

THE HIGH COURT

[2019 No. 159 CA]

**BETWEEN**

**GOVERNOR AND COMPANY OF THE BANK OF IRELAND**

**PLAINTIFF**

**AND**

**JOANNE PHELAN**

**DEFENDANT**

**JUDGMENT of Mr. Justice Michael MacGrath delivered on the 21st day of July, 2020.**

1. This is an appeal from an order for possession made pursuant to s. 62(7) of the Registration of Title Act, 1964 on 4th April, 2019 by His Honour Judge Quinn in respect of the defendant's premises comprised in Folio 62708F, County Meath (*"the mortgaged property"*). This is her principal private residence. A stay of twelve months was placed on that order.
2. On the 20th February, 2006 the ICS Building Society (*"the Society"*) offered the defendant, Ms. Phelan, facilities for the purchase of the mortgaged property in the sum of €600,000 repayable over 35 years. The loan offer was accepted and is stated to have been signed by the defendant on the 12th July, 2006. A deed of mortgage was executed on the 22nd August, 2006 between Ms. Phelan and the Society. On the 20th August, 2007 a charge was registered on the folio in favour of the Society.
3. On 5th June, 2014, pursuant to the Central Bank Act, 1971 (Approval of Scheme of Transfer between the Society and the Governor and Company of the Bank of Ireland) Order, 2014 (S.I. 257 of 2014), the interest of the Society in the mortgaged property was transferred to the plaintiff.
4. The plaintiff maintains that the defendant fell into arrears and defaulted in her repayments. A letter of demand was sent to her on the 8th January, 2016. The arrears were stated to be €96,914.16. The plaintiff demanded repayment of the total sum outstanding, inclusive of the amount advanced, being €607,075.45. A letter demanding recovery of possession of the premises was sent to her on the 6th July, 2016. Proceedings for possession were issued in the Circuit Court on 14th September, 2016.
5. The application for possession is grounded on the affidavit of Mr. John Reid sworn on the 2nd September, 2016. He is an employee and legal case manager of the plaintiff. He avers that his legal advice is that on service of the letter of demand, the entire loan became immediately due and payable in full, that monthly instalments ceased to fall due and there was therefore no longer any arrears of such instalments (i.e. overdue monthly instalments) as immediate repayment of the entire loan had been demanded and the plaintiff's enforcement powers under the mortgage became immediately exercisable. Nevertheless, and for the assistance of the court, Mr. Reid exhibits a form of statement of the loan account *"prepared as if the entire loan had not been called in as it was"*. This statement, which is dated 2nd September, 2016, was produced under Mr. Reid's direction by mechanical means directly from the Mortgage Accounting System (*"MAS"*) and was compared by him with the original MAS data and shows *"what would now have been the*

*continued accrual of instalments, and what would have been the current 'arrears' of such instalments, had the entire loan not been called in as it was".* He avers that as appears from the statement, the monthly instalments would then have been €893.45, the current arrears would then have been €105,639.65 which represented 54 months of missed repayments. Mr. Reid avers that the original borrowings from the Society and the current liabilities to the plaintiff, amounted to €605,442.45. The statement shows that Ms. Phelan made the required repayments until February, 2009 when arrears began to accrue. Ms. Phelan explained that her business encountered difficulty due to the downturn in the economy. She continued to make payments, albeit not always of the full required amount and not always in a regular manner, until 24th October, 2016. The closing balance on the account as per the statement of 2nd September, 2016 was €605,442.45. A statement exhibited in a later affidavit sworn by Mr. Reid on 29th August, 2016 indicates that at the end of August, 2018 the arrears would have grown to €151,099.05. Two further payments of €500 were made by Ms. Phelan in October, 2016. An updated statement prepared as of 23rd January, 2019 shows that arrears *would have grown* to €160,033.55.

6. The plaintiff is subject to the regulatory codes drawn up by the Central Bank/ the Irish Financial Regulation Authority as provided by s. 117 of the Central Bank Act, 1989 including the Code of Conduct on Mortgage Arrears ("CCMA") published by the Financial Regulator in February, 2009. Mr. Reid avers that the plaintiff complied with its obligations under the CCMA. Ms. Phelan was advised that the Bank had decided that an alternative repayment arrangement ("ARA") was not appropriate because her mortgage repayment history was not satisfactory. A previous repayment arrangement had been put in place, but she was unable to comply with its terms. Ms. Phelan was advised that she had a right to appeal that decision to the Mortgage Appeals Board and that her loan was being dealt with outside the plaintiff's Mortgage Arrears Resolution Process ("MARP"). Options such as voluntary sale, voluntary surrender, trading down and participation in a mortgage to rent scheme were outlined. She was written to on 19th August, 2016 by the solicitor representing the plaintiff who informed that while she was outside the MARP process, it was not too late for her to attempt to reach an alternative repayment arrangement. She was urged to take legal and/or financial advice including if appropriate advice from the local MABS office and that if she had any new or realistic proposals to make she could contact the plaintiff directly and forward an up to date vouched standard financial statement setting out such new proposal. The letter concluded that if something could be agreed, the legal process may be put on hold.

**Points of Defence**

7. Pursuant to directions given by the County Registrar on the 27th November, 2017, Ms. Phelan, who does not have legal representation, served and filed a replying affidavit which was sworn by her on 12th January, 2018. She raised the following points of defence:
  1. The Circuit Court did not have jurisdiction to deal with the application.
  2. She did not owe the plaintiff the sum claimed.

3. Confirmation, to be sworn on affidavit, was sought by her that she was never overcharged.
4. A forensic report which she had obtained proved that she had been consistently overcharged throughout the life of the mortgage.
5. The plaintiff had failed to provide her with full discovery of original documentation and information despite a request under the Data Protection Acts. Discovered documents had been redacted.
6. She was not afforded the opportunity to inspect the original property deeds.
8. Mr. Reid in reply, by affidavit sworn by on 29th August, 2018, avers that the proceedings were properly brought in the Circuit Court as the mortgage was created by deed executed before the commencement of the Land and Conveyancing Law Reform Act, 2009 ("*the Act of 2009*"). The Circuit Court had exclusive jurisdiction pursuant to the provisions of ss. 3(1) and 3(2) of the Land and Conveyancing Law Reform Act, 2013 ("*the Act of 2013*"). With regard to the data access requests, he avers that the defendant was replied to on 12th April, 2017 stating that the plaintiff did not have a record of a request to inspect the title deeds.
9. Mr. Reid explained that the loan account was subject to interest which was based on a tracker rate. A detailed examination had been conducted and he avers that the correct interest rates were applied at all times. The loan was not affected by tracker status issues. Given that the loan had been called in, the amount outstanding on the 24th January, 2019 was €660,033.55.
10. By letter dated 21st January, 2019, Ms. Phelan was informed that she could inspect the documents subject to a fee in respect of time/costs. She was offered facilities for inspection in the solicitor's offices. She was informed that the counterpart of the mortgage deed was filed at the Circuit Court office in Trim, and that she could inspect it by applying to that office. The originals of both mortgage deeds had been lodged in the Land Registry by the solicitor acting for Ms. Phelan in the purchase of the property and she was advised that if she had any concerns about title, or if she wished to review the registered deed, she should in the first instance approach the Land Registry.
11. Ms. Phelan swore and filed further affidavits on the 12th and 18th January, 2019 in which she made the following points:
  1. She was not legally represented and had difficulty understanding and engaging with the proceedings.
  2. She repeated that she had been overcharged interest. A report had been prepared by Mr. Greijmans of PMJ Audits Europe on 14th November, 2018 in support of this contention and which reported alleged overcharging of €113,000.

3. She has a constitutional right to legal aid and referenced the decision of the European Court of Human Rights in *Steel and Morris v. United Kingdom* [2005] EMLR 15 in support.
4. Pursuant to Article 6 of the European Convention on Human Rights, she was entitled to a fair and impartial hearing and fair procedures. Reliance is placed on *Connors v. United Kingdom* [2004] ECHR 223. She submitted that she has a constitutional right to cross examine witnesses.
5. There was an onus on the plaintiff to prove a pressing social need to possess her property in accordance with the provisions of Articles 8 to 11 of the European Convention on Human Rights.
6. That as a matter of public interest and public policy hardship would befall the Irish taxpayer as a result of her being rendered homeless, whereas the same hardship would not befall the plaintiff and therefore the doctrine of proportionality dictated that the plaintiff should not be entitled to recover possession. Reliance is placed on Article 7 of the Charter of Fundamental Rights and Freedoms and it is claimed that the possession of her home is disproportionate.
7. She had not been afforded an adequate opportunity to inspect the original documents.
8. The terms of the contract were unfair. She is a consumer within the meaning of the European Communities (Unfair Terms in Consumer Regulations) Act 1995, implementing EU Directive 93/13 and there is an obligation on the court to assess the contract in this regard. The decision of the European Court of Justice in *Aziz v. Caixa d'Estalvis de Catalunya* (2013, Case-415/11) is relied upon.
9. It is also claimed that the solicitor for the plaintiff is bound by his Code of Conduct to assist the court in reaching a just decision. Given the complexity of the case, the application ought to be heard only in the higher courts.
12. In an affidavit sworn on the 2nd April, 2019, Ms. Emma Morrison, solicitor in the firm representing the plaintiff confirms that she wrote to the defendant on two occasions, 25th January, 2019 and 5th February, 2019, in which she offered facilities for inspection of original documentation. A meeting took place on the 19th February, 2019 between Ms. Morrison, the defendant and a Mr. Gleeson, who accompanied her to that meeting. Ms. Morrison avers that the title deeds of the property and the original loan offer agreement were handed to Ms. Phelan. Mr. Gleeson inquired as to the whereabouts of the counterpart mortgage deed. He was informed that it was in the Circuit Court office in Trim and that the original mortgage deed was in the Land Registry.

**The tracker mortgage interest issue**

13. Ms. Phelan's contention that she has been overcharged interest is based on an opinion of Mr. Greijmans expressed in his report of 14th November, 2018 and in an affidavit subsequently sworn for the purposes of this appeal on 12th November, 2019. He works

with PMJ Audits Europe and holds a bachelors degree of Business Administration and Business Informatics from Fontys Hogeschool, Eindhoven. He has 25 years of experience in programming in 4GL Progress Language in which time he created programmes and ICT systems for businesses including a system for the analysis of mortgage accounts and of mortgage interest rates and charges. He emphasises the wording of the interest provision contained in special condition 11 of the loan agreement. The essence of the argument is that the loan is based on a variable interest rate which would not exceed 1.25% above a rate struck by the European Central Bank ("ECB"), the European Central Bank main refinancing operations minimum bid rate ("repo rate") and that since September, 2008 this interest rate has not existed.

**Condition 11A**

14. Condition 11A of the loan agreement provides as follows:-

*"11A. subject to Part B of this condition, the interest rate applicable to the loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 1.25% above the European Central Bank main refinancing operations minimum bid rate ("repo rate") for the term of the loan. Variation in interest rates shall be implemented by the Society not later than close of business on the 5th working day following a change in the repo rate by the European Central Bank. Notification shall be given to the borrower of any variation in interest rate in accordance with the general conditions fixed in (b) of this offer letter. In the event that, or at any time, the repo rate is certified by the lender to be unavailable for any reason the interest rate applicable to the loan shall be the lender's prevailing home loan variable rate."*

15. Mr. Greijmans' view is that this rate ceased to apply in October, 2008 consequent on the taking of measures by the ECB Governing Council to address the serious issue of liquidity which faced banks at that time. He maintains that under the contract the bank was obliged to certify that the repo rate was no longer available. This was not done, and Ms. Phelan was not notified of any change in accordance with the contract. In failing to certify that the minimum bid rate was unavailable, the bank was not entitled to continue to charge interest from 8th October, 2008. On his analysis, Ms. Phelan was overcharged by €113,486.54 up to 28th September, 2018.
16. The plaintiff and experts who have sworn affidavits of its behalf disagree. In an affidavit sworn on the 2nd April, 2019 Mr. Reid sets out a table of the interest rates which applied between August, 2006 and March, 2016 and contends that Mr. Greijman's opinion is based on a mistaken premise, namely that the European Central Bank Main Refinancing Operations ("ECB MRO") interest rate ceased on the 8th October, 2008. This is not the case. The ECB MRO interest rate continued to be set throughout the period and was adjusted from time to time by the ECB. The defendant's loan tracked this rate as agreed.
17. Further, and as referred to in more detail below, Mr. Tony Morley and Mr. Ciaran Rogers, experts retained by the plaintiff, contend that Mr. Greijmans is not qualified to comment on this issue and that he misunderstands the condition in the contract. They maintain that

Mr. Greijmans confuses the *interest rate applicable* with the *tendering procedure* and that the ECB MRO has always applied. Under the defendant's loan agreement, she enjoys a tracker mortgage with the applicable interest rate being tied to and tracking the ECB MRO minimum bid interest rate at a margin of 0.85% for the first twelve months of the loan and thereafter at a margin of 1.25%.

**Affidavits on appeal**

18. Following the service of the notice of appeal a number of further affidavits were filed which have been relied upon on this appeal.

**(a) Ms. Phelan**

19. In an affidavit sworn on 25th November, 2019, Ms. Phelan avers that the copy of the contract which was furnished to her at the offices of the solicitor on the 19th February, 2019 was unsigned and that this was noted by Mr. Gleeson. No explanation was forthcoming. It is claimed, therefore, that the plaintiff is in breach of the provisions of the Act of 2009, ss. 84 and 91 because she was not afforded the opportunity to see the signed loan offer agreement. She also avers that she was not provided with legal advice and was simply requested to *sign on the dotted line*. All of her dealings were through a broker and a solicitor. Ms. Phelan exhibits two letters sent to her, both of which are dated 31st March, 2017 from the plaintiff's Mortgage Arrears Support Unit. They show different figures for arrears with one of them outlining the redemption balance of €606,931.45. The arrears are stated to be €49,123.04 in one letter and €53,030.96 in the other. The point made is that these letters were issued after the proceedings were instituted and are the "*final demand letters*". They are not, however, relied upon by the plaintiff in these proceedings and their legal effect, if any, on the issues in the case, or on the earlier demand letter was not further articulated at hearing. Reference is made to these letters in the same paragraph of Ms. Phelan's affidavit in which she queries whether there has been a breach of the data legislation in that occupants were served with the Civil Bill, the possession order and the appeal and whether the Irish Credit Bureau and the Central Bank were informed before the loan was called. It is not made clear how the alleged breach of data protection legislation might give rise to a defence to the plaintiff's claim.

20. Ms. Phelan also avers that the Society failed to provide her with a cooling off period to which she claims entitlement in accordance with the provisions of the European Communities Cancellation of Contracts Negotiated Away from Business Premises Act, 1989.

21. In a further affidavit sworn on the 10th December, 2019 Ms. Phelan requests the court to approve legal aid for her, failing which she requests that a question be referred to the European Court of Justice. She repeats that the summary nature of the possession procedure is in contravention of the European Convention on Human Rights, Article 6.

**(b) Mr. Greijmans**

22. Mr. Greijmans in his affidavit sworn on 12th November, 2019 avers that had the Society intended to use the term main refinancing operations rate ("*MRO*") they should have said so in the contract. Rather, a more specific definition was employed which read "*main*

*financing operations minimum bid rate*", a rate which has not been available since 15th October, 2008. He refers to an extract from the ECB Statistic Pocket Book, July, 2014, s. 8 which, under the heading "*Monetary Policy*", addresses "*Key ECB Interest Rates*" from 11th May, 2001 to 11th June, 2014. The explanation for the change in interest rate which occurred in October, 2008 is outlined in a footnote in that document as follows:-

*"On 8 October 2008 the ECB announced that, starting from the operations to be settled on 15 October 2008, the weekly main refinancing operations would be carried out through fixed rate tender procedures with full allotment at the interest rate on the main refinancing operations."*

As is clear from the table contained in the booklet, the MRO is divided into two columns. These are "*Fixed rate tender procedures, Fixed rate*" ("*FRT*") and "*Variable rate tender procedures, Minimum Bid rate*" ("*MBR*"). Mr. Greijmans maintains that when the rates shifted from the MBR to the FRT, the MBR was no longer available. This ought to have led to the activation of the escape clause in the condition. This did not take place as it should have. Significant overcharging of interest occurred as a consequence of the Society's failure to certify to Ms. Phelan that the repo rate was unavailable and moving her onto the ECB MRO FRT rate without her consent. The amount overcharged is €113,486.54.

**(c) Mr. Tony Morley**

23. Mr. Tony Morley, the Bank of Ireland Head of Group Balance Sheet Management and an employee of the plaintiff, in an affidavit sworn by him on the 27th November, 2019 avers that Mr. Greijmans is mistaken in asserting that the two columns under one MRO heading meant that there were two separate and distinct interest rates (*i.e.* the FRT and the MBR). He avers that Mr. Greijmans confuses the ECB's MRO interest rate and the ECB's MRO *tender processes* which are two distinct matters and suggests that Mr. Greijmans displays a misunderstanding of the monetary policy implementation framework of the ECB and of the use of differing tender procedures to allot liquidity within the euro zone using the weekly MRO of the ECB. He provides definitions of the various terms and states that the term "repo" when used in connection with the ECB's open market refinancing operations and refers to the process whereby qualifying institutions which borrow money from the ECB, whether through its MRO or its Long Term Refinancing Operations ("*LTROs*"). This occurs by way of a re-purchase agreement. Collateral is provided for the loan and at the end of the period the loan is repaid with the collateral being repurchased or redeemed. The rate of interest charged by the ECB on the MRO or LTRO re-purchase agreement is fixed for the duration of the repurchase agreement. He avers that it has never been the case that two separate or distinct ECB MRO interest rates existed. From June, 2000 to October, 2008, when providing short term liquidity to the Euro system *via* its MRO, the ECB made a limited pool of liquidity available for qualifying institutions. They could apply, or 'bid', for funds in respect of each lending operation. A minimum bid rate was set for the operation. A qualifying institution who wished to have an improved chance of getting its full required allotment could bid at a higher rate for all or part of that allotment than the minimum rate set by the ECB. The changes in October, 2008 occurred as a result of the decision of the ECB's Governing Council, when faced with the then

rapidly deteriorating international financial situation, to make available an unlimited quantum of liquidity subject to satisfactory collateral to qualifying Eurozone banks.

24. Mr. Morley refers to a more recent version of the ECB Statistics Pocket Booklet. A number of rates are outlined. These include (i) a deposit facility rate which banks may use to make overnight *deposits* with the euro system, (ii) a marginal lending facility (mainly for overnight loans) and (iii) the main refinancing operations (MRO). The historical rates of interest of the ECB MRO is set out across two columns, one sub headed fixed rate tenders - mixed rate, and the other being variable rate tenders- minimum bid rate (in which the MRO interest rate appears). At no point have entries been made in both columns at the same time. There has only been one interest rate on the main refinancing operations at any time. He avers that the relevant ECB interest rate did not cease to exist, nor did it become not *available* in October, 2008. The ECB has continued, as it did before 2008, to fix and to publish a single ECB MRO interest rate for the time being. The wording employed in the contract refers to the rate at which the defendant's interest rate is tracked or tied. Mr. Morley avers that the word 'minimum' in the contract has the effect that if, as was possible in 2006 at the time of the advancement of the loan, the bank borrowed from the ECB MRO on a tender which included a bid at a margin over the then published ECB MRO interest rate, the defendant's interest rate would track the published rate, as the lowest or minimum rate, and would not take account of any premium paid by the bank to secure the funds which may have been over and above the published interest rate. The interest rate charged to the defendant has always tracked this rate. If for some reason access to the ECB MRO lending rate were to cease being available to the bank, such as, for example if Ireland was to leave the Eurozone - then under the terms of the loan agreement, the defendant's loan would thereafter be subject to the bank's prevailing home loan variable rate. This would be to the defendant's disadvantage as, according to Mr. Morley, throughout the period the home loan variable rate tended to be higher and sometimes significantly higher than the preferential tracker interest rates. He suggests that the substance of the defendant's contention is that she should have been moved off the tracker rate and on to a less preferential variable rate. This is despite the thrust of the Central Bank's tracker mortgage key examination process being to ensure that this does not happen. He also refers to published documents from the ECB's website post October, 2008 which continued to refer to '*minimum bid rate*'. Such publications include press releases in November, 2008 (regarding an ECB monetary policy decision regarding MROs), March, 2010 (concerning a minimum bid rate of the MRO settled in March 2010) and a monthly bulletin published in June, 2010 (in the context of an LTRO).

**(d) Mr. Ciaran Rogers**

25. Mr. Rogers is an economist holding the degrees of Bachelor of Commerce and Master of Business Science from University College Dublin. He was employed as an economist by the Central Bank from 1995 until 1998. From 1998 he moved from the Central Bank to the European Central Bank and worked as an economist in Frankfurt until 2005. He then returned to the Central Bank where he took up the position of head of the marketing operations desk, acting as a liaison between Irish banks and the ECB in the implementation of the ECB's main refinancing operations. In 2010, he left the Central

Bank to work in the private sector. In his first affidavit which was sworn on 28th November, 2019, he supports the views expressed by Mr. Morley and confirms:

- a. There is only one live MRO tender at any point in time.
  - b. There is only one MRO interest rate for each such tender which is fixed by the ECB Governing Council.
  - c. It is mistaken to equate an increase in the quantum of liquidity released in MRO lending operations (coupled with a consequential change from a variable to a fixed rate tender procedure as happened in October, 2008) with withdrawal or abolition of a specific ECB interest rate.
26. A further affidavit was sworn by him on 14th January, 2020 in reply to a further affidavit sworn by Mr. Cormac Butler in support of the defendant's position. Mr. Butler's affidavit is considered below. Mr. Rogers questions Mr. Butler's qualifications to express an opinion on ECB monetary policy implementation and states that in seven years working in the ECB and eight years in the Central Bank he never came across him. He observes that a report which Mr. Butler published, and which is referred to by him, was commissioned by individual members of the European Parliament and not by the Parliament itself. He states that Mr. Butler is incorrect in his interpretation of the ECB statistics pocket book and that he displays a fundamental misunderstanding of the monetary policy implementation framework of the ECB and its different tendering procedures. Again, the point is made that Mr. Butler confuses the MRO interest rates with the MRO tender process and that it is incorrect to equate a change from variable rate tender procedures to fixed rate tender procedures with the withdrawal or abolition of an ECB interest rate. He avers that Mr. Butler's central mistake is that MROs were conducted through a number of different types or categories of interest rates which could be abolished or discontinued and replaced by another.
27. Mr. Rogers exhibits a publication from the Central Bank of Ireland, entitled "*Documentation on Monetary Policy Instruments and Procedures 5 August 2019*" and he refers to various extracts and definitions contained therein of 'fixed rate tender procedure' and 'variable rate tender procedure'. He maintains that where the fixed rate MRO tender procedure is used, all bids will be at the MRO interest rate set and published by the ECB for that tender, but where the variable rate tender procedure is used there can be different settlement interest rates for that tender. He reiterates that there is only one live MRO tender at any one time and one MRO interest rate.
28. Mr. Rogers also refers to a publication on the implementation of the Eurosystem monetary framework published by the ECB - *Guideline (EU) 2015/510 of the 19th December, 2014 on the implementation of the Eurosystem monetary policy framework (General Documentation Guideline) (ECB/2014/60)* - which provides at Article 6.6 that "MROs are executed by means of fixed rate tender procedures or variable rate tender procedures, as decided by the Eurosystem". Article 6.5 provides that the ECB Governing Council is empowered to change the interest rate for the MRO's at any time. Article 34.1 provides

for the imposition of a minimum bid rate. He suggests that the effect of all of this is that the ECB is empowered to, and does, decide both the applicable interest rate for its MROs and separately whether to administer them through a fixed rate or variable rate tender procedure.

**(e) Mr. Cormac Butler**

29. Mr. Cormac Butler is a banking consultant based in London. He has trained bank regulators and is the author of a publication "*Accounting for Derivatives and Mastering Value at Risk*". He avers that he has given evidence to the House of Lords, the European Parliament and the Irish Parliament. Ms. Phelan handed to the court a record of a meeting of the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach dated 28th May, 2019, which was addressed by Mr. Butler. In his affidavit sworn on the 9th December, 2019, he supported the position taken by Mr. Greijmans. In his view, the MRO minimum bid rate ceased to apply on 15th October, 2008 and was replaced by a fixed rate which the bank was obliged to apply after that date. These descriptions were chosen by the ECB. They are separate interest rates and if they were the same there would be no requirement to label them separately or to have two separate columns of entry. He acknowledges that the change was necessary due to a change in the tendering system but in his view the bank cannot use any replacement rate until it certifies and notifies the customer that it has made the appropriate change.
30. Mr. Butler asserts that the plaintiff made two errors in their dealings with the defendant in referring specifically to the ECB MRO minimum bid rate. First, the wording of the contract was chosen by the plaintiff. They ought to have described the rate in the contract without reference to "*minimum bid rate*". Second, they ought to have notified customers as soon as that rate became unavailable. The rate was altered to a fixed rate without notification. He also describes Mr. Morley's definition of 'repo' as revised and vague and which excludes reference to that which is contained in the contract *i.e.* 'Main Refinancing Operations Minimum Bid Rate'. He queries the relevance of the use of the term in the context of LTRO's. Mr. Butler also states that the change made in October, 2008 was considered to be significant. It was reported as such in the press. The change altered the monetary policy regime. It followed that the MRO fixed rate is different from the MRO minimum bid rate. He points to another publication in December, 2008 where the term 'minimum bid' was dropped. He also states that Mr. Morley is incorrect to conclude that the minimum bid rate applies to both MRO and LTRO operations. The minimum bid rate for three month LTROs is obtained from the fixed rate of the MRO and it cannot be inferred that the MRO continues to use a minimum bid rate. The minimum bid rate applies to LTROs only. They are not referred to in the contract.
31. In a further affidavit sworn on 22nd January, 2020, Mr. Butler takes issue with the querying of his credentials. He confirms that he has specialist experience in the Eurosystem collateral framework and is regularly called upon by banks in London to deal with issues associated with intraday liquidity risks, payment systems and Central Bank Euro funding, all of which require expert knowledge of ECB and Bank of England funding.

32. Mr. Butler also refers to a Central Bank of Ireland document entitled "Tracker Mortgage Examination: Framework for conducting the Tracker mortgage Examination". He maintains that the defendant's case comes within appendix 3 to the framework because the customer has the right to have the main refinancing operations minimum bid rate applied where relevant, instead of the fixed rate and that the enforcement action by the plaintiff is harmful to the defendant. He reiterates that none of the witnesses who have sworn affidavits on behalf of the plaintiff can dispute the fact that in October, 2008 the ECB stopped using the 'Main refinancing operations variable rate tender procedure'. Condition 11(a)(ix) of the contract provides no other method of calculating the applicable rate than those specified in the contract. After 15th October, 2008 what was sought to be imposed was neither of those rates, *i.e.* the minimum bid rate plus the margin of 1.25% or the home loan variable rate. He rejects the contention that he confuses the ECB's MRO interest rate and the MRO tender process and makes a general point that in 2006 the banks misrepresented their financial situation making the financial crisis inevitable. He gave evidence on this to the Committee on Finance, Public Expenditure and Reform in May, 2019. Finally, he states that the plaintiff did not have the legal capacity to enter the loan arrangement but does not expand on this.
33. Counsel for the plaintiff, Mr. O'Neill S.C., submits that if the defendant's experts are correct in their construction of matters, all Bank of Ireland mortgages which have this clause would not have required investigation in accordance with the framework document; which inquiry concerned the refusal of the banks to permit borrowers to revert to tracker mortgages. He points out that banks in London are not in the euro currency zone and Mr. Butler is silent on his qualifications to speak on such matters.

**(f) Mr. Reid**

34. In his affidavit sworn on the 10th December, 2019 Mr. Reid exhibits the original mortgage loan offer which contains Ms. Phelan's signature.

**Summary possession**

35. This is an application for summary possession of the plaintiff's home. The court must exercise particular caution on such application. The principles applicable on an application for summary judgment apply with equal force to an application for summary possession. In *Aer Rianta v. Ryanair Ltd* [2001] 4 I.R. 607, Hardiman J. stated that the fundamental question is:-

*"Is it very clear that the defendant has no case? Was there either no issue to be tried or only issues which were simple and easily determined? Did the defendant's affidavits fail to disclose even an arguable defence?."*

36. In *Harrisrange v. Duncan* [2003] 4 I.R. 1, McKechnie J. stated that the power to grant summary judgment should be exercised with discernible caution. He amplified the applicable principles as follows, at p. 7:-

*"From these cases it seems to me that the following is a summary of the present position:-"*

- (i) *the power to grant summary judgment should be exercised with discernible caution;*
- (ii) *in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
- (iii) *in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
- (iv) *where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
- (v) *where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
- (vi) *where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
- (vii) *the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;*
- (viii) *this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
- (ix) *leave to defend should be granted unless it is very clear that there is no defence;*
- (x) *leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
- (xi) *leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
- (xii) *the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be. "*

37. Thus, as McKechnie J. observed, the overriding determinative factor is the achievement of a just result, whether that be by granting liberty to enter judgment or by granting liberty to defend. The court must be mindful of the constitutional right of access to justice either to assert or to respond to litigation. If the suggested defence is no more than a mere assertion of a given situation, leave to defend should not be granted; neither should it be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he or she has a genuine defence to the action. It is not up to a defendant to prove that his/her defence will probably succeed or that success is not improbable. The test is whether it amounts to an arguable defence.
38. Following the conclusion of the hearing, Ms. Phelan made further application by way of notice of motion dated 9th March, 2020 seeking to have the appeal transferred to plenary hearing. The plaintiff subsequently confirmed that it did not wish to make submissions on this application. Given that this is an appeal from the Circuit Court from an order obtained on a summary basis, if this court accepts that grounds for an arguable defence have been established, the appropriate order is to allow the appeal and to remit the case back to the Circuit Court for a full hearing on the issue.

#### **Ground of defence advanced**

39. It should be observed that a number of the grounds of defence advanced by Ms. Phelan have been addressed in decisions of courts in this jurisdiction in recent times. The plaintiff relies on such authorities.

#### **Jurisdiction**

40. Section 3 of the Land and Conveyancing Law Reform Act, 2013 which is entitled - "*Proceedings relating to certain mortgages to be brought in Circuit Court*"- provides:-

*"3.(1) This section applies to land which is the principal private residence of—*

*(a) the mortgagor of the land concerned, or*

*(b) a person without whose consent a conveyance of that land would be void by reason of—*

*(i) the Family Home Protection Act 1976 , or*

*(ii) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ,*

*and the mortgage concerned was created prior to 1 December 2009.*

*(2) Subject to subsection (4), proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates and which land is land to which this section applies shall be brought in the Circuit Court.*

*(3) The jurisdiction of the Circuit Court to hear and determine proceedings referred to in subsection (2) where the land concerned is land to which this section applies shall be exercised by the judge of the circuit where the land or any part of it is situated.*

(4) *Subsection (2) does not preclude a person initiating proceedings in the High Court where other proceedings relating to the enforcement of the mortgagee's rights under the mortgage concerned have been commenced in that court prior to the coming into operation of this section where those other proceedings have not been determined.*"

41. I am satisfied that s. 3 of the Land and Conveyancing Law Reform Act, 2013, applies and confers jurisdiction on the Circuit Court in this matter. The mortgage was created on the 22nd August, 2006, a date preceding 1st December, 2009 and it was registered as a charge on 20th August, 2007. The property is the principal private residence of the defendant and is situated in the circuit of the court in which the proceedings were instituted. It seems to me, therefore, that no arguable ground of defence arises under this heading.

**European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 (S.I. 27/1995)**

42. The defendant calls in aid the Consumer Contracts Directive 93/13/EC as transposed into Irish law by the European Communities (*Unfair Terms in Consumer Contracts*) Regulations 1995 ("the Unfair Terms and Regulations"). While she has not pointed to any particular term which is alleged to be unfair, she maintains that as this is a contract between a consumer and a business and contains non individually negotiated terms, it must be in plain terms. She submits that a contract may be classified as unfair if it causes significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

43. Article 4(2) of the Directive provides:-

1. *Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.*
2. *Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language."*

Regulations 3 and 4 are in similar terms.

44. Mr. O'Neill S.C. relies on the decision of McDermott J. in *Grant v. County Registrar for County Laois* [2019] IEHC 185 where it was held that these provisions do not apply to the main subject or principal terms of the agreement. This is also reflected in *Permanent TSB v. Davis and Davis* [2019] IEHC 184, where McDermott J. considered the decision of the CJEU in *Aziz* and that of the High Court in *Allied Irish Banks v. Coughlan* [2016] IEHC 752. Referring to the inquiry obligation placed on the court by the Directive, he observed:-

*"...As appears from the authorities cited that obligation also devolves upon this court on appeal against the order of the Circuit Court where it has 'the legal and factual elements necessary for that task'. In this case no claim was initially made by the defendants despite the extensive number of affidavits sworn that any of these terms were unfair within the meaning of the Directive or the Regulations though an issue was subsequently raised in further affidavits sought to be relied upon in the course of the appeal. The issue raised was limited to whether the Circuit Court ought to have considered of its own motion whether the terms of the loan and mortgage were unfair within the meaning of the directive and regulations. However, I am satisfied that in this appeal, which is a hearing de novo, this court has an obligation to consider whether the terms relied upon are unfair if they fall within the scope of the directive."*

45. McDermott J. noted that pursuant to Article 4(2) of the Directive the assessment shall relate neither to the definition of the main subject matter of the contract nor the adequacy of the price and remuneration, as against the services or goods supplied in exchange. He continued at para. 30 of *Davis*:-

*"...the court is satisfied that the terms relied upon by the plaintiff in seeking an order for possession are terms which constitute "the main subject matter of the contract" under Article 4(2) of the Directive which provides that the assessment of an unfair term shall not relate to "the definition of the main subject matter of the contract nor the adequacy of the price and remuneration on the one hand, as against the services or goods supplied in exchange on the other insofar as these terms are in plain intelligible language"... Regulation 4 is to the same effect. The defendants are customers within the terms of the Directive and Regulations. However, it is clear that the main subject matter of the agreement was that all monies advanced under the loan would be repaid by monthly instalments and at a variable interest rate over a period of 35 years. The loan would be secured on the family home: it was so secured. If the borrowers defaulted on their repayments the plaintiff became entitled to seek an order for possession having made the appropriate demand for repayment and made good their security. These terms were in clear and intelligible form and were fully understood by each of the parties to involve the offering of the defendant's family home and principal place of residence as security for the loan and that in default of making the agreed repayments the security might be realised by the lender..."*

46. McDermott J. accepted that the terms relied upon by the plaintiff in seeking an order for possession constituted the main subject matter of the contract under Article 4(2). Those terms were that all monies advanced under the loan would be repaid by monthly instalments and at a particular interest rate. The loan was secured over the family home. If the borrower defaulted on repayments the plaintiff became entitled to seek an order for possession having made good their security and having made the appropriate demand for repayment. McDermott J. was satisfied that the terms were in clear and intelligible form and were fully understood by each of the parties to involve the offering of the defendant's

family home and principal place of residence as security for the loan being advanced and to make repayments. It was also understood that in default of making repayments, the lender's security might be realised.

47. Reliance is also placed by the plaintiff on the decision of Meenan J. in *AIB v. O'Donohoe* [2018] IEHC 599. It was also held that the provisions of the general terms and conditions of offer of the mortgage loan and the mortgage conditions that related to the payment of interest did not amount to a breach of the Regulations. The amount advanced, the term of the loan and the interest payable constitute the "*main subject matter of the contract*". Therefore, Article 4 of the Regulations did not apply to the contract insofar as the payment of interest was concerned. The interest rate clauses such as the one which the court was dealing with in that case did not fall within the scope of the Regulations. It is specifically provided in schedule 3, sub para. 1 that it does not apply to "*financial instruments or other products or services where the price is linked to fluctuations in ... a financial market rate the seller or supplier does not control*". Meenan J. stated at para. 16:-

*"I would suggest that this provision is consistent with the view that interest rate clauses, such as those in question before this Court, are the 'main subject matter', as per Article 4, of a mortgage or loan agreement and thus not covered by the Regulations."*

48. Mr. O'Neill S.C. also relies on the decision of Meenan J. in *Permanent TSB plc v. Rabbitt* [2019] IEHC 100 where he held that the defendant had failed to identify any particular allegedly unfair term apart from a general objection applicable to any term that required repayment of the loan with interest.
49. I am not satisfied that an arguable ground of defence has been raised on the basis of an alleged breach of the Unfair Terms Directive and Regulations. The debate has largely revolved around the interpretation of clause 11 of the contract which concerns the manner in which interest is calculated and charged. To adapt the reasoning of McDermott J., the terms relied upon by the plaintiff in seeking an order for possession constitute the main subject matter of the contract under Article 4(2). Clause 11 is a term which, as Meenan J. observed, is one which concerns the '*main subject matter*' of the mortgage or loan agreement and is therefore not covered by the regulations. The interpretation of this term is considered below but apart from this term, no other term has been identified which it is contended breaches the Unfair Terms Directive and Regulations.

#### **The Distant Marketing Directive and S.I. 483 of 2013**

50. A defence is said to arise under the Consumer Rights Directive 2011/82/EC, repealing Council Directive 85/577/EC and Directive 97/7/EC. I am satisfied that this is not applicable because, by virtue of Article 3(e) of the Directive, it does not apply to the creation, acquisition or transfer of immovable property or of rights in immoveable property.

#### **Fair procedures and proportionality**

51. It is argued by Ms. Phelan that the summary possession process does not adequately vindicate her rights to a fair hearing and is disproportionate. It is argued that the summary nature of the procedure is in contravention of the European Convention on Human Rights, Article 6. Reliance is placed in this regard on *Connors v. U.K.* [2004] ECHR 223. Mr. O'Neill S.C. disputes these contentions. He submits that the proportionality of the remedy is exemplified by the following:

1. The loan was obtained for the purposes of purchasing the house.
2. The house could not have been purchased without the funds advanced pursuant to the loan agreement.
3. The loan was made on terms that necessitate repayment.
4. The loan conditions contain warnings that in the event of default, the house may be repossessed.
5. Customers are advised to take independent legal advice.

In addition, it is submitted that the plaintiff has complied with its obligations under the CCMA. No argument is made to the contrary. Counsel emphasises the summary nature of the remedy under s. 62(7) Registration of Title Act, 1964 which entitles a mortgagor to apply and obtain possession once there is default and demand has been made.

52. I do not believe that the authorities relied upon by Ms. Phelan support the wide proposition which she advances that the summary nature of the proceedings is disproportionate or impairs her right to a fair hearing. The procedures applicable on an application for summary possession are such that if an arguable point of defence is raised (which is not a high bar) then the matter must be transferred to plenary hearing. The court must be satisfied that on an application for summary possession it is clear that there is no defence. Further, as was pointed out by McDermott J. in *Davis*, these proceedings concern *inter partes* litigation under s. 62(7) of the Registration of Title Act, 1964, an Act of the Oireachtas which enjoys a presumption of constitutionality. In accordance with s. 62(7) of that Act, the registered owner of a charge has the right to seek and to obtain an order for possession if relevant proofs are established. The rights and the obligations sought to be enforced are those enjoyed by and imposed on the parties, pursuant to an agreement which was freely entered into by them. McDermott J. addressed the matter in the following terms in Grant at para. 130:-

*"I am satisfied that all relevant issues may be raised by or on behalf of the borrower in the course of such proceedings or by the court and that there are significant protective procedures requiring the pursuit of alternative remedies to possession prior to the institution of proceedings as detailed above and evidenced by the facts of this case: these measures are clearly focussed on affording a judicial process which has full regard for the right to a home and whether the granting of an order for its possession is proportionate in the circumstances of the case. The*

*court has jurisdiction to consider all the evidence in the case including the terms of the contract, the amount and duration of the loan, the amount outstanding, the extent of the arrears, the nature and extent of default, the steps taken to facilitate the borrowers to address their default before seeking possession (e.g. under the CCMA) and the extent if any to which the borrowers have engaged with the lender or are financially capable of doing so."*

53. Serious non-compliance by the borrowers over a lengthy period has also to be considered and he observed:-

*"The court may also receive and consider all relevant evidence concerning the financial and personal history of the borrowers before determining whether to grant the order or make such order as it thinks fit..."*

54. The following were considered to be features of the court's jurisdiction which are illustrative of the proportionality of the remedy:

1. That the lender has a right to a remedy to enforce its contractual and/or property rights.
2. The entitlement of a borrower to raise any relevant argument in defence which must be adjudicated upon by the court.
3. The provision of a judicial remedy whereby an order for possession may be sought and obtained in *inter partes* litigation is a legitimate aim.
4. The power to impose a stay.

Factors such as these were proportionate and facilitated the vindication of both parties' rights in a manner necessary in a democratic society and for the economic well-being of society.

55. I am not satisfied that the defendant has raised an arguable ground of defence, based on proportionality. A number of factors support this conclusion including the nature and extent of statutory and contractual rights of the parties, the attempts to engage in a resolution prior to proceedings, compliance by the plaintiff with its obligations under the CCMA, the procedures available to advance and defend the claim for possession in accordance with those contractual and statutory rights and the court's jurisdiction to grant a stay.

**The plaintiff's signature on the facility letter**

56. I am satisfied that Ms. Phelan signed the contract. This is evident from the affidavit of Mr. Reid sworn on the 10th December, 2019 in which he exhibits the original mortgage loan offer and to which it is clear that Ms. Phelan appended her signature. The principal complaint of Ms. Phelan appears to be that when she attended at the offices of the solicitors representing the plaintiff, the contract which was shown to her was unsigned. The suggestion appears to be that something untoward occurred in the production to the

court of a signed contract/facility letter. To be fair to Ms. Phelan, she does not positively aver or submit that she did not sign the contract; it is more a question of perhaps not remembering whether she did or not.

57. The argument raised on affidavit is that the document must be signed (see reference to the requirement for a signature under the Bills of Exchange Act in para. 6 of her affidavit sworn on 29th November, 2019). Ms. Phelan has, however, averred to having signed "*the dotted line*". Further, considerable reliance is placed by Ms. Phelan, and in particular by the experts retained by her, on the wording of a contractual provisions in the contract. I am not satisfied that an arguable defence has been established on this issue. The point seems to be also directed at an alleged breach of ss. 89 and 91(a) of the Land and Conveyancing Law Reform Act, 2009. But even assuming without so finding that such breaches have occurred, I am not satisfied that it has been demonstrated that this gives rise to an arguable ground of defence.
58. Fundamentally, however, even if there is any doubt about whether Ms. Phelan signed the facility letter, no issue arises about her signature on the mortgage. This was registered as a charge on the folio and it is in furtherance and realisation of this security that the plaintiff now seeks recovery of possession of the premises.

#### **Reference to the European Court of Justice and legal aid**

59. Ms. Phelan in her affidavit sworn on the 10th December, 2019 requested the court to refer a question on the interpretation of validity of EU law to the European Court of Justice. While no particular question is formulated, it would appear from her affidavit that the issue which she wishes to refer to the European Court of Justice concerns her entitlement/lack of entitlement to civil legal aid. She requests that the court, of its own motion, approve legal aid to facilitate equality of arms. She also avers that legal aid is not available "*under s. (ii) of the Civil Legal Aid Act, 1995*" (sic). I assume that this is a reference to s. 27(9)(a) of the Civil Legal Aid Act, 1995. This issue was not the subject of argument or submissions at trial. No basis has been advanced as to the court's jurisdiction to intervene in the manner suggested.
60. It is unfortunate that Ms. Phelan is not represented in these proceedings. The matters of defence raised by her are complex. Entitlement to civil legal aid is determined in accordance with criteria laid down by statute. The refusal of legal aid is not a matter for determination by this court in these *inter partes* proceedings.

#### **The interest rate**

61. The debate on this issue has centred on whether the phrase "*minimum bid rate*" in clause 11 of the facility letter/contract describes, as argued by the plaintiff, a tendering process, or, as advocated by the experts retained by the defendant, an interest rate calculable in a particular manner specific to and identified with precision in the contract and which interest rate no longer exists. A significant conflict arises on the affidavits. Mr. Reid, Mr. Morley and Mr. Rogers disagree with the opinions expressed by Mr. Butler and Mr. Greijmans and questions have been raised as to the qualification of certain of the deponents to express such opinions.

62. I am satisfied that the evidence establishes the following. Loan facilities are provided by the ECB to qualifying banks and are subject to different interest rates largely dictated by the length of the loan facility. These facilities include a marginal lending facility rate relating to overnight loans. There is also the longer term, LTRO, and a seven day facility which is the ECB MRO. The latter appears to provide the bulk of liquidity to the banking system in the Eurozone. Between 1999 and June, 2000 participating banks seeking ECB MRO funds were required to bid for them, but the rate was fixed. This altered when the ECB announced that, commencing from the operations to be settled on 28th June, 2000, the ECB MRO would be conducted as variable rate tenders. The ECB put in place a rate, known as the minimum bid rate, which was the minimum interest rate at which participating banks might place their bids in order to secure required liquidity. When introduced in June, 2000, the minimum bid rate was 4.25%. This rate varied from time to time according to the decision of the Governing Council of the ECB. Thus, in so far as such changes impacted on a tracker mortgage, the facility might be described as variable over the lifetime of the mortgage. Arising from the financial crisis in 2008 there was a particular concern about the liquidity of banks and their requirement for funds. It was decided by the Governing Council of the ECB that the quantum of funds that might be made available to a participating bank would effectively be unlimited, subject to the provision of satisfactory collateral. The rate of interest at which the banks might bid for funds became fixed. The participating bank was not required to bid at a higher rate to secure part or all of the funds it required. It is clear from the publications referred to by the parties that this came to be recognised as a significant decision on ECB monetary policy.
63. When the plaintiff entered her contract in 2006, the interest-rate applying to her loan was tracked against the interest rates on the ECB MRO, which at that time was set according to the variable rate tender procedures, 'minimum bid rate'. The interest rate applicable to her loan was stated in her contract to be calculated at no more than 1.25% above the "*European Central Bank main refinancing operations minimum bid rate ("repo rate")*". In October, 2008 the fixed rate tender procedure introduced a rate of 3.75%. This rate has varied in accordance with decisions of the ECB's Governing Council and has continued to reduce over the years. The evidence also indicates that only one interest rate was applied at any one time and at no point were fixed and variable bid rates simultaneously available.
64. The contract wording suggests that it was the intention of the parties that an interest rate would always apply. This is evident from the provisions of part 1 of the contract which contains the statutory loan details, and which noted the number of repayments that would take place (420 repayments inclusive of interest).
65. This is an application for summary possession, and therefore the test is whether the defendant has advanced an arguable ground of defence that the effect of the decision by the ECB on 8th October, 2008 and the failure by the plaintiff to certify "*the unavailability of the rate*" results in no interest being chargeable thus leading to overcharging of interest.

66. While there may be a strong grounds for arguing that the expression "*minimum bid rate*" is referable to the tender process rather than being a reference to a specific and separate interest rate, I do not believe that the issue raised by the defendant may safely be described as unarguable. I am satisfied that the conflicting views expressed are such that it would be inappropriate to determine this issue without further hearing. There is a clear conflict, which this court is unable to resolve simply on a consideration of the contents of the affidavits. Further, I cannot be satisfied, to adopt *dicta* of McKechnie J. in *Harrisrange*, that there are no issues of law which require fuller argument and greater thought for a better determination of such issues. The applicability, operation and effect of the *contra proferentem* principle, in my view, is also one which would benefit from further argument.
67. Consideration must now be given to the consequences of the court's finding that an arguable point has been raised in relation to the alleged overcharging of interest. In this regard, Mr. O'Neill S.C. submits that even if Mr. Greijmans and Mr. Butler are correct, this defence does not assist the defendant. Allowing for alleged overcharging, he submits that it is clear from the evidence that the defendant was in default when demand was made. Arrears had accumulated even if one discounts the amount claimed to have been overcharged and the defendant was in any event in default at the time demand was made and the loan called in on 8th January, 2016. On Mr. Grijmans' calculations, alleged overcharging at that time amounted to €92,432.20, whereas the arrears as notified to the defendant were €96,914.16. He submits that there was default sufficient to entitle the mortgagee to issue the demand and to recover possession of premises.
68. Counsel for the plaintiff also accepts that although entitlement to possession may not be affected by this debate, the amount of arrears at any given time may be taken into account in the determination of the length of a stay on an order for possession. Nevertheless, he submits that the stay of twelve months imposed by the Circuit Court is more than adequate and meets any argument that might arise.

**Registration of Title Act, 1964 and the Letter of Demand**

69. Section 62(7) of the Registration of Title Act, 1964 provides:-

*"When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession."*

70. In *G.E. Capital Woodchester Homeloans Ltd v. John Reade and Dympna Reade* [2012] IEHC 459, Laffoy J. held that the onus of proof in an application for possession under s. 62(7) of the Registration of Title Act, 1964 rests on the plaintiff. Two requirements have to be complied with before the court may make an order for possession. First, the principal money must be due and second the applicant must be registered as the owner of

the charge on the relevant folio. If both requirements are fulfilled the court is empowered to make an order for possession if it considers it proper to do so. No issue has been raised regarding the validity of the registration of the charge.

71. Ms. Phelan has relied on Reade and therefore, it is appropriate that the circumstances of this decision and its potential relevance to this case are considered. Laffoy J. considered the facts and issues which arose in that case as follows:-

- "7. *First, as is clear from the outline of the provisions of the Charge given by the defendants to the plaintiff and their effect under pre-1st December, 2009 law contained in paras. 13 and 14 of the Judgment, under the terms of the Charge the entire of the secured monies, including principal, remaining unpaid would only become due by the defendants to the plaintiff on demand following an event of default. A demand would be necessary to render the monies remaining unpaid on the happening of an event of default due and payable to the plaintiff. Accordingly, as was the position in the Wise case, a demand was necessary, in this case, following an event of default.*
8. *Secondly, as in the Wise case, the core question then was whether there was a demand which rendered repayment of the principal monies secured by the Charge due, as required to give the Court jurisdiction under s. 62(7).*
9. *Thirdly, as regards the letter which the plaintiff contended was dispatched on 10th April, 2007 in the form of the precedent letter, on which the plaintiff relied so as to avoid the implications of the decision in Start Mortgages Ltd. & Ors. v. Gunn & Ors. [2011] IEHC 275, in the interests of clarity, I will quote hereunder the first two paragraphs of that letter, which are the only paragraphs relevant to the issue, because the remainder of the letter deals with the question of legal expenses. The first two paragraphs were in the following terms:*

*"We refer to your mortgage account and note from our records that as of XX/XX/XX, your account is €xxxx.xx plus charges of €xx.xx in arrears.*

*We must advise you that unless you remit this sum in full within 7 days from the date hereof we will have no alternative but to pass this account over to our Solicitors to commence repossession proceedings as arising from your default under your mortgage agreement the entire balance outstanding has now fallen due which as of the xx/xx/xx, amounted to €xxxxxxxx.xx."*

*The problem with that precedent is that it "put the cart before the horse". Under the terms of the Charge all monies remaining unpaid by the defendants to the plaintiff secured by the Charge would have become immediately due and payable "on demand" to the plaintiff on the happening of any of the events of default specified, for example, default "in payment of any monthly or other periodic payment or in payment of any of the secured monies hereunder". So for repayment*

*of the principal monies to be due, as required by s. 62(7), the essential sequence was –*

- (a) the happening of an event of default such as non-payment of an instalment, followed by*
- (b) a demand for repayment of all of the monies remaining unpaid.*

*The entire monies secured by the Charge did not automatically become repayable on the happening of an event of default, as assumed in the precedent letter. The precedent letter demanded the arrears due at the date thereof and threatened the commencement of possession proceedings in the event of the defendants failing to pay up. It did not demand the entire balance outstanding on the Charge. On the authority of the Wise case, the Court has no jurisdiction under s. 62(7), because the principal monies secured by the Charge had not become repayable, no demand having been made in accordance with Clause 3 of the Charge.*

10. *Fourthly, the letter of 2nd February, 2012 from the plaintiff's solicitors suffers from the same frailty. In the interests of clarity I will quote the first two paragraphs of that letter and part of the third paragraph. The remainder of the letter deals with the issue of legal costs and expenses. The letter stated:*

*"We act on behalf of [the plaintiff] who instruct us that you are in arrears on your mortgage account in the sum of €53,317.78 as at the 2nd February, 2010.*

*The purpose of this letter is to advise you that as a result of your above default in your mortgage the entire balance outstanding on your mortgage account in the amount of €270,915.45 as at the 2nd February, 2010 has now fallen due and owing. We are instructed to demand within ten days from the date hereof vacant possession of our security the premises known as 66 Riveroaks, Claregalway, Co. Galway for the purpose of sale as our client's power of sale has now arisen under the terms of your mortgage. However, if the arrears outstanding to our clients are discharged within ten days from the date hereof proceedings for repossession of our client's security will not be issued.*

*You should note that if you do not furnish vacant possession or discharge the arrears outstanding within ten days, we have strict and firm instructions to issue proceedings for recovery or possession of our client's security immediately."*

*In that letter, it was assumed that the entire balance outstanding on the Charge had fallen due and owing as a result of the defendants' default. In accordance with the terms of the contract between the plaintiff and the defendants embodied in the Charge that was not the case. A demand was necessary to call in the entire*

*principal and interest outstanding. The letter of 2nd February, 2010, like the letter relied on in the Wise case, was not a demand which rendered the principal money repayable, so as to confer jurisdiction under s. 62(7) on the Court."*

72. It will be seen that Laffoy J. described the essential sequence as being the happening of an event of default such as non-payment of an instalment which renders the principal monies repayable, followed by a demand for repayment of all of the monies remaining unpaid. The letter of demand must seek the entire balance which is outstanding in respect of the charge.
73. It is not disputed in this case that a letter of demand is required but in light of the decision in *Reade* an issue arises concerning whether the letter or letters sent by the plaintiff to the defendant amount to a demand at law. In this regard, Ms. Phelan also exhibits letters of demand issued on 31st March, 2017, following the commencement of these proceedings, which signify different sums claimed in respect of arrears.
74. The letter of demand relied upon is that of the 8th January, 2016 where it was stated that despite previous correspondence the defendant had failed to meet the instalment repayments due. These were detailed in the heading to the letter where the redemption balance was stated to be €607,075.45 and the outstanding arrears, €96,914.16. The letter proceeded as follows:-

*"We now call on you to pay us everything you owe under these mortgage loan account(s) within 10 business days of the date of this letter. This letter is a demand for early repayment of your mortgage loan account(s) under your mortgage loan offer letter(s) and Mortgage Deed and the total amount you now owe at the date of this letter is quoted above. Interest continues to accrue daily at the rate(s) applicable to your mortgage loan accounts."*

The defendant was advised that if the amount due under the mortgage loan account was not paid within ten business days proceedings for possession might be brought.

75. On the 6th July, 2016 a demand was made for possession by the solicitor representing the plaintiff. Ms. Phelan was advised, *inter alia*:-

*"... Our client instructs us that demand was made on you for full repayment of the total amounts due from you to them on your above Mortgage Loan Account but that notwithstanding such demand you have failed, refused and neglected to discharge the said sums.*

*In these circumstances TAKE NOTICE that our client NOW REQUIRES POSSESSION of the property referred to in the heading of this letter for the purpose of a sale thereof by them as Mortgagees in possession. We therefore demand, on their behalf, that you quit and deliver up clear vacant possession of the said property to them by clearing the property and delivering the keys thereof to our clients at New Century House, IFSC, Mayor Street Lower, Dublin 1."*

**A letter before action was sent to the defendant on 19th August, 2016.**

76. Analysis of the statement of loan account exhibited to Mr. Reid's affidavit sworn on 2nd September, 2016 shows that the defendant made all required re-payments up to February, 2009 but thereafter fell into arrears. The statement of account also illustrates that Ms. Phelan continued to make payments thereafter, albeit not always the required amount and sometimes on an intermittent basis only, up to 24th October, 2016.
77. While the letters of the 31st March, 2017 suggest other and different figures in respect of arrears, the figures used/calculated by Mr. Greijmans and Mr. Reid appear to coincide and no issue is taken on the calculations (as opposed to the alleged overcharging of interest). The statements of account exhibited by Mr. Reid in his grounding affidavits do not contain figures for the accumulated and outstanding balances as have been provided by Mr. Greijmans. Nevertheless, Mr. Greijmans' analysis shows that as of 1st September, 2016 the overall balance due without taking into account the alleged overcharging was €605,442.45. This coincides with the figure referred to by Mr. Reid as being the total sum due as of the date of swearing of his affidavit on 2nd September, 2016. Therefore, considering the analysis carried out by both Mr. Reid and Mr. Greijmans there would not appear to be any dispute in relation to their respective calculations of the total sum due, subject of course to the issue of overcharging. The conflicting amounts referred to in the plaintiff's letters of 31st March, 2017 add little except potential confusion, but they are not letters upon which these proceedings are based or upon which the plaintiff purports to rely. They were sent to the defendant several months after the issuing of the proceedings.
78. Condition 4(b) of the loan provides that:-

*"In the event of any repayment not been paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in clause 2(a), the Society may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan."*

Clause 2(a) refers, *inter alia*, to the deed of mortgage.

79. Clause 6 of the deed of mortgage makes provision for the Society's powers and clause 7 concerns the exercise of those powers. Clause 6 provides that at any time after the execution of the mortgage, the mortgagee may without further consent from or notice to the mortgagor enter possession of the mortgaged property. By virtue of clause 7, however, this power is not exercisable until certain events occur. One such event, per clause 7.01(a) is where "*default is made in payment of a monthly or other periodic payment or repayment of any other of the secured monies hereunder.*"

**Conclusion**

80. While I have concluded that the defendant has an arguable defence on the issue of the overcharging of interest, counsel for the plaintiff nevertheless maintains that this does not assist the defendant on the facts because she is in arrears on either figure. When the letter of demand issued on 8th January, 2016, the amount alleged to have been overcharged (€92,432.20) was less than the amount of accrued arrears (€96,914.16) as

of that time. I am satisfied on the evidence, therefore, that the defendant had fallen into arrears in her repayments, even if she is successful in her argument regarding the overcharging of interest. In those circumstances, the plaintiff as owner of the charge and in accordance with the terms of the loan and mortgage was entitled to demand repayment of the full amount due, failing payment of which it was entitled to seek possession.

81. On the face of it, therefore, in accordance with s. 62(7) of the Registration of Title Act, 1964, as a matter of principle, if the demand is valid the plaintiff is entitled to an order for possession of the property subject to any issue concerning a stay.

82. An issue which arises, nevertheless, arises from a consideration of the *Reade* decision which Ms. Phelan produced to the court. It is clear from that decision that the letter of demand must be valid. If the defendant is correct it would seem to follow that the full amount demanded in the letter of 8th January, 2016 may be in excess of that which was owed. This issue was not expressly articulated by the parties but given the defendant's reliance on *Reade*, and in the interests of justice, the court requires the assistance of the parties on the following issues:

**I. The Letter of Demand**

- (a) In the event that the defendant might be ultimately successful on the issue of alleged overcharging of interest, whether this has the potential to affect the validity of the letter of demand; and
- (b) whether this issue, i.e. the validity or invalidity of the letter of demand is in the circumstances capable of being determined on a summary application;

**II. Stay**

In the event that the court should conclude that the letter of demand is valid, the court invites submissions on the extent to which the issue of alleged overcharging ought to be addressed, if at all, in the context of the exercise by the court of its jurisdiction regarding the potential imposition of a stay, or the terms of any such stay.

83. Therefore, the court invites the parties' further assistance on these issues. Submissions which the parties wish to make should be made and exchanged by electronic means within a period of four weeks from the date of this judgment, or such further period as may be agreed by the parties.