in that respect bears comparison to the instant case. Noting the absence of authority, the English Court of Appeal looked at texts and articles before coming to its conclusion which I have quoted above. In the previous paragraph the court noted:

"37. One odd feature of the texts so far referred to is that none of them refers to the only decision on the point, namely Owen v Cornell (1967) 203 EG 29. The only exception is a later paragraph in the 11th Edition of Fisher and Lightwood, para 19.1 where the editors are discussing mortgagees' rights to immediate possession. In a footnote they include the statement that the assignment of rights under a mortgage to a sub-mortgagee does not destroy the right of the head mortgagee to go into possession and cite Owen v Cornell."

86. In *Owen v Cornell* Buckley J considered that the mere fact of a sub-mortgage did not prevent the principal mortgagee from exercising his rights under the principal mortgage. He concluded thus:

"The fact was that the legal estate in the term of 3,000 years still remained in the head mortgagee, notwithstanding that he had created out of it a subdemise for a

shorter period. There remained a nominal reversion of one day which was in the head mortgagee. The sub-mortgagee had a lesser estate carved out of the head mortgagee's estate. He [Buckley J] saw no reason in these circumstances why the head mortgagee ought not to be permitted to exercise his rights in respect of the legal estate vested in him to obtain possession of the property. He saw nothing which suggested that Parliament intended any other result."

In coming to this conclusion, he relied on a statement of Harman J in *Four Maids Ltd. V Dudley Marchall (Properties) Ltd* [1957] 1 Ch. 317 in what was a simple mortgage repossession case where he stated:

"The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right".

87. While *Owen v Cornell* concerned somewhat different facts, in that the sub-charge was by way of sub-demise that retained a nominal reversion, it does show that even where the chargee had substantially sub-charged the entire security the chargee's rights are retained. It persuaded the Court of Appeal to reach the decision that it did in *Credit & Mercantile plc v Marks*. The extract from Harman J in *Four Maids* also emphasises the importance of the contractual terms in mortgages, and the English Court of Appeal similarly emphasised that *"In our view all depends upon the true construction of the sub-mortgage in the particular case."*
88. While the English caselaw must be approached with some caution, because the statutory provisions there have diverged since 1925, it is of note that the Court of Appeal did not find anything in their Law of Property Act, 1925 or their Land Registration Act 1925 that might lead them to any other conclusion. The court accepted from consideration of their statutes that *"...a sub-charge creates a new mortgage term, not the original mortgage term transferred to the sub-mortgagee."* (para.48). I take a similar view of the Irish statutory provisions in the Act of 1964 and the Land Registration Rules, which make the distinction between the transfer of a charge and a sub-charge noted earlier. The appellant's argument that SPL's rights under the mortgage in some way became subsumed by the second defendant by virtue of the Sub-Charge, if correct, would mean that there was no distinction between the transfer of a charge and a sub-charge.
89. Accordingly, I accept the defendants' submissions on this issue. I am satisfied that by creating the Sub-Charge, SPL did not divest itself of legal title to the charges it held over the land in Folios 24835F and 12327. There is nothing in the Sub-Charge to suggest otherwise. Furthermore, I note that the "Heads of Claim" which set out the parameters of the plaintiff's case in the court below expressly conceded that legal title to the lands rested with SPL. It follows from this that SPL retained the power to recover possession, and to sell, and that the Transfer dated 8 November 2013 by SPL to the defendants in consideration of €400,000 was a valid exercise of SPL's powers notwithstanding the subsistence of the Sub-Charge. I also note that, following the Transfer on 13 November 2013, on 17 January 2014 the defendants became registered as "full owner as tenant in

common” of the lands in Folios 24835 F and 12327, and on the same day the Sub-Charge in so far as it was registered in Folio 37S in favour of the second defendant at entries 1 and 2 in respect of those two folios was cancelled – presumably because the Sub-Charge was redeemed by the transfer of ownership, or merged with the fee simple - and on the same date the PRA cancelled the Notes both Folios that had recorded the Sub-Charge. In this respect it must also be noted that the register is conclusive evidence of title (s.31 of the Act of 1964) in the absence of mistake or actual fraud neither of which apply in this case.

90. All in all, I agree with the view expressed by the trial judge that the plaintiff has no standing to advance the issue of the Sub-Charge, which is a matter more particularly for the defendants, *qua* purchasers of the lands, to raise with SPL. In any event, in coming to his decision, the trial judge took account of the second defendant’s testimony that his security in respect of SPL’s security over the lands had been satisfied.

Alleged non-compliance with the 2009 Act

91. Albeit that no written or oral submissions were made as to the relevance of ss. 97-103 of the 2009 Act, the grounds of appeal allege that the trial judge erred in failing to find that SPL and/or the second defendant did not comply with these provisions. It is the case, however, that in an affidavit sworn 12 January 2016, the plaintiff withdrew his reliance on ss. 100(1), (2) and (3) and 103(2). He is, therefore, not entitled at this juncture to revive any complaint he may have based on those provisions.
92. In the court below, what was addressed by the trial judge was the argument that the Consent executed by the plaintiff on 18 May 2011 was “ineffectual” insofar as SPL failed to take possession of the lands within seven days of the execution of the Consent as required by s.97 of the 2009 Act. It was argued that although clause 12.8 of the Mortgage Deed had expressly disapplied s. 97 of the 2009 Act the plaintiff’s surrender of possession on 18 May 2011 revived the provision. The case made at trial was that SPL had not gone into possession within seven days of the surrender date as required by s.97.
93. The trial judge rejected the argument canvassed by the plaintiff’s then counsel. He did so on the basis that the plaintiff had given over possession of the lands to SPL. I am satisfied that the trial judge was correct in finding no merit in the plaintiff’s argument. I also agree with the trial judge that if there was any flaw in the Deed of Transfer by dint of the plaintiff’s possession argument, that was a matter for the purchasers to take up with SPL. Any such flaw cannot assist the plaintiff.

The plaintiff’s reliance on 1995 Regulations

94. It was submitted on behalf of the plaintiff that given his status as a consumer, he must be afforded the protections of the Unfair Terms in Consumer Contracts Directive, as transposed into law in this jurisdiction by the 1995 Regulations. In this regard, counsel for the plaintiff relies on the dicta of Barrett J. in *AIB v. Coughlan* [2016] IEHC 752 (at paras. 4, 15 and 17). Again, this was not an argument canvassed in the High Court. In those circumstances, I fail to see how the plaintiff’s argument can be entertained at appellate

level, having regard to the test which is to be met by the plaintiff, as set out in *Lough Swilly Shellfish Growers*, which I find has not been met in this case.

95. In any event, the defendants do not accept that the plaintiff was a consumer for the purposes of the 1995 Act, notwithstanding that the Commitment letter described him as a consumer. I am inclined to agree with the defendants' argument. The evidence in the case shows that the monies borrowed by the plaintiff were for the purposes of property development, and to discharge a debt due to the Revenue. Even if the plaintiff were to be considered a consumer for the purposes of the 1995 Act, he has not shown how his status as a consumer has any impact on the Deed of Transfer of 8 November 2013, in circumstances where, for the reasons already set out in this judgment, I have rejected the arguments put forward on his behalf that the Deed of Charge should be set aside. In other words, save for the arguments advanced in relation to the Sub-Charge, all of which have been rejected for the reasons set out herein, the plaintiff has not pointed to, nor have I been able to discern, any term of the contract between the plaintiff and SPL that has operated unfairly against him.

96. For the reasons set out herein, I would dismiss the appeal.

Haughton J.

I agree with the judgment of Faherty J.

Murray J.

I also agree with the judgment of Faherty J.