

THE HIGH COURT

**[2024] IEHC 345
Record No. 2020/6178P**

BETWEEN

JOSEPH CORCORAN AND KATHERINE CORCORAN

Plaintiffs

and

**PERMANENT TSB PLC, START MORTGAGES DAC, TOM O'BRIEN AND HILARY
LARKIN OF MAZARS**

Defendants

Judgment of Mr. Justice Conor Dignam delivered on the 7th day of June 2024

INTRODUCTION

1. By Notice of Motion, the second, third and fourth named defendants ("the applicants") seek (i) an Order pursuant to Order 19 Rule 28 of the Rules of the Superior Courts and/or the Court's inherent jurisdiction striking out the plaintiffs' proceedings on the basis that they are unsustainable, frivolous, vexatious and/or bound to fail, (ii) an Order pursuant to Order 19 Rule 27 of the Rules of the Superior Courts and/or the Court's inherent jurisdiction striking out pleas which are unnecessary or which will prejudice or delay the fair trial of the action, and (iii) an Order pursuant to section 123 of the Land and Conveyancing Law Reform Act 2009 vacating a lis pendens registered by the plaintiffs.

2. At the hearing, Counsel for the applicants indicated that the application relief (i) was not being moved under Order 19 Rule 28 and they were only relying on the Court's inherent jurisdiction on the grounds that the proceedings are unsustainable, frivolous, vexatious and/or bound to fail.

FACTS

3. The facts in summary are as follows.

4. In late 2007, the plaintiffs obtained three loans from the first-named defendant ("permanent tsb"), as follows:

- (i) By letter of approval of the 22nd October 2007, the plaintiffs were offered a loan of €631,000 subject to a number of special conditions (to which I return). This offer was accepted by the plaintiffs on the 24th October 2007. The security for this loan was a first charge over two apartments ("the IFSC apartment" and "the Mountjoy apartment"). This loan account was numbered 90211668 and I will refer to it as the "1668 loan".
- (ii) By letter of approval of the 28th November 2007, the plaintiffs were offered a loan of €406,000 also subject to a number of special conditions. This was accepted by the plaintiffs on the 19th December 2007. The security was a mortgage over an apartment in Dún Laoghaire ("the Dún Laoghaire apartment"). This loan account was numbered 90226497 and I will refer to it as the "6497 loan".
- (iii) By letter of approval of the 30th November 2007, the plaintiffs were offered a loan of €500,000 also subject to a number of special conditions. This offer was accepted by the plaintiffs on the 19th December 2007. The security for this loan was a mortgage over a property in Castlegregory ("the Castlegregory house") and a further charge over the IFSC apartment and the Mountjoy apartment. This loan account was numbered 90226616 and I will refer to it as "the 6616 loan").

5. These loans were accepted by the plaintiffs by signing a separate "Acceptance of Loan Offer" in respect of each of them. These signatures were witnessed by their solicitor. They were stated to be accepted on the terms and conditions set out in (i) the letter of approval, (ii) the General Mortgage Loan Approval conditions, and (iii) the permanent tsb Mortgage Conditions.

6. Each of the letters of approval contained the following Special Condition (I am quoting from the 1668 loan):

“**permanent tsb** will accept monthly repayments, as set out in the letter of approval, representing repayment of interest only (as may be varied from time to time and including insurance premiums where applicable) for the first five years from the date of cheque issue or such other period as **permanent tsb** may decide. **permanent tsb** reserves the right to review the deferral of the repayment of principal at any time during the term of the loan, including the first five years of the term and may require the applicant to cease the interest only repayment and require the repayment of principal and interest and the applicant will immediately arrange to pay the revised monthly repayment comprising the repayment of principal and interest calculated over the remaining term so that the principal and interest will be discharged within the existing term of the loan.”

7. The Special Condition was identical in each loan except that in the case of both the 6497 loan and the 6616 loan the interest-only period referred to was three years rather than five years.

8. On the 11th January 2008, the plaintiffs executed a deed of mortgage in respect of the IFSC apartment and the Mountjoy apartment which expressly incorporated the clauses set out in the PTSB Mortgage Conditions 2002.

9. A Registry of Deeds search discloses registration of a mortgage and charge dated the 11th January 2008 in respect of the IFSC and Mountjoy apartments on the 9th December 2012. The IFSC apartment is registered land. A charge in favour of permanent tsb was registered on Folio 94464L (the IFSC apartment) on the 8th November 2012. A curious feature of the case is that the plaintiffs appear to have also executed an Irish Banking Federation Housing Loan Mortgage in favour of permanent tsb in respect of the IFSC apartments, as when the applicants obtained copies of the application for registration from the Property Registration Authority this is what was attached to the application for registration on Folio 94464L. This application bears the same dealing number as the relevant entry in the Folio. This mortgage deed was stated to be version 1.1.2011 of the Irish Banking Federation’s Standard Mortgage but was executed three years earlier, on the 11th January 2008. The defendants are not relying on this. It also appears to be accepted by the plaintiffs that this is not the relevant mortgage deed because in the course of their submissions they referred to this as being the wrong mortgage conditions.

10. By notices dated the 1st December 2010 the plaintiffs were informed that the interest-only period would end on the 1st April 2011 and that the loans would convert to

repayments of principal and interest from that date. This is central to the dispute between the parties. This particular issue was a source of very significant confusion and lack of clarity as to precisely what the plaintiffs case is because their claim as pleaded seems to be premised on similar notices having been received in respect of all three loans, including the 1688 loan, but the only notices adduced in evidence relate to the 6497 and 6616 loans (the three year interest-only loans). I return to this below when considering the plaintiffs' claim.

11. As it happened, the notice in respect of the 6616 loan was sent to the wrong address (nothing turns on this). When the plaintiffs received the notice in respect of the 6497 loan (which was sent to the correct address) they engaged in correspondence with permanent tsb in relation to an extension of the interest-only period. This correspondence ended up applying to both the 6497 and the 6616 loans. Permanent tsb's position was that remaining on interest-only at that stage would be a re-negotiation of the contract *"and the terms and conditions, mortgage product and rate may change and your current tracker mortgage will move to a variable rate and your tracker rate and price promise would no longer be applicable to you."* It seems that an extension was not agreed at that stage (other than from the 1st April to the 1st June 2011 due to the notification in relation to the 6616 loan having been sent to the wrong address) and the loans converted to capital and interest repayments.

12. It seems that by January 2013 the plaintiffs were in arrears in respect of the 6497 and 6616 loans and on the 6th March 2013 agreement was reached to capitalise the arrears and that there would be a three year interest-only period in respect of those loans from that point on.

13. It seems that the plaintiffs began to be in arrears in respect of the 1668 loan from about July 2011 and were in arrears in the amount of approximately €13,000 in June 2013. By letter of offer permanent tsb offered to capitalise the arrears and extend the interest only-period for three years. This was accepted by the plaintiffs on the 19th June 2013.

14. It is appropriate to pause to note that a central part of the plaintiffs' case is that the only reason they were in arrears was because some (or all) of their loans had been wrongfully converted to principal and interest repayments on foot of the notices of the 1st December 2010 and that they were essentially wrongfully compelled to agree to capitalising the arrears to an in interest-only period of just three years.

15. By letters of the 24th February 2016 in respect of the 6497 and 6616 loans, the plaintiffs were informed that the three year interest-only period agreed in 2013 was due to expire on the 1st March 2016 but it was being extended for a further five months, and then by letters of the 2nd August 2016, permanent tsb confirmed that the mortgage repayments on those loans had changed to principal and interest.

16. In relation to the 1668 loan, permanent tsb informed the plaintiffs by letter dated the 12th July 2016 that the interest free period was due to expire on the 1st August 2016 and that it was being extended for a further four months.

17. It seems that there was some contact between the plaintiffs and permanent tsb about the three accounts because there is an internal permanent tsb email dated the 18th August 2016 referring to the three accounts and recording that the first-named plaintiff had told the bank official that he would be unable to satisfy his August repayments if they were converted to capital and interest from interest-only repayments. There was subsequently correspondence between the plaintiffs and the bank including the provision by the first-named plaintiff of a statement of affairs.

18. On the 1st November 2016, permanent tsb informed the plaintiffs that the interest-only facility in respect of the 1668 loan was due to expire on the 1st December 2016 and by letter of the 1st December permanent tsb informed the plaintiffs that the mortgage repayments had been changed to principal and interest.

19. There were ongoing contacts between the plaintiffs and permanent tsb in 2017 in an attempt to resolve the plaintiffs' difficulties in discharging sums which were claimed to be due and owing and, while formal letters of demand issued on the 12th September 2017 in circumstances where the plaintiffs had fallen into arrears, those contacts continued after that. It should be noted that the plaintiffs have not denied that they were in arrears in respect of the accounts. Their point is that they were caused to be in arrears by the actions of permanent tsb in wrongfully converting the loans to capital and interest repayments in 2010/2011.

20. By separate letters of the 2nd August 2018 in respect of each of the loan accounts, the first-named plaintiff was informed that permanent tsb had entered into an agreement to transfer the mortgage loans to Start Mortgages DAC, the second-named named defendant ("Start"). It is worth noting at this stage that it is claimed by the plaintiffs that prior to that they had been given an assurance by a permanent tsb area manager that their mortgage would not be sold (a possible sale of mortgages by

permanent tsb was being discussed in the media at the time) and they relied on that assurance to borrow monies from family members to carry out repairs to the Mountjoy apartment.

21. By Deed of Transfer, Conveyance and Assignment dated the 1st February 2019, permanent tsb assigned its estate, rights, title, interest, benefit and entitlement (past, present and future) in the loans and security to Start. By a Deed of Conveyance of the same date, permanent tsb transferred its interest in the mortgages of the unregistered properties (the Mountjoy apartment) to Start.

22. By separate letters of the 1st February 2019 in respect of each of the loans, permanent tsb informed the plaintiffs that the loans "*and related facility and offer letters, restructure arrangement, guarantees, mortgages or other security*" and all "*present and future rights relating to your Loan and the Loan Documents*" had been "*assigned, transferred and conveyed*" to Start on the 1st February 2019 ("goodbye letters"). Then, by separate letters of the 7th February 2019, Start informed the plaintiffs that the mortgage loans had transferred to Start on the 1st February 2019 ("hello letters").

23. In fact, I have not seen any such letters to the second-named plaintiff in respect of loan 6497 but no point is made of this by the plaintiffs.

24. On the 27th March 2019, Start's ownership of the charge over the IFSC apartment was registered on Folio 94464L, its ownership of the charge over the Dún Laoghaire apartment was registered on Folio 112408L, and its ownership of the charge over the Castlegregory house was registered on Folio 37513F. The Mountjoy apartment is unregistered land.

25. By demand letter of the 21st November 2019 in respect of the 1668 loan (secured by the IFSC and Mountjoy apartments), Start notified the plaintiffs that they had failed to pay the monthly mortgage repayments as they fell due and had therefore defaulted and demanded payment of the outstanding amount in full. They also notified the plaintiffs that if the outstanding amount was not paid within seven days they would "*appoint a Receiver in accordance with the terms and conditions of your Mortgage...The role of the Receiver is to manage the mortgage property, collect rent and/or to arrange for the sale of the mortgage property.*"

26. By Deed of Appointment dated the 19th February 2020 (accepted on the 13th March 2020) the third and fourth-named defendants were appointed receivers over the

IFSC apartment and the Mountjoy apartment. The Deed of Appointment states that the appointment was being done pursuant to the "*powers contained in a mortgage...dated the 11th January 2008...and every other power conferred upon it by statute or otherwise.*"

27. It is claimed by the plaintiffs that following their appointment, the receivers contacted the tenants in the IFSC and Mountjoy apartments and both sets of tenants gave notice that they were ending their tenancies. The plaintiffs are suspicious of this because the tenants in the IFSC apartment had only been paying 50% rent due to Covid 19.

28. It is also claimed that the plaintiffs incurred expenditure to redecorate the apartments and then put them back on the rental market through a letting agent in August 2020 but the receivers instructed those agents to remove the apartments from all letting sites and to cease to act and informed them that the receivers had taken possession of the apartments. The plaintiffs claim that the receivers must have forcibly gained entry.

29. The apartments have remained vacant and it is claimed that this has caused a very significant loss of rental income.

THE PLAINTIFFS' CASE

30. The proceedings were instituted by Plenary Summons dated the 4th September 2020. A Statement of Claim was delivered on the 19th February 2021. It is not necessary to set out the contents of the Statement of Claim in any great detail. As touched on in paragraph 10 above, in certain respects there is a significant lack of clarity and precision in the Statement of Claim. This, together with certain parts of the first-named plaintiff's replying affidavit has caused or allowed for a degree of confusion about the plaintiffs' case.

31. There are a number of different elements to the plaintiffs' claim.

32. The first is that permanent tsb wrongfully converted the plaintiffs' loan(s) from interest-only to capital and interest in 2010/2011, this wrongful action caused the plaintiffs to go into arrears and everything, including the agreement to capitalise arrears and for a three year interest-only period from 2013 to 2016, and ultimately the appointment of the receivers, flowed from this. Part of the plaintiffs' case is that the

plaintiffs did not know that the conversion of the loan(s) was in breach of contract until they finally obtained copies of their loan documentation in 2019.

33. It is in this element of the plaintiffs' claim that the imprecision and lack of clarity is most evident.

34. I understood paragraphs 7-9 of the Statement of Claim to be making the case that all three loans were converted at that time. However, the reliefs at paragraphs 1-3 of the prayer in the Statement of Claim seem to only refer to one mortgage. To that extent it could be understood as being concerned solely with the conversion of the 1688 loan and the case seemed to be that the 1688 loan was converted within the expressly stated five year interest-only period. However, some of the other reliefs (paragraphs 5(b) and (c)) refer to "mortgage contracts" plural. Paragraphs 6 and 7 (there are two number 7's) of the first-named plaintiff's replying affidavit (in which he deals with the conversion point) focus exclusively on the 1688 loan. Indeed, in paragraph 7 he says "*The first breach of these conditions is that the interest only period was to be for at least 5 years and this Notice was issued less than 3 years into the mortgage term which commenced in January 2008, when the funds were drawn down.*" It will be recalled that it is only the notices in respect of the 6497 and 6616 loans that are in evidence. Indeed, the plaintiffs were given time to deliver a supplemental affidavit to exhibit the notice in respect of the 1688 loan and, while an affidavit was delivered, a notice was not exhibited. Unfortunately, the confusion is compounded by the fact that elsewhere in the affidavit he refers to the mortgages plural and, more particularly, by the fact that when dealing with the conversion of the 1688 loan in paragraphs 6 and 7 he purports to exhibit the notice of the 1st December 2010 in respect of that loan but instead exhibits the notice in respect of the 6616 loan.

35. Thus, it is not entirely clear whether the plaintiffs are claiming that all three loans (including the 1688 loan) were converted at that time or just the 6497 and 6616 loan.

36. There is obviously a significant difference between the 1688 loan on the one hand and the 6497 and 6616 loans on the other. The latter two only expressly stated a three year interest-only period while the former stated a five year period. Thus, conversion of the latter two at this time was outside the expressly stated interest-only period whereas conversion of the 1688 loan at that time, if it occurred, was within the five year period provided for.

37. It seems to me that the only safe way for me to proceed is to consider this element of the plaintiffs' claim on the following basis:

- (i) that they are claiming that all three loans were converted at that time, ie. by notices dated the 1st December 2010;
- (ii) that only the 6497 and 6616 loans were converted at that time but this conversion rendered the plaintiffs unable to pay the repayments on their various loans and pushed the 1688 account into arrears also.

38. I appreciate that this may be giving the plaintiffs the benefit of their own lack of precision or clarity. However, I think it is open to me to approach the matter in this way in circumstances where the defendants do not appear to have sought further particulars and in light of the way the case was argued. The plaintiffs submitted that on the correct interpretation of Special Condition 7 permanent tsb could not convert the loans from interest only to principal and interest either within or outside the specified interest-only period unless they first conducted a review and they did not do so.

39. It will be necessary, if I do not strike out the proceedings, for an amended Statement of Claim to be delivered to deal with these deficiencies.

40. The plaintiffs claim that these wrongful actions forced them into arrears and this forced them into agreeing to capitalise the arrears and accept an interest-only period limited to three years in 2013. They claim that permanent tsb fraudulently misrepresented the financial and legal position to them and they are therefore not bound by the 2013 agreement.

41. The second element of the plaintiffs' claim is that they had to put money into repairing the Mountjoy apartment when it was damaged by the occupants, that they were given an assurance by a manager in permanent tsb that the mortgages would not be sold as part of a sale which was being discussed in the press, and on that basis they borrowed money from family members and repaired the property, but Permanent TSB nonetheless sold the mortgages to Start.

42. The third element of the claim is a claim that permanent tsb was not entitled to sell the mortgages to Start and that the sale was therefore illegal and void. Three bases for this claim are advanced in the Statement of Claim: (a) that permanent tsb breached an agreement not to sell the plaintiffs' mortgage, ie., the assurance given by the

permanent tsb area manager; (b) that permanent tsb misrepresented to Start that they were annuity mortgages and not interest-only tracker mortgages (this, of course, is linked to whether permanent tsb was entitled to convert the loans in 2010/2011, 2013 or 2016). Part of the basis of this claim is that Permanent TSB recorded a "Product Change" or "New Product" on the 1st December 2016 in the annual Mortgage Statement for 2016; and (c) that permanent tsb and Start conspired to misrepresent the terms of the mortgages and thereby infringe on the plaintiffs' rights in dealing with Start. It is claimed on the other hand, that if Start knew it was not an annuity mortgage then Start is guilty of fraudulent misrepresentation in appointing receivers and moving to sell the properties because they knew that the mortgages were in positive equity. Another ground for challenging the validity of the sale, relating to the status of Start, was raised in the affidavit and at the hearing. I address this below.

43. The fourth element of the claim is that Start did not have a right to appoint a receiver at all and their appointment is therefore invalid. (The point that the receivers do not have a right of sale (even if validly appointed) is repeatedly made throughout the Statement of Claim but no claim for relief is sought). There are a number of limbs to this element of the case.

44. Finally, they claim that the receivers have acted in breach of duty in failing to let the two apartments which would have generated very significant levels of rent and seek damages in that amount. They repeatedly assert that the receivers are intent on selling the apartments "*in breach of the mortgage terms and conditions and their claimed authority*". However, no relief is claimed in relation to this.

45. The specific reliefs sought against Start are at paragraphs 5 – 9 of the prayer (the reliefs at paragraph 5 are also directed against permanent tsb):

"5. Damages and an Order that the Sale of the Plaintiffs' Mortgages by Permanent TSB plc to Start Mortgages DAC was invalid for any of the following reasons...

6. Damages against Start Mortgage DAC for the invalid appointment of Tom O'Brien & Hilary Larkin as Receivers and for Trespass and loss of rental income.

7. An Order that Start Mortgages DAC did not have the power to appoint a Receiver under section 108 of the Land and Conveyancing Reform Act 2009 as claimed by them.

8. *An Order that Start Mortgages DAC must adhere to the original terms of the Mortgages as detailed in the Mortgage Offer Documents.*

9. *An Order that Start Mortgage sell to the Plaintiff the Mortgages that they acquired from Permanent TSB plc at the price they paid, if they can show that they honestly believed that they were purchasing annuity mortgages that were in arrears, rather than the Interest Only Mortgage Contracts as defined in the Mortgage Offer Documents.”*

46. The nature of the reliefs sought is important to the Court’s considerations and it is to be noted that save for paragraphs 6-8 and the Order sought at paragraph 1 the reliefs sought are claims for damages.

DISMISS AS BEING BOUND TO FAIL

47. Counsel on behalf of the defendants made it clear that the application to strike out was not being moved on the basis of a failure to disclose a reasonable cause of action but rather on the Court’s inherent jurisdiction to strike out proceedings that are unsustainable, frivolous, vexatious and/or bound to fail.

48. The general principles applying to the Court’s inherent jurisdiction to strike out proceedings on the basis that they are frivolous, vexatious or bound to fail are well-established. They were recently stated by the Court of Appeal in *Scotchstone Capital Fund Ltd & anor v Ireland & anor [2022] IECA 23*, at paragraph 290:

“290. ...*In essence these are:*

a) An application for a strike out of a plaintiff’s claim on the basis of the inherent jurisdiction is not a substitute for summary disposal of a case;

b) The jurisdiction exists, not to prevent hardship to a defendant from defending a case, but to prevent against an abuse of process of the court by the plaintiff, e.g. causing a manifest injustice to the defendant in being asked to defend a case which is bound to fail;

c) The burden of proof is on the defendant;

d) *There is a degree of overlap between bound to fail jurisprudence and cases which are held to be frivolous and vexatious. However, the latter are cases which may have a reasonable chance of success but would confer no tangible benefit on a plaintiff or are taken for collateral or improper motives or where a plaintiff is seeking to avail of scarce resources of the courts to hear a claim which has no prospect of success;*

e) *The standard of proof is on the defendant/respondent to show that the claim is bound to fail or frivolous or vexatious;*

f) *Bound to fail may be described inter alia, as devoid of merit or a claim that clearly cannot succeed;*

g) *Frivolous and vexatious must be understood in their legal context as claims which are, inter alia, futile, misconceived, hopeless;*

h) *The threshold for the plaintiff successfully to defend such a motion is not a prima facie case but a stateable case;*

i) *It is a jurisdiction only to be used sparingly, in clear cut cases and where there is no basis in law or in fact for the case to succeed;*

j) *The court must accept that the facts as pleaded by the plaintiff in considering whether an Order pursuant to O.19, r. 28 may be made but in the exercise of its inherent jurisdiction the court can to some extent look at and assess the factual basis of the plaintiff's claim;*

k) *Where the legal or documentary issues are clear cut it may be safe for a court to reach a conclusion on a motion to dismiss;*

l) *Even where a plaintiff makes a large number of points, each clearly unstateable, it may be still safe to dismiss; and*

m) *In some cases, even if the factual disputes are clear cut or may be easily resolved, the legal issues or questions concerning the proper interpretation of documentation may be so complex that they are unsuited to resolution within the confines of a motion to dismiss."*

49. The Court of Appeal also considered the jurisdiction in *McAndrew v Launceston Property Finance DAC & anor [2023] IECA 43*. Faherty J, on behalf of the Court, having considered a number of the authorities, restated many of these general principles. In summary she said:

- (a) when exercising its inherent jurisdiction, the court is not limited to the pleadings but is free to hear evidence on affidavit and engage in some analysis of the facts (paragraphs 59-60);
- (b) the burden of proof is on the defendant (paragraph 61);
- (c) the standard of proof is that the Court should not require a plaintiff to be in a position to show a prima facie case, merely a stateable case, in an application to strike out (paragraph 67);
- (d) the Court has jurisdiction to strike out a case if it is clear to the Court that the case is bound to fail (paragraph 62);
- (e) the Court's inherent jurisdiction extends to cases where it is shown that there is no arguable basis in law and in fact for the claim made (paragraph 63);
- (f) the jurisdiction is to be exercised sparingly and only in clear cases and should not be invoked merely because the case brought by the plaintiff is very weak or where it is sought to have an early determination on some point of fact or law since the effect of striking out proceedings is to deprive a litigant of what would otherwise be a constitutional right of access to the courts (paragraphs 63-65);
- (g) there may be cases where the legal or documentary issues may be clear and straightforward such that it is safe for the Court to reach a conclusion on those questions on the hearing of a motion to dismiss (paragraph 66);

50. Implicit to these two judgments, but stated explicitly in a number of cases referred to below, is that the default position is that proceedings should go to trial and that a person should only be deprived of a trial when it is clear that there is no real risk of injustice.

51. There is a well-established difference between the Court's jurisdiction under the original Order 19 Rule 28 and its inherent jurisdiction (noted at sub-paragraph (j) of *Scotchstone*) (it remains to be considered what those differences are in light of the amended Order 19 Rule 28 which came into effect in September 2023). Under the Court's inherent jurisdiction, the Court can engage, albeit to a limited extent, with the facts and the evidence particularly where it is a "documents" case.

52. In essence, the applicants' case is that this case can be determined on the documentation, that oral evidence will not advance matters, and that I am therefore in as good a position to determine the matter as a judge at trial.

53. Clarke J engaged with the scope of the Court's ability to engage with the evidence and to determine an application to strike out proceedings on the basis of that evidence under its inherent jurisdiction in a series of cases including *Salthill Properties Ltd v Royal Bank of Scotland plc* [2009] IEHC 207, *Lopes v Minister for Justice* [2014] IESC 21, [2014] 2 IR 301, *Keohane v Hynes* [2014] IESC 66 and *Moylist Construction Ltd v Doheny* [2016] 2 IR 283 and in the course of doing so specifically referred to documentary evidence.

54. He said in *Keohane* (quoted in *Moylist*) that:

*"6.8 What the Court can analyse is whether a plaintiff's factual allegation amounts to no more than a mere assertion, for which no evidence or no credible basis for believing that there could be any evidence, is put forward. **Likewise, the Court can go into documentary facts where the relevant documents govern the legal relations between the parties or form the only possible evidential basis for the plaintiff's claim (as in Lopes). As Barron J. noted in Jodifern, a court can look at a contract and it may become clear beyond argument as to what that contract means. On that basis, it may follow that a plaintiff's claim may be bound to fail.** But there may be cases where, notwithstanding the text of a contract, facts are asserted and backed up either by evidence or by the possibility that evidence might be found, which might lead to the contract being construed in some different way or the consequences for the wrong alleged in the proceedings being differently considered. In such cases, as Barron J. made clear, the case must go to trial.*

*6.9 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. **In cases where the legal rights and obligations of the***

parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. **Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations...**" (emphasis added)

55. In *Moylist* he went on to draw some assistance from the criteria by reference to which the courts consider whether to adjourn proceedings commenced by Summary Summons to plenary hearing. He emphasised that the principles are not "necessarily exactly the same" but that "there are broad similarities which make it useful to refer to 'leave to defend' jurisprudence, at least by analogy." He said:

"3.11 ...Like the summary judgment motion, such an application will be heard on affidavit and within the confines of a motion rather than at a full hearing. The test which the court is required to apply is very similar. In a summary judgment application, it is as to whether it is very clear that the defendant has no defence (this test is now well established, going back at least to *Aer Rianta cpt v. Ryanair* [2021 4 IR 607]). That is very similar to the test applied in a *Barry v. Buckley* application which requires the court to be satisfied that the claim is bound to fail or, to use the language of the summary judgment jurisprudence, that it is very clear that the plaintiff has no case and thus that the plaintiff's claim to bound to fail.

3.12 It seems to me to follow from that analysis that there are cases which are just not suitable for an application to dismiss under the inherent jurisdiction. Clearly, cases involving factual disputes (save to the very limited extent to which it is appropriate to engage with the facts as identified in *Keohane*) have already been held to fall into that category. However, it seems to me that there are also limitations on the extent to which cases which involve issues of law or construction can properly be the subject of an application to dismiss under the inherent jurisdiction. The limitation is similar to that which was identified in *McGrath* as applying in the context of summary judgment motions. A court should not entertain an application to dismiss where the legal issues or questions of construction arising are themselves complex and such as would

require the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored."

56. He went on at paragraphs 21 and 22 to say:

"3.15 That is not, of course, to say that there will not be cases where the legal or documentary issues may be clear and straightforward such that it is safe for the court to reach a conclusion on those questions on the hearing of a motion to dismiss. That is also not to say that the fact that a plaintiff may make a large number of points, each one of which is clearly unstateable, should not prevent a dismiss from being ordered. As Denham J. observed in a different context in *Bula v. Tara Mines Ltd.* (No. 6) [2000] 4 I.R. 412 at p.462, "seventeen noughts are still nothing."

3.16 But I would caution against the appropriateness of the use of the application to dismiss under the inherent jurisdiction of the court in relation to proceedings where, even if there are no factual disputes or any such factual issues as might arise come within the strictures identified in *Keohane*, nonetheless the legal issues or questions concerning the proper interpretation of documentation are complex. In such cases, the very complexity of the issues (even if the court has a fairly clear view on them) makes it difficult to determine, within the confines of a motion heard on affidavit, that the plaintiff's case is such that it can safely be said that it is bound to fail." (emphasis added)

57. Before addressing the elements of the plaintiffs' claim by reference to these principles, it should be noted that the submissions from both sides went into very great detail. I have considered all of the points raised and the responses to them but, given the relatively narrow focus of the Court's function on these motions, I do not consider it necessary to deal with all of them.

Conversion from Interest only to Principal and Interest – Interpretation of Special Condition 7

58. As noted above, I propose approaching this element of the plaintiffs' claim from two perspectives:

(i) that the plaintiffs are claiming that permanent tsb converted the 1688 loan (together with the other two loans) in 2011 and were not entitled to do so because (a) it was during the specified interest-only period, and/or (b) it could only be done following a review; and

(ii) permanent tsb only converted the 6697 and 6616 loans and, while they did so outside the specified interest-only period (three years), they were not entitled to do so without first conducting a review.

59. I consider both of these in turn. Central to them is the proper interpretation of Special Condition 7. The interpretation advanced by the applicants is that the loan facilities would be interest-only for three or five years and would then automatically convert to capital and interest unless permanent tsb extended the interest-only period but that permanent tsb also had the right to amend or bring to an end the interest-only repayments (including the three or five year period or such extended period) following a review. This is based in part on the fact that there are two separate sentences in Special Condition 7: the first providing for the initial period and the power to vary that period; and the second providing for the right to bring the interest-only period to an end upon review. It was also submitted that this is the correct interpretation when considered in the context in which the loan agreements were executed, which the applicants described at paragraph 4.9 of their written submissions as being "*namely, for the purpose of the Plaintiffs borrowing significant sums from PTSB. They accepted a loan offer in which they expressly stated that the offer was made upon the Terms and Conditions set out in the letter of approval, General Mortgage Loan Approval Conditions and PTSB Mortgage Conditions, copies of which they have received. The acceptance of the loan offer further stated that the Terms and Conditions had been fully explained by their Solicitor and was countersigned by the said Solicitor.*"

60. The interpretation advanced by the plaintiffs is that the loans were to be interest only for the whole term (twenty-five years) and did not automatically convert to principal and interest on expiry of the three or five year specified interest-only period. They accepted that permanent tsb could convert the repayments to capital and interest, but they could only do so following a review.

61. I accept the points made on behalf of the applicants that the question of the interpretation of the Special Condition 7 is largely, if not entirely, a matter of an analysis of the contract (using the approach and principles discussed below), that oral evidence will add little to the analysis, that if I am satisfied that the interpretation is

straightforward I can resolve it on this motion and, it follows, if I agree with the defendants' interpretation then this part of the plaintiffs' case must be held to be bound to fail. However, I must be satisfied that the interpretation is straightforward. It seems to me that if there is any material ambiguity or complexity I can not determine the point on this motion. This seems to me to follow from the statements in emphasis in the authorities set out above. The test on such a motion is not whether the Court is capable or even well-placed to resolve the question but whether the Court is satisfied that the plaintiffs do not have a stateable case or that there is no basis on which the agreement could support the plaintiffs' position and they are therefore bound to fail.

62. Before dealing with the interpretation point I think it appropriate to deal with a separate, secondary point. The plaintiffs repeatedly plead in the Statement of Claim that they had never seen the terms and conditions. It is unclear from the Statement of Claim whether they are referring to the General Mortgage Loan Approval conditions or the terms of the Mortgage Conditions. It seemed to be clarified during the hearing that they were referring to the General Mortgage Loan Approval conditions. In any event, there is no basis for any claim that they would be entitled to rely on not having seen either set of conditions. The "Acceptance of Loan Offer" notices expressly stated that

*"I/We the undersigned accept the within offer on the terms and conditions set out in
(i) Letter of Approval
(ii) the General Mortgage Loan Approval Conditions
(iii) the permanent tsb Mortgage Conditions
copies of the above which I/we have received and agree to mortgage the property to
permanent tsb as security for the mortgage loan."*

It also stated that *"My/our solicitor has fully explained the said terms and conditions to me/us."* Each of the notices of acceptance was signed by the plaintiffs and their signatures were witnessed by their own solicitor. In relation to the Mortgage Conditions, clause 7 of the Mortgage Deed states *"This Indenture incorporates the Clauses set out in permanent tsb Mortgage Conditions 2002 (herein called "the Mortgage Conditions") and the Mortgagor and Guarantor (if any) ACKNOWLEDGE RECEIPT of the Mortgage Conditions which they have read and understood and they covenant with permanent tsb to observe and be bound by the Mortgage Conditions."* This Deed, containing this clause, was also signed by the plaintiffs in the presence of their solicitor, who also signed the deed.

Conversion of the 1688 loan

63. In my view, it is beyond doubt that there is a stateable case that while the 1688 loan could be converted to capital and interest during the initial five year period, that could only be done on foot of a review.

64. That it could be converted during that period arises from the express terms of the clause. The first sentence expressly provides that repayment of interest only will be accepted for the first five years "*or such other period as permanent tsb may decide.*" *It does not state "or such other **longer** period as permanent tsb may decide."* This is reinforced by the express terms of the second sentence which provides that permanent tsb may "*...review the deferral of the repayment of principal at any time during the term of the loan, including the first five years of the term and may require the applicant to cease the interest only repayment and may require the repayment of principal and interest...*" I appreciate that it is somewhat incongruous that the Special Condition would provide for a specified interest-only period but also provide that it could be brought to an end by the bank during that very period but that appears to be the only correct interpretation of the Special Condition. It is perhaps in this context that the "review" provision must be seen.

65. There is also undoubtedly a stateable case that a requirement to cease the interest only payments during that initial period could only be made following a review. That follows from the combination of the first and second sentences. To suggest that the requirement for a review does not apply to a decision to cease the interest-only repayments during the specified interest-only period would be illogical and would place the borrower at a greater disadvantage during the initial period than after it.

66. It seems to me that in truth the real question in relation to the 1688 loan is the factual one of whether it was converted during the initial period. The plaintiffs have not placed any evidence before the Court that this loan was converted at that time. In particular, despite the averments in the first-named plaintiff's affidavit, a notice of the 1st December 2010 in respect the 1688 loan has not been exhibited. This is despite the plaintiffs having the opportunity after the hearing to deliver a supplemental affidavit for the purpose of doing so. In my view this comes very close to being a '*mere assertion*' (see para 6.8 of *Keohane*). However, for the purpose of this application, this must be seen in the context of the applicants not stating in clear and express terms on affidavit that no such notice was sent in respect of the 1688 loan or that the loan was not converted at that time (though this does seem to be implicit in the affidavit) and that in

their Defence, the furthest they go is to put the plaintiffs on proof of receipt of the said notices (paragraph 8). Furthermore, in the Defence delivered on behalf of permanent tsb it is not denied that a notice was sent in respect of the 1688 loan. Indeed, paragraph 16 of the Defence pleads (in response to paragraph 7 of the Statement of Claim) that "*...it is admitted that letters were sent dated 1 December 2010...*". It must be acknowledged, however, that paragraph 7 of the Statement of Claim does not specifically mention the 1688 loan and the plea in paragraph 16 of the Defence is subject to the preliminary objection in paragraph 5 that the Statement of Claim is vague and improperly particularised and that the Defence is delivered without prejudice to that objection.

67. Nonetheless, I have to deal with the case as it currently stands and it seems to me in that context that I could not conclude that the factual claim that the 1688 loan was converted before the expiry of the five year period is bound to fail.

68. Before concluding this section I must refer to one issue which also applies to the issue of the conversion of the other two loans. There was no real discussion at the hearing about what is meant by "review". The plaintiffs suggested that it means a review, involving them, of their ability to pay the higher amount of capital and interest. This was not contested by the applicants and there was no dispute that there had not been such a review.

69. In those circumstances, I can not conclude that a claim that the 1688 loan was wrongfully converted during the specified interest-only period is bound to fail.

Conversion of the 6497 and 6616 loans

70. It is common case that these loans converted to principal and interest in 2011, which was outside the specified three year interest-only period. In the absence of any claim of a review having been conducted, this element of the claim turns on whether the loans were to automatically convert to capital and interest at the expiry of the initial specified period or whether such conversion could only occur after a review. If it is the former then the plaintiffs are bound to fail on this element of the claim.

71. The principles of contract construction are summarised in *Headfort Arms Limited t/a The Headfort Arms Hotel v Zurich Insurance plc [2021] IEHC 608* and *Premier Dale Limited t/a The Devlin Hotel v Árachas Corporate Brokers Limited [2022] IEHC 178*. At

paragraph 38 of *Headfort Arms Hotel*, McDonald J set out a summary of the principles. Insofar as relevant to the current dispute, he said:

“...For convenience, the principles can be restated as follows:-

- (a) The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;*
- (b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract;*
- (c) The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;*
- (d) For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person;*
- (e) A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document if considered in isolation. As Lord Hoffmann explained in the Investors Compensation Scheme case at p. 912, the meaning of words is a matter of dictionaries and grammar. However, in order to ascertain the meaning of words used in a contract, it is necessary to consider the contract as a whole and, as noted in sub-para. (c) above, it is also necessary to consider the relevant factual and legal context;*
- (f) While a court will not readily accept that the parties have made linguistic mistakes in the language they have chosen to express themselves, there*

may be occasions where it is clear from the context that something has gone wrong with the language used by the parties and, in such cases, if the intention of the parties is clear, the court can ignore the mistake and construe the contract in accordance with the true intention of the parties;

- (g) *As O'Donnell J. made clear in the MIBI case, in interpreting a contract, it is wrong to focus purely on the terms in dispute. Any contract must be read as a whole and it would be wrong to approach the interpretation of a contract solely through the prism of the dispute before the court. At para. 14 of his judgment in that case, O'Donnell J. said:-*

"It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later.";

- (h) *In the case of a standard form policy produced by an insurer, ambiguity in the language of the policy will be construed against the insurer. This is known as the contra proferentem rule. This principle was affirmed by the Supreme Court in Analog Devices v. Zurich Insurance Company [2005] 1 I.R. 274 and in Emo Oil Ltd v. Sun Alliance & London Insurance plc [2009] IESC 2. In the latter case, Kearns J. (as he then was) cautioned that this principle will, in commercial cases, "usually be an approach of last resort" albeit that he also stated that it may be "more readily resorted to in respect of routine standard form commercial insurance policies". Later, in Danske Bank v. McFadden [2010] IEHC 116, Clarke J. (as he then was) explained the contra proferentem principle as follows, at paras. 4.1 to 4.2:-*

"4.1 The... contra proferentem rule is... only to be applied in cases of ambiguity and where other rules of construction fail. As such, the rule can only come into play if the court finds itself unable to reach a sure conclusion on the construction of the provision in question...

4.2 The rule can only be applied in cases of genuine ambiguity in interpretation of the agreement. As noted by Clarke: The Law of Insurance Contracts, 5th Ed.,... at para. 15-5:-

"In the past some courts were quick to find ambiguity in policies of insurance in order to apply the canon of construction contra

proferentem, and that raised the suspicion that the canon was being used to create the ambiguity, which then justified the (further) use of the canon: the cart (or the canon) got before the horse in the pursuit of the insurer. Orthodoxy, however, is that contra proferentem ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty. The maxim should not be used to create the ambiguity it is then employed to solve. First, there must be genuine ambiguity.””;

(i)...”

72. Many of the principles set out in this summary may be seen as elements of the “text-in-context approach”. McDonald J went on to say at paragraph 39:

“While each of the above principles must be borne in mind, the overall approach of the court to the interpretation of any contract (including a policy of insurance) is to apply what Clarke C.J. has described as the “text in context” approach. That requires consideration both of the terms of the contract as a whole and the relevant factual and legal background against which the contract was put in place.”

73. I have to confess to initially being of the view that the proper interpretation of Special Condition 7 was straightforward and meant what the applicants said it meant. However, upon closer consideration, I am not satisfied that the interpretation is as clear and straightforward as is required on a motion of this type or that the plaintiffs’ interpretation is unstateable.

74. I do not have to, and should not, express any view on the strength of the parties’ respective positions beyond that.

75. The express terms of the clause when taken alone undoubtedly lean towards the interpretation advanced by the applicants. The mere fact that a fixed period of time is expressly specified certainly lends support for the interpretation that the deferral of repayment of capital automatically (i.e. without the need for a review) lapses on the expiry of that period unless permanent tsb extends the deferral. However, as is clear

from *Headfort*, the clause must not be taken in isolation and it must be read in its overall context.

76. Both sides pointed to factors which they submitted were part of the context by reference to which the contract should be interpreted in accordance with the "*text-in-context*" approach:

- (i) The applicants pointed to the fact that the plaintiffs entered this agreement for the purpose of borrowing significant sums and, in accepting the offer, expressly stated that they had received the terms and conditions and they had been explained to them by their solicitor and they signed them as witnessed by their solicitor. These are all important matters but I do not find them of much assistance in interpreting the terms of the contract. The fact that they received the terms and conditions and that they were explained by their solicitor does not, it seems to me, assist in interpreting the disputed clauses.
- (ii) The plaintiffs (in paragraph 9 of their written submissions) pointed to an email of the 12th January 2011 from the first-named plaintiff in which he himself stated that "*...Interest Only is how I have run my investment business for the last 10 years.*" The applicants for their part pointed to the statement by the first-named plaintiff in that same email that "*...it was assumed that the interest rate period would be reviewed after two years and extended...*" I do not believe that this email is a relevant contextual factor or that I can have regard to it in construing the contract. It post-dates the execution of the contract: in construing the contract the Court looks at the context at the time the contract was entered into. Furthermore, as noted by McDonald J "*The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed.*"
- (iii) The plaintiffs also relied on a notation on the 1st December 2016 in the Mortgage Statement for 2016 re "New Product". It will be recalled that this was the date on which the interest-only period agreed in 2013 came to an end and it seems that this notation recorded the change from interest-only to capital and interest. The plaintiffs made a number of

points about this but insofar as relevant to the current discussion the argument was that if the mortgage provided for conversion to capital and interest repayments then it was not a "New Product" when this conversion occurred and the use of this label therefore suggests that permanent tsb believed it to be something new. For the same reason as why I do not believe I can have regard to the statements in the email, I can not have regard to this notation.

- (iv) The plaintiffs also urged me to have regard to the alleged fact that over 40,000 mortgages were converted by notice of the 1st December 2010 in interpreting the contract. The point they make is that it is inconceivable that all of those mortgages were entered into on the same date so that their interest only periods were expiring on the exact same day. Even if it is correct that over 40,000 mortgages were converted by notice dated the 1st December 2010, I do not believe that this is of any assistance in interpreting the contract because, due to the provision in the first sentence that the interest-only period could run for such period as permanent tsb may allow, it does not necessarily follow that the original specified interest-only periods in all of these loans were all expiring on the same day. Many of them could have been due to expire on various earlier dates but were extended by permanent tsb until they served these notices.

- (v) The plaintiffs pointed to certain features of the letters of approval. The terms of the first page of the letters of approval are clearly relevant and, it seems to me, of significance, for the purpose of interpreting the text of Special Condition 7 in context. They each describe the relevant loan as "*Loan Type: Tracker (LTV<80%/500K+) Int Only RIP*" (emphasis added) ("Int Only RIP" means Interest Only Residential Investment Property). There is a very slight difference in the description of the 6497 loan but it also contains the description "*Int Only RIP*". Secondly, the monthly instalment is stated as being "*Interest only*" and the relevant monthly amount is given. Thirdly, the Period of Agreement is given as 25 years and the Number of Repayment Instalments appears to be calculated on the basis of interest only repayments for that whole term. It seems to me that these give support for the interpretation that, notwithstanding the specific reference to an interest only period in the first sentence of the Special Condition, the loan was intended to be interest only for its whole

term subject only to the bank's ability to bring the interest only period to an end upon a review. As against that, importantly, in relation to the point that the monthly instalment is stated as being "Interest Only", the reference to "*Interest only*" has an asterisk attached which states "See *special conditions attached*". This must be taken as a reference to Special Condition 7 as it deals with interest-only. Thus, the general provision must be read as being subject to the special conditions. However, that does not mean that those general provisions can be disregarded when adopting the text in context approach to interpretation.

77. The express terms of Special Condition 7 tend to support the interpretation contended for by the applicants. However, when the text in context approach is adopted and these features of the letters of approval are taken into account, it does seem to me that there is a stateable basis for the interpretation contended for by the plaintiffs and in circumstances where I have found that two interpretations may be open, the application of the contra proferentem principle must also offer some support to the plaintiffs' position.

78. After the conclusion of the hearing the plaintiffs delivered a further affidavit in which they exhibited a European Standardised Information Sheet relating to the 6497 loan which they submitted supported their interpretation. The plaintiffs had been permitted to deliver a supplemental affidavit for a different purpose, i.e., to deal with whether a notice of the 1st December 2010 had been received in respect of the 1688 loan, and in those circumstances it would have been inappropriate for me to have regard to this document.

79. In my view, the fact that there is a stateable basis for the interpretation advanced by the plaintiffs is sufficient to preclude me from concluding that they are bound to fail on this point.

80. There was detailed argument about the Unfair Terms in Consumer Contracts Regulations (Council Directive 93/13/EEC and SI 27/1995). In circumstances where I am not satisfied that the plaintiffs could not succeed on the interpretation point, it is not necessary for me to consider the Unfair Terms in Consumer Contracts Regulations point.

81. Of course, the question of the interpretation of the contract between permanent tsb and the plaintiffs and therefore the conversion of the repayments to principal and interest are primarily matters between permanent tsb and the plaintiffs and I have

therefore had to consider whether any claim in respect of those matters is bound to fail as against the applicants. Indeed, the specific relief in respect of these matters (paragraphs 1-3 of the prayer in the Statement of Claim) is sought against permanent tsb. However, in the circumstances of this case there is no neat dividing line between the claim against permanent tsb and Start. The nature of the mortgage and whether it could be converted to capital and interest repayments is a central part of the case against Start and underlies part of the basis for the relief at paragraph 5 of the prayer. Also, the case that is made by the plaintiffs is that they were forced into arrears and into capitalising those arrears by the wrongful action of permanent tsb and that those arrears at least in part gave rise to Start's appointment of the receivers. Furthermore, in circumstances where the benefit of the loans and security has been transferred to Start, it can not be concluded that the plaintiffs do not have a stateable case that any liability which might attach to permanent tsb in respect of them will attach to Start.

82. Thus, while I agree with the applicants that it is unlikely that any oral evidence will advance the interpretation point any further, I nonetheless can not conclude that the plaintiffs are bound to fail in circumstances where there is a factual aspect to the point about the conversion of the 1688 loan, and the interpretation point is not sufficiently clear and straightforward when the text in context approach is adopted. It seems to me that to resolve the interpretation point in those circumstances would be to depart from the default position that a litigant is entitled to a trial and would be treating this process as a summary disposal of the issue.

83. In those circumstances I can not conclude that the plaintiffs are bound to fail on this element of their claim.

84. This leaves the question of whether I should consider whether or not to dismiss the other aspects of the plaintiffs' claim.

85. It was well-established that the Court could not dismiss part of a plaintiff's claim under Order 19 Rule 28 (Denham J in *Aer Rianta v Ryanair* [2004] IESC 23), which was in place when this matter was heard (this is no longer the case under the new Order 19 Rule 28 in place since September 2023). However, as noted above, it was made clear at the beginning of the hearing that the applicants were relying on the Court's inherent jurisdiction rather than on Order 19 Rule 28. Whether or not the Court could dismiss part only of a plaintiff's claim in the exercise of its inherent jurisdiction to dismiss proceedings which are bound to fail was considered by Collins J in *Ballymore Residential Ltd v Roadstone Ltd* [2021] IECA 167 and Stack J in *Christian v Symantec Ltd* [2022] IEHC

397. It was also touched upon by Cregan J in *Ryanair DAC v SC VOLA.RO SRL* [2022] IEHC 741.

86. In *Ballymore*, Collins J said:

"39. ...According to the Supreme Court, the jurisdiction conferred by Order 19, Rule 28 is exercisable only in respect of the entirety of a pleading and does not permit a court to exercise a form of "blue pencil" jurisdiction": *Aer Rianta cpt v Ryanair Ltd* [2004] IESC 23; [2004] 1 IR 506 (per Denham J at para 24)...

87. He went on at paragraph 42:

42. That leaves the *Barry v Buckley* jurisdiction. Counsel for *Ballymore* suggested in submissions that, under *Barry v Buckley*, a court will not dismiss part of a claim. That particular point was not addressed by counsel for *Roadstone* and no authority either way was opened to the Court.

43. In the absence of any detailed debate on the point, it is appropriate to proceed cautiously. Certainly, there are instances where as a matter of fact a court exercised the *Barry v Buckley* jurisdiction to strike out part of a plaintiff's claim. However, I am not aware of any decision in which the issue has been considered at the level of principle.

44. The decision of the High Court in *Ennis v Butterly* [1996] IEHC 51, [1996] 1 IR 426 is a case where the High Court considered it appropriate to dismiss part of the action. The defendant had sought the dismissal of the entire action...

45. There are conflicting policy considerations at play in this context. On the one hand, it appears to be highly undesirable that the High Court might routinely be asked to exercise the sort of "blue pencil" jurisdiction" referred to by Denham J in her judgment in *Aer Rianta v Ryanair*. While her observations were made in the context of an application under Order 19, Rule 28, they have obvious relevance and resonance in the *Barry v Buckley* context also. Denham J explained how the development of such a jurisdiction would have inappropriate consequences: "It would have the potential of initiating a whole new jurisdiction of interlocutory applications whereby parties sought to blue pencil (strike out) portions of statements of claim or defences. It could herald a whole new list in the High Court where parties would fight on the pleadings. Such an approach is contrary to the policy of expeditious litigation. It would involve further costs and raise that consideration also. In addition it would involve motions which could be time consuming; as if part

of a pleading is to be sought to be struck out, the probability is that at least one party will seek to have the issue analysed in the context of the whole pleading. Thus the entire pleading would be considered by the court. Indeed, there may be great difficulty in analysing a part of a pleading independent of the rest of the pleading.” (at paragraph 24) These are, on any view, powerful considerations.

46. On the other hand, where a discrete claim or cause of action is clearly bound to fail and where it appears that significant court time and legal costs would be saved if that claim or cause of action were to be excised from the proceedings at an early stage, there are, arguably, compelling countervailing policy considerations in favour of holding that the Barry v Buckley jurisdiction should, in principle, be available. It may be that Ennis v Butterly should be understood as an example of such approach, though not expressly articulated in such terms. Certainly, the breach of contract claim which was struck out by the High Court appears to have been the primary claim in Ennis v Butterly and there can be little doubt but that the striking out of that claim significantly narrowed the scope of the proceedings, with consequent saving in court time and costs.

47. There may be other exceptional circumstances in which a court could properly consider exercising the Barry v Buckley jurisdiction in respect of part only of a claim. For instance, where a claim of fraud or other deliberate wrongdoing is made without a proper basis it may be that a court would consider it necessary to strike out that claim in order to vindicate the rights of the defendant. Claims of professional misconduct that are made without a proper basis might fall to be treated in the same way. However, the issue was not debated in any meaningful way and so these observations are tentative (and obiter).”

88. In *Christian v Symantec*, Stack J said:

“14. Counsel for the defendant is of course correct in conceding that Order 19, r. 28 does not permit the strike out of part of a statement of claim: Aer Rianta c.p.t. v. Ryanair Ltd [2004] 1 IR 506. I note that, there, the Supreme Court (per Denham J., as she then was) expressly left over any consideration of whether part of a claim could be dismissed or struck out pursuant to the inherent jurisdiction of the court. The key finding in that case was that O. 19, r. 28 could only be used to strike out an entire pleading. In coming to this conclusion, the Supreme Court contrasted the wording of r. 28, which refers to the striking out of “any pleading” with the explicit reference in Order 19, r. 27 to the striking out of “any matter in ... any pleading”.

15. *The rationale underlying the exercise by the court of its inherent jurisdiction appears from the judgment of Costello J. in Barry v. Buckley where he said that the jurisdiction existed "to ensure that an abuse of the process of the courts does not take place". He further stated (at p. 308) that if a court is satisfied that a plaintiff's case was doomed to fail "then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to the defendant".*

16. *In Barry v. Buckley, the defendant was being prejudiced by the very existence of the proceedings because the plaintiff had instituted proceedings for specific performance and had registered a lis pendens against the land, meaning that the defendant could not sell the lands for a considerable time, perhaps several years, even though the claim was completely unfounded as it was clear that no contract had ever been concluded between the parties. That was an abuse of the court's processes as the proceedings themselves were being used to obtain a benefit to which the plaintiff was clearly not entitled.*

17. *If the primary rationale for the jurisdiction is to permit the court to regulate its own procedures and prevent abuse of them, it seems to me to follow logically that it is possible to strike out part of a claim. There would seem to be no reason why a claim which constitutes an abuse of process and which, if it were the only matter pleaded in a statement of claim, would be liable to be struck out as an abuse of process, could not also be struck out in circumstances where it was included in the same action as other claims. The jurisdiction would seem to be sufficiently flexible to be applicable in such case. Indeed, the exercise of the jurisdiction in relation to only part of a claim seems to have been assumed in *Burke v. Beatty* [2016] IEHC 353, discussed further below.*

18. *It remains the case, however, that the jurisdiction is one to be "exercised sparingly" as cautioned by Costello J. (also at p. 308). It also appears from *Barry v. Buckley* that the basis for exercising the claim is where the proceedings are causing "irrevocable harm" (in that case, by unjustifiably preventing a landowner from dealing with his property) or where it is in some way oppressive to ask a defendant to defend the claim. This could occur, for example, where a defendant is being asked to meet a claim which has already been determined in earlier proceedings. In those circumstances, the court retains an inherent jurisdiction to dismiss as being frivolous or vexatious, or as an abuse of process.*

19. *In considering the application in this case, I am acutely conscious that, regardless of its merits, it can, at best, remove only a limited part of the extremely*

lengthy statement of claim that has been filed. I note the comments of the Supreme Court in Aer Rianta c.p.t. v. Ryanair Ltd as to the undesirability of applications in respect of part of the pleadings, and the consequences of such applications for the courts which could, as outlined by Denham J. at para. 24 of that case, have the potential of initiating a whole new jurisdiction of interlocutory applications whereby parties sought to "blue pencil" (i.e., strike out) portions of statements of claim or defences, and it could herald a whole new list in the High Court where parties would fight on the pleadings. The Supreme Court was clear that such an approach would be contrary to the policy of expeditious litigation, would involve further costs, and that such motions could be time consuming and difficult.

20. It therefore seems to me that the inherent jurisdiction of the court should only be exercised in relation to part of the proceedings in very rare and clear cases, where that part of the claim constitutes an abuse of process even though the remainder of the claim is properly brought, or where the defence of that particular aspect of the claim would prove oppressive for the defendant over and above any difficulties presented by the defence of the proceedings as a whole."

89. The plaintiffs did not object to the court considering different elements of the claim and this point was therefore not argued. I agree with the reasoning of Collins J and Stack J. There are very weighty public policy reasons as to why the courts when being asked to exercise its inherent jurisdiction should be very slow to consider striking out parts of a Statement of Claim. The creation of a "*whole new list in the High Court where parties would fight on the pleadings*" would have a very significant impact on the right of all litigants to access the Courts. However, the courts must also be alert to the adverse impact of permitting the continuation of parts of cases which are bound to fail and the trial of which will consume limited court resources, thereby depleting their availability to hear other cases. It must also be noted that the new Order 19 Rule 28 now allows the Court to strike out parts of a claim. The correct balance is that the Court should be very slow to embark on such a process and should only contemplate doing so in rare and clear cases and, in particular, only where the claim is made up of separate and distinct elements.

90. Referring back to the elements of the plaintiffs' claim identified above, it seems to me that it is impossible to say that the following elements are separate and distinct from the claim that the conversion of the loans was wrongful: (i) the claim that permanent tsb fraudulently misrepresented the financial and legal position to the plaintiffs in 2013 and thereby wrongfully led them to agree to capitalising the arrears and entering an agreement for a three year interest-only period, converting to capital and interest at the

end of that period; (ii) the claim that if Start bought the mortgage knowing that it was not an annuity mortgage, they were guilty of fraudulent misrepresentation when appointing the receivers and moving to sell the properties because they knew the mortgages were in positive equity; (iii) the claim that the difficulties caused by the wrongful conversion ultimately led to the appointment of the receivers; and (iv) the validity of the sale of the mortgage to Start. The first and second of these are inherently linked with the question of whether the loans could be converted to capital and interest. In relation to the third, there are two bases for the claim that the sale of the mortgage to Start was invalid. The first is that permanent tsb misrepresented to Start that the mortgage was an annuity mortgage (based, it was submitted, on the 'New Product' notation on the 2016 mortgage statement). This, of course, is directly related to the question of whether the mortgage had been lawfully converted to capital and interest. The second basis is that clause 6.7 of the Mortgage Conditions provide that "*permanent tsb may at any time...transfer the benefit of the Mortgage to any person...*", clause 1.15 provides that "*person includes a corporation*" and Start is not a "*corporation*" within the meaning of the Companies Act 2014. Conceivably this claim could be dealt with separately. However, to do so would, in my view, involve the Court in the type of exercise cautioned against in Ballymore and Christian v Symantec. It would require the Court to parse one element of the plaintiffs' claim, ie. it would not only require the Court to consider striking out part of the plaintiffs' claim but would require it to consider striking out a part of a part of the claim. Furthermore, this point is not in fact pleaded in the Statement of Claim.

91. It seems to me that the following elements of the plaintiffs' claim are entirely separate from the issue of whether permanent tsb was entitled to convert the repayments to capital and interest: (i) the claim that the plaintiffs were given an assurance by a manager in permanent tsb that their mortgage would not be sold as part of the sale which was being discussed in the press and, in reliance on this assurance, they incurred expenditure on repairing the apartment; (ii) the claim that Start did not have a right to appoint a receiver because the registration of the charge post-dated the repeal of the Conveyancing Act 1881; and (iii) the claim that the receivers have acted in breach of duty in failing to let out the two apartments which would have generated significant levels of rent. In relation to the second of these, ie. that Start was not entitled to appoint a receiver because of the repeal of the 1881 Act, that is separate because it is not in any way dependent on the questions of the validity of the conversion to principal and interest and whether this wrongfully caused arrears or the validity of the sale of the loans to Start. As noted above, the plaintiffs make the point in the Statement of Claim that even if validly appointed, the receivers do not have a right of sale. However, they do

not make any claim for relief in this regard. Furthermore, there is no evidence that the receivers have attempted to sell the properties. I have therefore not considered it in this context.

92. It seems to me that as these are separate and distinct, they could conceivably take up considerable time at trial and therefore be oppressive to the defendants. It is, therefore, appropriate to consider these elements of the plaintiffs' claim.

Assurance by permanent tsb manager

93. This is something which will turn on oral evidence and therefore it can not be concluded that the plaintiffs are bound to fail in establishing that such assurance was given or that it has the legal effect contended for. There is, of course, a potential difficulty in establishing that the applicants (and in particular Start) has any liability on foot of any such assurance but to the extent that it is based on the loan documents it seems to me, for the reasons set out above relating to the transfer of the benefit of the loans and security, that there is a stateable case that liability may be attached to Start.

Appointment of the receiver – repeal of the Conveyancing Act

94. The plaintiffs claim that Start did not have a power to appoint a receiver over either the IFSC or Mountjoy apartments because the charges were registered after the repeal of the Conveyancing Act 1881 by the Land and Conveyancing Law Reform Act 2009.

95. Their argument is that under clause 6 of the Mortgage Conditions there are several rights related to receivers but these rely on clause 6.2 which itself relies on the Conveyancing Acts and those Acts were repealed before the charge was registered.

96. Clause 6.2 of the Mortgage Conditions provides:

"The statutory powers of sale and appointment of a receiver conferred by and incidental provisions contained in the Conveyancing Acts 1881 to 1911 shall apply to this security with the following modifications and additions that is to say...

97. The chronology is as follows. The mortgage was executed on the 11th January 2008. The 1881 Act was repealed with effect from the 1st December 2009. The mortgage was registered in the Registry of Deeds against the Mountjoy apartment on the 9th December 2010 and then it was registered in the Land Registry against the IFSC apartment on the 8th November 2012, i.e., both registrations were after the repeal of the 1881 Act

98. The plaintiffs rely on *EBS v Gillespie* [2012] IEHC 243 (which itself followed on from *Start v Gunn* [2011] IEHC 275).

99. Laffoy J in *EBS v Gillespie* had to consider whether the plaintiff was entitled to invoke the statutory jurisdiction to grant an Order for possession conferred by section 62(7) of the 1964 Act in circumstances where the proceedings seeking that relief were initiated after the repeal of the section. At paragraph 24 of her judgment, she said:

"24. The repeal of s.62(7), as is the case in relation to the repeal of any enactment, is subject to the provisions of s.27 of the Interpretation Act 2005 (the Act of 2005). Section 27(1) of the Act of 2005 provides that the repeal does not –

"...affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment."

Sub-section (2) of s.27 provides that, where an enactment is repealed, any legal proceedings, including civil proceedings, in respect of a right, privilege, obligation or liability acquired, accrued or incurred under the enactment –

"may be instituted, continued or enforced...as if the enactment had not been repealed."

In order to determine whether, notwithstanding the repeal of s.62(7), the jurisdiction of the Court to make an order for possession under that provision is alive as regards the plaintiff's claim against the defendant in these proceedings, the crucial question is whether it has been established that the plaintiff had acquired as against the defendant a right to seek the statutory remedy in the form of an order for possession of the property secured by the Charge prior to 1st December, 2009. The answer to that question turns on the application of the requirements of s.62(7) in the context of the agreement between the plaintiff and the defendant embodied in the Charge to the facts...

25. *In order to establish that its claim for possession within s.62(7) prior to 1st December, 2009, the plaintiff has to establish compliance with the two requirements expressly set out in the sub-section, namely:-*

(a) that repayment of the principal monies secured by the Charge had become due by that date; and

(b) that the plaintiff was the registered owner of the Charge."

100. On the facts, Laffoy J was satisfied that the plaintiff was the registered owner of the charge prior to 1st December 2009. She then went on to consider whether repayment of the principal monies had become due by that date. She determined that it had and concluded that as both of the requirements were satisfied "*...prior to the repeal of s.62(7), the plaintiff had acquired a right to seek an order for possession under that provision and, by virtue of s.27 of the Act of 2005, the plaintiff was entitled to institute these proceedings to obtain the appropriate remedy to enforce that right.*"

101. The plaintiffs rely on the necessity for the charge to be registered prior to the 1st December 2009.

102. In my view, the plaintiffs' reliance on *EBS v Gillespie* is misplaced and the claim that the appointment of the receivers was invalid due to the repeal of the 1881 Act prior to the registration of the charge is bound to fail.

103. I was referred to Twomey J's judgment in *Duffy v PTSB & Ors [2021] IEHC 511* in which, at paragraph 15, he considered what appears to be the same mortgage condition 6 and determined that the appointment of a receiver in that case was valid and was done in accordance with the Conveyancing Acts 1881 to 1911. However, Twomey J did not have to consider the precise point raised by the plaintiffs in this case and this judgment is therefore of limited assistance.

104. In *Kavanagh & Lowe v Lynch & ors [2011] IEHC 348*, Laffoy J considered the security held by Irish Life and Permanent (permanent tsb) on foot of a 2007 mortgage and the right to appoint a receiver. She noted that the mortgage was a two page document "*which incorporated the clauses set out in the Mortgage Conditions of 2002 of Permanent*" (i.e., the same mortgage conditions as in this case). She noted that the rights and remedies of permanent tsb were set out in Clause 6 of the Mortgage Conditions and that Clause 6.4 provides that permanent tsb may without any previous

notice to or concurrence on the part of the mortgagor "...appoint at the cost and sole risk of the Mortgagor a person to collect and receive such rents and profits for the use and benefit of [permanent tsb] at such commission as [permanent tsb] shall think fit **so that the statutory provisions respecting the appointment of receivers over property in mortgage and the powers and duties of such Receivers or otherwise in relation thereto shall apply to this security except so far as the same are hereby varied and subject to the provisions hereinbefore contained.**" (emphasis added). She went on:

"3.5 On the basis of the provisions of the 2007 Mortgage and Mortgage Conditions to which I have referred and the contents and provisions of the documents exhibited by Mr. Lowe, I am satisfied that on the 13th May, 2010 the power of Permanent to appoint a receiver was exercisable and, further, that it was properly exercised by the deed of appointment of that date. By the combined operation of the 2007 Mortgage and the Mortgage Conditions, certain rights, remedies and powers were given to Permanent, in some instances by reference to the Act of 1881. At the time the 2007 Mortgage and those rights, remedies and powers were created, the Act of 1881 was in force. In properly construing the extent of the mortgagee's rights, remedies and powers, one must read into the 2007 Mortgage and Mortgage Conditions, where appropriate, the relevant provisions of the Act of 1881 where they have been incorporated therein, subject to any variations which are expressly provided for. The fact that since the commencement of the Act of 2009, on the 1st December, 2009, ss. 15 to 24 of the Act of 1881 have been repealed cannot vary the proper construction of the 2007 Mortgage or impact on the contractual relationship of the mortgagors and Permanent, as mortgagee, thereby created. The rights, remedies and powers conferred on Permanent ab initio in the 2007 Mortgage still apply.

3.6 Accordingly, in my view, the considerations which arose in *Start Mortgages Limited v Gunn and Others* [2011] IEHC 275 in consequence of the repeal of s.62(7) of the Registration of Title Act 1964 (the Act of 1964) by s.8 of the Act of 2009 do not arise in relation to the power of Permanent to appoint Mr. Lowe as receiver or the nature of the powers conferred on Mr. Lowe as such receiver, insofar as they are conferred by reference to the provisions of the Act of 1881."

105. At paragraph 7.4 Laffoy J said:

"On this application, the defendants have raised issues about the title of the plaintiffs as receivers and their powers, which I have addressed earlier, by reference

to the...2007 Mortgage, and they have done so in reliance on the fact that the provisions of the Act of 1881, by reference to which powers were conferred on the mortgagees and receivers appointed by them have been repealed. On this point, it seems to me that there is a clear distinction between the impact of the repeal of s.62(7) of the Act of 1964, which provided a statutory remedy to the owner of registered land to apply to court in a summary manner for possession of the land when repayment of the money secured by the charge had become due, as found by Dunne J in Start Mortgages Limited & Ors v Gunn & Ors, and the impact, if any of the repeal of the Act of 1881 on the drafting device universally availed of by draftsmen of security documents of conferring powers on mortgagees by incorporating statutory provisions in force at the time of creation of the security, with or without variation. As I have found, in the latter situation, the ascertainment of the rights and liabilities of the parties to the security document is a matter of construction of the document and the repeal of the statutory provisions does not have the impact advocated by counsel for the defendants. Nonetheless, the issue may be the subject of further debate at the trial of the action. However, at this juncture, on the basis that all of the immoveable property the subject of this application was mortgaged by the 2005 Mortgage or the 2007 Mortgage and that both Mr. Kavanagh and Mr. Lowe have been validly appointed a receiver, I am satisfied that the title of each of the plaintiffs to possession cannot be in issue."

106. It is important to note that Laffoy J's judgment was given in respect of an application for an interlocutory injunction application. However, it is an extremely clear statement of the law. Furthermore, it is one with which I agree for the reasons set out by Laffoy J.

107. There is a fundamental difference between the two situations – in *Start v Gunn* and *EBS v Gillespie* the question was whether a statutory remedy continued to be available post repeal of the section providing for that remedy; the question in *Kavanagh v Lynch* and in this case is the proper interpretation of a contract between the parties.

108. I am satisfied that the plaintiffs can not succeed in the claim that Start did not have the power to appoint a receiver on the basis that the charge was not registered until after the repeal of the 1881 Act.

109. The plaintiffs also make a separate point about the mortgage in respect of the IFSC apartment. They say that "*the wrong Mortgage Conditions were registered with this Mortgage/Charge*". It will be recalled that the 2011 v.1.1 of the Irish Banking

Federation's General Housing Loan Mortgage Conditions was registered rather than the Mortgage Conditions 2002 on which the defendants rely. In my view, the plaintiffs can not rely on this in circumstances where they accept that these were the "*wrong mortgage conditions*" (and do not dispute that the conditions relied upon by the applicants are the correct ones) and where it was the plaintiffs' own solicitor who registered these wrong conditions. The plaintiffs also submit that the applicants can not rely on section 108 of the 2009 Act to appoint receivers because the mortgage was entered into before the commencement of that Act. I understand that this issue arises because it is pleaded in paragraph 16 of the Statement of Claim that when the plaintiffs sought evidence to show that Start had the power to appoint receivers to sell the property, Start claimed a power under section 108 of the 2009 Act. However, at the hearing, it was accepted on behalf of the applicants that this was an error. Furthermore, at paragraph 14 of the Defence, it "*is admitted that s.108 of the Land and Conveyancing Reform Act 2009 has no application in respect of a mortgage entered into prior to 1 December 2009.*"

Breach of duty of the receivers

110. The plaintiffs claim that the receivers have acted in breach of duty in failing to let out the two apartments which would have generated significant levels of rent. Those amounts would, of course, have gone against any indebtedness owed by the plaintiffs to Start and they therefore claim that they have suffered loss.

111. I was referred to Clause 6 of the Mortgage Conditions and section 24(1) of the 1881 Act by the applicants. As set out above, clause 6.2 provides that:

"The statutory powers of sale and appointment of a receiver confirmed by and incidental provisions contained in the Conveyancing Acts 1881 to 1911 shall apply to this security with the following modifications and additions that is to say..."

Section 24(2) of the 1881 Act provides that the receiver shall be deemed to be the agent of the mortgagor and the mortgagor shall be solely responsible for the receivers' acts or defaults. Clause 6(2)(c) provides:

"Any receiver shall have power in the name of the Mortgagor to give notice to quit and bring and take actions or proceedings for ejectment or recovery of

possession of any tenancy or otherwise and to re-let or let the property or any part thereof from time to time to such person or persons as he shall think fit...and to accept from time to time the surrender of the leases or tenancies of the Property or any part thereof for the purposes of selling or re-letting the same, without being responsible for loss."

112. I do not believe that these provisions mean that a Court could not conclude that the third and fourth-named defendants (on whose behalf this application is brought) are liable to the plaintiffs' for a breach of duty (if such breach is established). That is certainly not provided for in section 24(2). The mere fact that the receivers are deemed to be the agent of the mortgagor and the mortgagor shall be solely responsible for the receivers' acts or defaults does not preclude a finding that the receivers owe a duty and a liability, not to third parties, but to the mortgagor. In relation to clause 6.2(c), it is at least arguable that the provision that the receiver may perform certain actions in the name of the mortgagor "without being responsible for loss" means that the receiver would not be responsible to the third party and not that he would not be responsible to the mortgagor.

113. It seems to me that I should not parse the claim to consider whether it should be dismissed against Start. The claim will have to be tried, even if only against the third and fourth-named defendants, and the third and fourth-named defendants are represented by the same solicitors so there is no basis upon which I could conclude that it is oppressive for the defendants for this element of the claim to be permitted to continue.

ORDER 19 RULE 27

114. The defendants also seek relief under Order 19 Rule 27, submitting that even if I am disposed to permitting some matters to proceed, I should strike out specified paragraphs in the Statement of Claim (paragraphs 12-15, 16-17, 24 and 26) as being unnecessary and that they would delay the fair trial of the action.

115. Order 19 Rule 27 provides:

"The court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the

action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client."

116. The basis upon which these paragraphs are said to be unnecessary or would delay the hearing is that they can be determined on the basis of the documentation and their continued inclusion would involve someone getting into the witness box and opening all of the documents where in reality this Court is in as equal a position as any other to make the necessary determination now having reviewed all the documentation.

117. I am unable to agree that this is a correct exercise of the jurisdiction under Rule 27. The logic of that argument is that I should determine the matters at this stage and they must be determined against the plaintiffs. It seems to me that this would either amount to a form of summary judgment or would amount to a finding that the matters pleaded in those paragraphs disclose no reasonable cause of action or are bound to fail. Neither is a correct use of Order 19 Rule 27. It seems to me that the jurisdiction under Rule 27 (at least in respect of matters which are alleged to be unnecessary or likely to delay the trial of the action) is directed towards pleadings which include matters which are extraneous or irrelevant to the issues in dispute or which are so vague and uncertain that the matters at issue are not properly identified rather than to the question of whether or not the matters pleaded have any merit (while there have been justified complaints about vagueness and uncertainty in the pleadings, that is not the basis upon which Rule 27 was invoked). If Rule 27 were to encompass a consideration of whether the matters pleaded have any merit it would be replicating the jurisdiction under Rule 28.

SECTION 123 – VACATE THE LIS PENDENS

118. The defendants also apply for an Order vacating the lis pendens entered by the plaintiffs.

119. They do so on two bases: firstly, the proceedings do not concern a claim to an estate or interest in the lands; and secondly, as the proceedings are bound to fail they are not being prosecuted bona fide. In relation to the second, the defendants stated that they were not suggesting any mala fides on the part of the plaintiffs but rather that if proceedings are bound to fail they could not be prosecuted bona fide. While the

defendants did make the point that the plaintiffs had delayed in issuing their proceedings, this was not a basis for the application to vacate the *lis pendens*

120. Section 121(2) of the Land and Conveyancing Law Reform Act 2009 provides:

“(2) The following may be registered as a *lis pendens*:

- (a) any action in the Circuit Court or the High Court in which a claim is made to an estate or interest in land (including such an estate or interest which a person receives, whether in whole or in part, by an order made in the action) whether by way of claim or counterclaim in the action; and
- (b) any proceedings to have a conveyance of an estate or interest in land declared void.”

121. Section 123 of the 2009 Act provides:

“123.— Subject to [section 124](#) , a court may make an order to vacate a *lis pendens* on application by—

- (a) the person on whose application it was registered, or
- (b) any person affected by it, on notice to the person on whose application it was registered—
 - (i) where the action to which it relates has been discontinued or determined, or
 - (ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted bona fide.”

122. It is clear from section 121 that in order to register a *lis pendens* the proceedings must include a claim to an estate or interest in land. Interestingly, the grounds upon which a Court may make an Order vacating a *lis pendens* prescribed by section 123 do not include that the proceedings do not encompass such a claim. However, it seems to me that the Court must have a jurisdiction to vacate a *lis pendens* on the basis that it

was incorrectly registered in the first place or that the plaintiff was not entitled to register it. Alternatively, if the proceedings do not include a claim to an interest in land but a lis pendens was registered on foot of them, it would seem to me that it is open to a court to conclude that the proceedings were not being prosecuted bona fide for the purpose of section 123 of the 2009 Act. In *Bennett v Earlsfort Centre (Developments) Unlimited Company* [2018] IEHC 61 (referred to by Barniville J in *Hurley Property ICAV v Charleen Limited* [2018] IEHC 611) McGovern J held that the claim was in essence a claim for specific performance and/or damages and that the specific performance element of the claim was not for the performance of a contract for the sale of land. He held that on that basis, the proceedings did not in reality amount to a claim to an estate or interest in the land and the claim was not, therefore, one which came within the scope of section 121(2)(b). He said "*The issues in dispute will be resolved in due course at the hearing. These issues involve the construction of a contract and a determination as to whether or not the plaintiffs are entitled to damages. The issues do not involve a bona fide claim to an estate or interest in land.*"

123. In *Hurley Property ICAV v Charleen Limited* Barniville J considered the jurisdiction to vacate a lis pendens on the grounds that the proceedings are not being prosecuted bona fide paragraphs 84 – 91. He referred to Laffoy J's judgment in *Gannon v Young* [2009] IEHC 511 and Faherty J's decision in *Kenmare Property Finance Ltd v McGuinness* [2015] IEHC 576 in both of which the courts accepted that if the plaintiff's claim was doomed to fail the plaintiff was not prosecuting its claim bona fide. However, both judges rejected the respective applications on the basis that it could not be said that there "*no issues of fact*" arising in the case.

124. Barniville J went on to say at paragraph 90:

"90. This aspect of the court's jurisdiction to vacate a lis pendens under s.123(b)(ii) encompasses a situation where the bringing of the proceedings (and the registration of a lis pendens on foot of those proceedings) amounts to an abuse of the process of the court (such as where the proceedings are brought for an improper purpose such as to frustrate a sale or to seek to exert improper pressure on an opposing party) (as outlined by Ryan J. in Kelly and McGovern J. in Bennett) as well as a situation where the proceedings themselves are bound to fail or, as Laffoy J. said in Gannon, "doomed to failure". A lis pendens which has been registered on foot of proceedings which are bound to fail will be vacated under s. 123(b)(ii) on the grounds that "the action is not being prosecuted bona fide ", even though there might not be a lack of bona fides, as that term is commonly understood. It is true that where an action is brought, and a lis pendens registered on foot of that action, in circumstances

where the processes of the court are employed solely for the purpose of frustrating the exercise of legitimate rights, that would involve a lack of bona fides as the term is commonly understood. Both situations are encompassed by this part of the jurisdiction contained s.123(b)(ii)."

125. I am satisfied that the proceedings do not include a claim to an estate or interest in land. The plaintiffs' estate or interest in the land is not disputed. It is fair to say that as part of the pleas in the Statement of Claim, the plaintiffs do contest the validity of the sale of their mortgage to Start and, to that extent, the proceedings do concern Start's estate or interest in the land. However, the reliefs sought are almost all limited to claims for damages and do not, for example, claim declaratory reliefs in respect of any party's interest in the lands. Reliefs 1, 8 and 9 are in substance declarations but they have nothing to do with a claim for an interest in the lands. Relief 7 is also in substance a declaration but, again, it is not a claim to an interest in the lands.

126. Part of the plaintiffs' argument that the proceedings do indeed comprise a claim to an interest in land and properly ground the registration of a lis pendens is that the receiver is trying to sell the property. However, there is no evidence of the receivers trying to sell. Indeed, the defendants, through Counsel placed some reliance on the fact that the receivers have not tried to sell the lands. The Defence is somewhat vague on this point. At paragraph 19 it is denied that the third and fourth named defendants are "*seeking to sell the properties...at "fire sale prices"*" and that "*[A]s a result of the said litigation and the registration of a lis pendens, the Third and Fourth Named Defendants have taken no further steps in respect of the property pending the determination of the within litigation*" and at paragraph 20 it is denied that the applicants "*do not have an entitlement pursuant to mortgages to sell the Apartments as is alleged or at all.*" I do have a concern about this feature of the case. It would be incongruous if, as part of the argument in favour of having the lis pendens vacated on the grounds that they do not include a claim to an estate or an interest in land, the defendants could point to the fact that there has been no attempt to sell, but then once the lis pendens has been vacated they then moved to sell the property. That would seem to me to be very likely to lead to a challenge to those attempts. However, that would have to be determined on its own merits. I am confined to the current proceedings. I am satisfied that those proceedings do not include a claim to an interest in the lands.

127. I am conscious that the plaintiffs are lay litigants and that it is possible that they thought they had included such a claim. Birmingham J said in *JO'N v SMcD [2013] IEHC*

135 that “Clearly, there can be no questions of a lay litigant being deprived of his right of access to the courts by reason of any lack of skill as a draftsman.” This was said in the context of an application to dismiss proceedings under Order 19 Rule 28. The consequences of such an Order is to deprive a party of their right of access to the courts. The consequences of vacating a lis pendens are less severe (because the proceedings are not in any way brought to an end). Nonetheless, it seems to me that the same general approach can be adopted and, if there was a deficiency in the pleadings which the plaintiff wished to rectify by way of amendment, the Court would have to be slow to grant an order vacating the lis pendens before giving the plaintiff an opportunity to amend the pleadings. However, in this case, the plaintiffs were fully aware that the basis of the defendants’ application was that the proceedings did not include a claim to an interest in land and yet did not ask for an opportunity to amend the proceedings. Significantly, the first-named plaintiff informed the Court during the hearing that he had difficulty persuading the Central Office to register the lis pendens, presumably on the basis that there was no claim to an interest in land. Notwithstanding this, the plaintiffs did not seek to amend the pleadings.

128. It seems to me that it is appropriate to vacate the lis pendens on the basis that the proceedings do not include a claim to interest or estate in land.

129. In those circumstances, it is not necessary to consider the second basis to the application to vacate the lis pendens.

SUMMARY

130. I am not satisfied that the plaintiffs’ claim in respect of the alleged wrongful conversion of the plaintiffs’ loans is bound to fail and I will, therefore, not make an Order striking out that element of their claim. However, there is a significant lack of clarity about precisely what case is being made by the plaintiffs and I will therefore direct that an Amended Statement of Claim be delivered within two weeks subject to anything the parties may say about the time period.

131. I refuse, for the reasons set out in, inter alia, paragraph 90 above, to dismiss the plaintiffs’ claim that permanent tsb fraudulently misrepresented the financial and legal position to the plaintiffs in 2013.

132. I will also refuse (for the reasons set out at paragraph 93 above) to dismiss the plaintiffs' claim for damages on the basis that they were given an assurance by a manager in permanent tsb that their mortgage would not be sold as part of the sale which was being discussed in the press at that time and their claim that the receivers (the third and fourth-named defendants) have acted in breach of duty (for the reasons set out at paragraphs 110-113).

133. I will make an Order pursuant to the Court's inherent jurisdiction striking out the plaintiffs' claim that Start did not have a right to appoint a receiver because the registration of the charge post-dated the repeal of the Conveyancing Act 1881 on the basis that it is bound to fail for the reasons contained in paragraphs 94-109.

134. I refuse the relief sought pursuant to Order 19 Rule 27 of the Rules of the Superior Courts for the reasons set out in paragraphs 114-117.

135. I will make an Order pursuant to section 123 of the 2009 Act vacating the lis pendens registered by the plaintiffs for the reasons set out in paragraphs 118-129 above.