# THE COURT OF APPEAL

# CIVIL

**[Approved]**
**[No Redaction Needed]**
**Neutral Citation: [2023] IECA 196**
**Court of Appeal Record Number: 2022/150**
**High Court Record Number: 2015 No. 1320 S**

**Costello J.**
**Pilkington J.**
**Butler J.**

**BETWEEN**

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

**PLAINTIFF/**
**RESPONDENT**

**- AND –**

**BRIAN REILLY**

**DEFENDANT**

**- AND -**

**LYNN REILLY**

**DEFENDANT/**
**APELLANT**

**JUDGMENT of Ms. Justice Costello delivered on the 31st day of July 2023**

**1.** This is an appeal by the second named defendant ("the appellant") from the order of the High Court of 20 May 2022 (O'Regan J.) entering summary judgment in favour of the plaintiff ("the bank") against the defendants in the sum of €167,837.59 together with continuing interest on the principal sum from 13 April 2022 and awarding the bank the costs

of the proceedings. The appellant appealed the decision by a Notice of Motion dated 16 June 2022. The first named defendant failed to appeal the judgment against him within the time allowed by the Rules of the Superior Court and his application for an extension of the time in which to appeal was refused by this Court on 24 January 2023. This judgment is confined to the appeal against the Order against the appellant.

**The facts**

**2.** The defendants are father and daughter. The appellant wished to purchase a home in County Dublin. On 15 December 2006, ICS Building Society offered the defendants a loan in the sum of €280,600 to facilitate the purchase of an apartment to be held in the sole name of the appellant. On 22 December 2006, the defendants accepted the offer. The loan was duly drawn down and the property purchased. The defendants executed a charge in favour of ICS Building Society over the property. The charge in the name of the appellant was duly registered as a burden on the relevant Folio on 22 January 2007.

**3.** The defendants fell into arrears from 2008 onwards. In an affidavit sworn on 22 April 2022 the appellant averred that she immediately realised that she could not afford the repayments due on foot of the loan as she was earning €30,000 per annum at the time. She said that in the early months of 2007 she was unable to improve her employment situation and so she reluctantly decided to leave Dublin *"at least temporarily"* to work in the United Kingdom. She moved to London in June 2007. She says that the property was rented out *"and the mortgage repayments were made in full up until 2010"*. This latter averment is clearly incorrect in light of the full Statements of Accounts which were exhibited and subsequently appended to the amended Summary Summons. She explained that she could not contribute to the repayments and also cover her rental payments in London.

**4.** At paras. 10 and 11 she averred:

*"In order to address the accumulating issues with the Property, I authorise Mr. David Kane of Kane Bergin, Auditors and Accountants, to communicate with the plaintiff on my behalf in an attempt to deal with any arrears. The first named Defendant informed me that he was in regular discussions with Mr. John Feeney, a Bank of Ireland official (Bank of Ireland, of which ICS Building Society was a member) and also directly with a Mr. John Conville, another Bank of Ireland official with regards to finding a mutually acceptable agreement. The first named defendant informed me that these conversations with Mr. John Conville resulted in a new repayment agreement of €650.00 per month being agreed and accepted by the Bank. This repayment plan was put in place in or around October 2012 and it was my belief that this would remain in place until <u>either our circumstances improved and that no further action would be taken by the bank.</u>*

*11. I say that I understood this new arrangement was to remain in place until <u>my circumstances changed materially.</u> The repayments of €650.00 were made consistently after the agreement. Given the nature of the agreement, I had understood that while this was being honoured on the Defendants' behalf, that no legal action would be taken by the Plaintiff."* (Emphasis added)

**5.** The Statement of Account shows that on 19 January 2010 there was a repayment of €2,200. There was no further payment in 2010 or 2011. There was a repayment on 3 July 2012 in the sum of €560. On 10 September 2012 a lodgement in the sum of €650 is credited to the account. There were two payments of €650 on 31 October, and a further payment of €650 on 6 December 2012. In each month from January to April, the sum of €650 was lodged and on 10 May the sum of €1,660. 05 was lodged. There were no further payments in 2012, 2013 or 2014 by either of the defendants.

**6.** In an affidavit sworn in February 2017 the first named defendant referred to an agreement which he says he reached with Mr. John Colville on behalf of the bank in October 2012. At para. 5 of his affidavit he averred:

> *"Acknowledging the difficulties in making the loan repayments and in the midst of arrears in respect of the said loan, this Deponent made contact with a Mr. John Conville in Bank of Ireland (of which ICS Building Society was a member) and commenced what appeared to be agreeable discussions with a view to coming to a mutually beneficial agreement. These discussions resulted in an undertaking to restore an 'interest only' payment schedule for €650.00 per month which was approved by the Bank. This was an agreement by the bank to accept €650 per month and not to take any further action. This payment schedule was put in place in or around October 2012 and <u>it was my belief that this arrangement was to remain in place until our circumstances improved</u>."*(Emphasis added)

**7.** The bank disputed that any such agreement was entered into and Miss Jacinta Enright, a legal case manager in the Arrears Support Unit of the plaintiff, swore an affidavit on 15 May 2017 stating her belief that no such undertaking or agreement was entered into. She pointed to the absence of any documents evidencing the alleged agreement or undertaking and at paras. 15 and 16 of her affidavit she averred:

> *"15. The correct position is that on 30th October 2012, the First Defendant contacted the Plaintiff and advised that tenants for the property had been secured at a rent of €800.00 per month. The First Defendant was advised to contact the Second Defendant with a view to making up the amount necessary to repay capital and interest which at the material time was €971.71.*

*16. The Plaintiff could not enter into any forbearance agreement with the Defendants in the absence of Standard Financial Statements which, as previously averred, were not properly submitted or vouched by the Defendants. With regard to this latter issue, and contrary to the averment in paragraph 13 of the First Defendant's Affidavit, the correct position is that in September 2014, the Defendants provided unvouched and out of date Standard Financial Statements. When by October 2014 vouching documentation had still not been received, the Plaintiff, as it was entitled to do, took steps to appoint a receiver."*

**8.** No affidavit was sworn by either Mr Colville or Mr Feeney addressing the alleged agreement of October 2012.

**9.** There is a certain lack of clarity around events in the late spring and summer of 2013. It appears that on 8 April 2013 ICS Building Society wrote to the appellant calling in the arrears then said to be due on foot of the loan. The appellant says she received this letter on 17 April 2013 and she replied to it on 20 April 2013. In addition, a letter issued by Whitney Moore Solicitors on behalf of the building society dated 17 April 2013 demanded possession of the premises from the appellant and noted that the arrears at that time stood at €41,581.77. In her affidavit the appellant stated that she was greatly shocked by these letters and, without obtaining legal advice, she wrote directly to Mr. Conville on 20 April 2013 and she said that she could not pay for the apartment. She said that the property was rented out and she would instruct the tenants to pay the bank directly and said that her father would return the keys and that she was *"irrevocably"* handing back the apartment to the bank *"to do with as they wish"*. A partial copy of a letter dated 1 May 2013 was exhibited by the appellant, apparently emanating from the Mortgage Arrears Support Unit of the building society, which acknowledged receipt of the keys but indicated that it would not be accepting possession of the property. The appellants did not receive this letter until 12 August 2013 and she replied

on 14 August 2013. She referred to the earlier correspondence and said: "*All of this at a time that both I, and my father, acting on my behalf, had both been in full contact with John Conville at BOI"*. She referred to her response in April *"I was clearly confused and upset when I first responded, without the benefit of any professional advice, and now need to seek such advice as to how best to respond to your disappointing and clearly uncaring correspondence."* Neither she nor the first named defendant nor any adviser acting on their behalf thereafter contacted the building society asserting the existence of an agreement by the building society in October 2012 to accept reduced interest only repayments or that they had complied with or would resume complying with the agreement.

**10.** The building society wrote to the appellant and the first named defendant under the Code of Conduct of Mortgage Arrears (CCMA) on 3 July 2014. The letter stated that the mortgage loan was being dealt with under the Mortgage Arrears Resolution Process and set out the information which the building society sought under the MARP process. The letter stated that so far, the defendants had not provided the necessary information. The letter stated that if they did not complete a full complete standard financial statement making a full and honest disclosure of all information including relevant supporting documentation that they would be classified as "*not co-operating*" under the CCMA. The information was not provided and by letters dated 15 August 2014 addressed to each borrower, the building society classified them as not co-operating under the CCMA. The arrears due at that time were stated to be €56,418.68.

**11.** With effect from 1 September 2014, the assets and liabilities of ICS Building Society – including the liabilities of the defendants to the building society, and the benefit of the loan agreement – were transferred to the bank under the relevant provisions of the Central Bank Act, 1971 and the Central Bank Act, 1971 (Approval of Scheme of Transfer between ICS

Building Society and the Governor and Company of the Bank of Ireland) Order 2014, (S.I. 257 of 2014).

**12.** The bank wrote to the appellant (and the first named defendant) on 19 September 2014 calling in the loan. It stated that the redemption balance was €304,049.59 and that the current outstanding arrears were €57,322.77. The letter gave her ten days in which to discharge the sum and undertook not to commence legal proceedings until the time had elapsed.

**13.** The defendants were unable to clear the loan and on 4 December 2014 the bank appointed a receiver over the property under clause 6 of the Mortgage Deed. The mortgage property was let to a tenant at the time and when the tenant left, on or about 18 July 2015, the tenant surrendered the keys and possession of the mortgaged property to the receiver who duly accepted and secured possession thereof. In so doing, he was acting as the agent of the mortgagor, that is the defendants.

**14.** The receiver arranged for the sale of the property at auction. The sale was completed and closed by the bank selling as mortgagee on 16 October 2015. The defendants were credited the full net sale proceeds and rental income accrued during the receivership amounting to €145,320.48 on 19 October 2015 and the balance of €7,677.76 on 11 April 2017.

**The proceedings**

**15.** The bank commenced proceedings against the defendants by issuing a Summary Summons and a Concurrent Summary Summons on 3 July 2015 claiming summary judgment in the sum of €307,013.09 together with continuing interest. Ms Andrea De Courcy swore an affidavit on 27 October 2016 to ground the application for summary judgment and thereafter there were exchanges of affidavits by the parties. Ultimately, by order dated 26 July 2021 the Summons and Concurrent Summons were amended to set out the particulars necessary to comply with the decision of the Supreme Court in *Bank of Ireland v. O'Malley*

[2019] IESC 84, [2020] 2 ILRM 423 and the Statements of Account were attached as a schedule to the Summary Summons.

**16.** The affidavit of Ms Marie Carey sworn on 30 April 2019 on behalf of the bank sets out the credits due in favour of the appellant and the first named defendant and averred that as of 17 April 2019 the sum of €162,095.78 remained due and owing over and above all just credits and allowances. She swore a further affidavit on 28 April 2022 updating the figures to the sum of €167,837.59 as the sum due as of 12 April 2022.

**17.** The defendants filed a number of affidavits opposing the application to enter summary judgment: the first named defendant's affidavit of February 2017, already referred to; Maurice Lyons, solicitor, swore two affidavits on 9 October 2018 and 6 November 2019. The first named defendant swore a second affidavit on 13 April 2022. Mr. Ben Hoey swore an affidavit on 14 April 2022 and the appellant swore the affidavit of 22 April 2022, previously referred to. It is not necessary to set out all of the grounds upon which the appellant opposed the application for summary judgment as only four issues were pursued on appeal. The appellant contends that she had established an arguable defence on the basis that:

1. There was an agreement reached in October 2012 whereby the defendants would repay the sum of €650 per month and that while this arrangement was in being, no further steps or actions would be taken by the building society (now the bank) to take possession of the subject property or to realise the debt.
2. The bank acted in breach of the Code of Conduct of Mortgage Arrears.
3. The appointment and conduct of the Receiver impacted upon the quantum of the bank's claim.

4. An issue in relation to the calculation of interest which is discussed in detail below and which concerned the European Central Bank Main Re-financing Operations minimum rate ("*Repo Rate*")

**Judgment of the High Court**

**18.** The Judge noted the evidence in relation to the loan agreement, the execution of the deed and the registration of the charge as security on the Folio and the arrears on the loan account. She referred to the transfer of the ICS Loan Book under legislation to Bank of Ireland. She then proceeded to address the defences raised by the defendants.

**19.** The first was that an estoppel arises because of an asserted oral agreement entered into in October 2012 between the first named defendant and personnel within ICS Building Society. The trial judge held that:

> *"Because the payment of €650 started in September in advance of the agreement, I cannot see how the payments thereafter, €650, actually support or might be said [to be] in part-performance of an agreement not then yet made. Furthermore, the payment of €1,660 in May 2013 is not consistent with the asserted arrangement."*

**20.** She referred to correspondence between the lending institution and the appellant and observed that the appellant never raised the issue of this now asserted agreement. O'Regan J. also referred to further attempts to negotiate a settlement between the parties and opined that if a deal had been done then there would have been no further need to engage in further negotiations but rather, to insist on the deal being performed.

**21.** The trial judge accepted the submissions on behalf of the bank that the defence amounted to a mere assertion that an estoppel arises. Even if a deal had been reached, the defendants must point to some action to their detriment or prejudice such that it would be unconscionable to allow the bank to resile from the agreement. The trial judge noted that

the defendants did not assert any prejudice or detriment and that it was merely stated that it would be unconscionable to allow the bank to resile from this agreement.

**22.** In those circumstances, she was not satisfied that an arguable ground existed in relation to the asserted estoppel in respect of the agreement of October 2012.

**23.** She next addressed the defence based on alleged non-compliance with the code of conduct for mortgage arrears. She held that Miss Carey's affidavit of 30 April 2019 showed that the building society complied with the code of practice. In any event, she said that non-compliance with the code may give rise to a moratorium on obtaining an order for possession but does not afford a defence to an application for summary judgment.

**24.** She then turned to the argument that there was in fact no Repo Rate after October 2008 and therefore, in accordance with special condition 4 of the loan agreement, there was no valid interest rate applicable to the loan. Mr. Lyons, the defendants' solicitor, contended that because the repo rate ceased to exist and the ICS Building Society failed to certify an alternative rate in accordance with special condition 4, that no interest was in fact chargeable on the loan from October 2008.

**25.** The trial judge rejected this argument. She noted that Mr. Lyons was not in a position to give expert evidence but that the bank had adduced expert evidence from Mr. Rogers, formerly an economist in the Central Bank who acted as head of market operations desk at the ECB from 2005-20010 and then as Head of Liquidity Management in the ECB, and Mr. Tony Morley, the Bank of Ireland Head of Group Balance Sheet Management, who was personally familiar with the detail and operation of the European Central Bank's re-financing operations. The trial judge noted that Mr. Rogers stated that there was only ever one MRO rate (also referred to as the Repo rate) and that his expert evidence was not countered. In the absence of countervailing expert evidence, she held that it was not arguable that there

was no interest rate accruing since October 2008; she was satisfied that there was one MRO rate, and it was not arguable that there were two.

**26.** The argument in relation to the receiver in the High Court was that clause 6.01 of the mortgage which enabled the building society to appoint a receiver was an unfair term and the clause and appointment of the receiver gave rise to a counterclaim. O'Regan J. rejected this argument on the basis that the protections afforded to consumers under unfair terms legislation did not apply to the core terms of the contract as held by the High Court in *Allied Irish Banks Plc v O'Donoghue [2018] IEHC 599* and *AIB Mortgage Bank v Cosgrove [2017] IEHC 803.* By implication she held that the clause was core to the mortgage agreement and was therefore satisfied that this defence was not arguable.

**27.** For these reasons (and others which are not relevant to this appeal), she was satisfied that in applying the principles set out by McKechnie J. in *Harrisrange Ltd v Duncan* [2003] 4 IR 1, this was not a case *"which should go forward to plenary hearing."* She held that the bank was entitled to recover summary judgment and she entered judgment in the sum of €167,837.59 with interest continuing from 13 April 2022. She held that there was no reason to exercise her discretion in favour of altering the default provisions in s.169 of the Legal Services Regulation Act, 2015 and accordingly she awarded the bank the costs of the proceedings.

**The Appeal**

**28.** In her Notice of Appeal, the appellant raised five issues. The first was that the bank was estopped from seeking summary judgment by reason of the oral agreement entered into in October 2012. She contended that oral evidence and cross-examination was necessary to determine the factual dispute between the parties in relation to the alleged oral agreement. The second issue concerned the conduct of the receiver. The arguments advanced on appeal differed to those raised before the High Court. Originally his appointment was challenged,

though this was not maintained at the hearing. Before this Court it was contended that certain actions of the receiver gave rise to a counterclaim in favour of the appellant. The impugned actions were the taking of possession of the secured premises (by receiving the rent from the tenants and subsequently taking physical possession) and then selling the secured property. Complaint was also made that additional costs were incurred by the Receiver's sale. Thirdly, it was asserted that the bank had not complied with the terms of the code of conduct of mortgage arrears and that this afforded her a defence to the claim for summary judgment. Fourthly, it was said that there was non-compliance with the terms of the Land and Conveyancing Law Reform Amendment Act 2013. This latter point was not maintained at the hearing. The fifth issue concerned the interest rate and the alleged abolition of the repo rate. It was said that in the absence of a Repo rate the bank had charged interest without a legal basis for same. She contended that expert evidence will be required to address this issue and the experts who gave evidence on behalf of the bank will need to be cross-examined.

**Discussion**

***The estoppel argument***

**29.** The terms of the alleged agreement have been set out in the extracts quoted from the affidavits of the appellant and the first named defendant. The deponents for the bank have denied that any such agreement was reached. The agreement asserted by the appellant is unclear and vague in my judgment. The agreement is said to continue *"until either our circumstances improved" or "my circumstances changed materially"* according to the appellant, two apparently inconsistent conditions. It is doubtful whether such a vague term could be enforced. Do the circumstances of both the first named defendant and the appellant have to improve before the bank can seek to restore repayments in line with the loan agreement, or may it do so if they improve for the appellant but not the first named

defendant? By what yard stick is the improvement of their respective circumstances to be assessed? What degree of improvement is required?

**30.** However, it is not necessary to determine this appeal by reference to these questions. The appellant's position, taken at its height, is that it was agreed that the defendants would repay the sum of €650 per month and the bank would refrain from action. It is undeniable that this ceased in April 2013, save for a lump sum payment made in May 2013. Even on her own case, the appellant does not contend that the bank was to be bound indefinitely to an agreement which the appellant accepts she did not perform nor that she was in any way prejudiced by the bank's actions in agreeing to accept the lesser figure (on her case).

**31.** The appellant did not advance any case that she acted to her detriment in reliance on the asserted agreement. Indeed, it is difficult to see how she could do so as, on her case, she was afforded forbearance by the bank. She was asked to repay less than the sum due under the loan agreement. Prejudice/ detriment is an essential ingredient of estoppel by representation (*Doran v Thomas Thompson & Sons Ltd [1978] IR 223*). The absence of any such prejudice or detriment is fatal to this asserted defence.

**32.** The last payment on the account was May 2013. In my judgment, even if there was an agreement as asserted by the defendants, the bank could not be estopped from seeking to recover the full amount due in September 2014, sixteen months after the last payment on foot of the asserted agreement, when it sent a letter of demand calling in the loan. It was entitled to treat any concession as withdrawn and the correspondence proceeding the letter of demand of 14 September 2014 made amply clear that it did not consider that it was bound by any agreement and the defendants did not suggest the contrary.

**33.** It is also important to recall that in neither of the appellant's letters of April or August 2013 did she assert that such an agreement existed or that the bank was precluded from resiling from such an agreement when she failed to keep up the (reduced) repayments. There

are no contemporary documents which support the existence of the asserted agreement. The defendants' actions from 2013 onwards, in particular her offer to surrender the secured property to the bank, appear to contradict such agreement. Her response to her undoubted difficulties was to attempt to renegotiate with the bank rather than to hold the bank to the alleged existing agreement. Finally, the bank's deponents deny the existence of the agreement and, significantly, aver that no debt forgiveness agreement may be entered into by the bank without it being recorded in writing and signed by the borrower. The uncontroverted evidence is that there is no such record of the agreement. All of this, when combined with the vagueness of the asserted agreement and the inconsistency of the terms of the asserted agreement, leads to the conclusion that what she now says is not credible. In *Aer Rianta v. Ryanair* [2001] 4 I.R. 607, McGuinness J posed the question for a court to ask in these circumstances as: "Is what the defendant says credible?" In my judgment in this case, what the appellant says is not.

**34.** For all of these reasons, I am not satisfied that the appellant has made out an arguable ground of defence that the bank is estopped from claiming summary judgment in these proceedings.

***Conduct of the receiver***

**35.** At the hearing of the appeal, it was not contended that the receiver was not validly appointed or that the clause entitling the mortgagee to appoint a receiver was an unfair term within the meaning of the European Communities (Unfair terms in Consumer Contracts) Regulations 1995. The argument related to the conduct of the receiver once appointed. The receiver was appointed on 4 December 2014, and he took possession of the secured premises when the departing tenant delivered him the keys to the property. He therefore took peaceful possession of the property. He then arranged the sale of the premises. The actual sale was effected by the bank as mortgagee in October 2015 following an auction. The appellant has

had a solicitor on record since 3 November 2015. No objection was taken to the appointment of the receiver or his conduct until three years later. The affidavit of Mr. Lyons sets out a variety of complaints about the actions of the receiver which he says gives the appellant grounds for a counterclaim. The difficulty with this position is that the receiver is not a party to these proceedings, and the receiver is the agent of the defendants. It follows that there can be no arguable counterclaim against the bank for the alleged defaults of the receiver and therefore any alleged claim the appellant may have against the receiver is not a defence to the claim by the bank for summary judgment in these proceedings.

**36.** In addition, the asserted grounds for complaint against the receiver do not withstand scrutiny. There is a vague reference to rental income *"issues"*, though these are never elaborated and therefore cannot amount to even a stable claim. The receiver collected rents from the tenant and the property was sold within a very few months after he obtained possession of the property. The property was peacefully repossessed from the tenant who surrendered the keys directly to the liquidator, so there can be no issue about alleged wrongful possession of the secured property. Likewise, there can be no issue regarding the alleged unnecessary additional costs incurred by a receiver's sale of the property, as the bank has not deducted the receiver's fees from the net proceeds of sale. The appellant has been given full credit for the net proceeds of sale and so she can have no complaint based on the expenses associated with the receivership.

**37.** For these reasons, I am not satisfied that the appointment and/or alleged misconduct of the receiver affords the appellant an arguable ground of defence to the bank's claim for summary judgment in these proceedings.

***The code of conduct of mortgage arrears***

**38.** The appellant asserts a defence to the claim for summary judgment on the basis of alleged non-compliance with the code of conduct of mortgage arrears. I am satisfied that

this ground of appeal must be rejected for two reasons. First, the trial judge found that there was, in fact, evidence of compliance by the bank with the requirements of the code. Ms. Carey, in her affidavit, averred to the facts of compliance and exhibited the letters from the bank to the appellant and the first named defendant warning that if they did not comply with the standard requests set out in the correspondence that they would be deemed to be non-cooperating borrowers within the meaning of the code. The second letter stated that they were "*not co-operating*" and accordingly the provisions of the Code of Conduct no longer applied in respect of the loan. Neither the appellant nor the first named defendant disputed any of this evidence. It followed that as a matter of law, the bank and its receiver were entitled to seek the repayment of the loan. This meant that the bank and the receiver were entitled to sell the property in the circumstances.

**39.** Furthermore, it is established law that a breach of the Code of Conduct of Mortgage Arrears does not afford a defence to a claim for judgment for the outstanding loan. The defaulting debtor may only rely upon the code where the creditor seeks possession of the mortgage property, and the debtor alleges a breach of the moratorium provided in the code. A failure by a lender to comply with the other provisions of the code does not affect its entitlement to obtain an order for possession as a matter of law and *a fortiori* did not afford a defence to a claim for summary judgment. (See *Irish Life & Permanent v. Dunne* [2016] 1 IR 92.)

***The Repo rate***

**40.** The Mortgage Loan Offer letter set out the interest rate applicable to the loan. The fixed rate was 4.650% for 36 instalments until 29 January 2010. Thereafter, there would be 384 instalments at a variable interest rate. The special conditions specified at Part 4(a)(ii) that the interest rate applicable to the loan will be a variable interest rate.

*"This variable interest rate may vary upwards or downwards. The interest rate shall be no more than 1.25% above the European Central Bank Main Refinancing Operations Minimum Rate ("Repo rate") or the term of the loan. Variation in interest rates shall be implemented by the lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer Letter. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate."*

**41.** Mr. Lyons, solicitor for the appellant, averred in his affidavit of 9 October 2018:

*"13. ...A perusal of the Mortgage Loan Offer Letter dated the 15th December 2006…shows that this is a Tracker Mortgage which tracks the European Central [Bank] Main Refinancing Operations Minimum rate (REPO rate) for the term of the loan. It further provides that in the event that the REPO rate at any time is certified by the Bank to be unavailable for any reason, then the interest rate applicable shall be a stated alternative rate.*

*14. I say the Plaintiff Bank is well aware that the European Central Bank Main Refinancing Operations Minimum rate ceased to exist in its entirety as of October of 2008. I say that despite the fact that the Plaintiff was aware of the fact that the said rate ceased to exist, no certification or notification of any sort was given by the Plaintiff Bank or its predecessor to the Second Named Defendant in this regard.*

*15. I say that [the] natural conclusion from the foregoing is that as and from October 2008, as the European Central Bank Main Refinancing Operations Minimum Rate was*

*the applicable rate to the Account and no certification was ever furnished by the bank to the contrary, no interest whatsoever accrued to the Mortgage Loan Account the subject matter of the instant proceedings."*

**42.** In response to this averment, Ms. Marie Carey swore an affidavit on 30 April 2019. She said that the assertion that the Repo rate ceased to exist in its entirety as of October 2008 and that no further interest accrued on the defendants' account is incorrect. She set out in tabular form the details of the applicable European Central Bank main refinancing operations minimum interest rates to date, and in the right-hand column she set out the interest rates applied to the defendants' loan from the drawdown to date.

**43.**

| **DATE** | **ECB MRO INTEREST RATE** | **AGREED MARGIN** | **DEFENDANTS' RATES** |
|---|---|---|---|
| 24.08.2006* | --- | --- | 4.65% |
| 29.01.2010** | 1.00% | + 1.25% | 2.25% |
| 13.04.2011 | 1.25% | + 1.25% | 2.5% |
| 13.07.2011 | 1.50% | +1.25% | 2.75% |
| 09.11.2011 | 1.25% | +1.25% | 2.5% |
| 14.12.2011 | 1.00% | + 1.25% | 2.25% |
| 11.07.2012 | 0.75% | + 1.25% | 2% |
| 09.05.2013 | 0.5% | + 1.25% | 1.75% |
| 13.11.2013 | 0.25% | + 1.25% | 1.5% |
| 11.06.2014 | 0.15% | + 1.25% | 1.4% |
| 10.09.2014 | 0.05% | + 1.25% | 1.30% |
| 16.03.2016 | 0% | + 1.25% | 1.25% |
| * Date of drawdown | | | |

| | |
|---|---|
| * | end of initial fixed interest period at 4.65% |

**44.** She confirmed that the interest rate charged to the defendants tracked the Repo rate at the agreed margin of 1.25% over the Repo rate. She exhibited customer year end statements of the account which confirmed the applicable interest rates charged to the account. The appellant has not contested the fact that these interest rates were applied but argues the legality of the action of the bank in charging such interest rates.

**45.** Two deponents swore affidavits on behalf of the bank explaining the position regarding the European Central Bank main refinancing operations interest rate. The first affidavit was sworn by Mr. Tony Morley on 8 May 2019. He is an employee of the bank and at the time of swearing the affidavit held the office of Bank of Ireland Head of Group Balance Sheet Management. He avers that as such he was personally familiar with the detail and operation of the European Central Banks' refinancing operations. He says that the averments of Mr. Lyons were incorrect and suggested a fundamental misunderstanding of the position. He states that:

"*No ECB interest rate 'ceased to exist' in October, 2008… and specifically, the interest rate to which the Defendants' Loan herein is tied- that is the ECB MRO Interest Rate- has continued to be set and published by the ECB from time to time since before the Defendants' loan was drawn down through to date."*

**46.** He exhibited a printout from the ECB's website showing the ECB interest rates from 1999 to the date of his affidavit. The exhibit shows interest rates under the heading Main Refinancing Operations. He avers that there:

> *"has only ever been one '..interest rate on the main refinancing operations (MRO)…', or ECB MRO Interest Rate, at a time -- and what the two sub-columns [in the exhibit] differentiate between are the tender processes (fixed or variable) through which the*

*ECB manages the allocation of its MRO lending and between which it switches from time to time as it considers appropriate in its management of the liquidity within the Eurosystem."*

This does not detract from the fundamental point that one and only one ECB MRO interest rate (Repo rate) has at all times been fixed by the ECB.

**47.** He explains that in October 2008 the ECB's allocation mechanism for the making available of liquidity to the Euro system via the ECB's MRO changed, not the interest rate. At para. 10 he stated:

*"The position therefore - as appears from the ECB history document exhibited by me and as detailed above - is that no ECB interest rate 'ceased to exist', in October, 2008, or at all and that the ECB has continued - as it did before October, 2008, and as it still does - to fix and to publish a single ECB MRO Interest Rate for the time being, lowering and/or raising it from time to time as it deems appropriate, and to make short-term, inter-bank, liquidity finance, based thereon available to qualifying institution (such as the plaintiff) through its MRO system. That ECB MRO interest rate has been available throughout for fixing the Defendants' Tracker Mortgage Loan interest rates herein at the agree margin thereover."*

**48.** In addition, he referred to the fact that multiple documents readily available from the ECB's website confirmed the continued existence of the ECB MRO interest rate after October 2008. He exhibited a press release issued by the ECB on 6 November 2008, a press release issued in March 2010 and a Monthly Bulletin issued in June 2010 and an extract from the ECB Statistics Profit Book published in July 2014 all of which clearly illustrated that the ECB has continued to publish and operate an ECB MRO interest rate after October 2008.

**49.** The second affidavit was sworn by Mr. Ciaran Rogers, an economist who was formerly employed by the Central Bank of Ireland and then by the ECB. When working as an economist in the ECB, he held the position *inter alia* of ECB Head of Liquidity Management. In 2005, he returned to the Central Bank of Ireland as Head of Market Operations Desk which involved acting as liaison between Irish banks, such as the respondent bank, and the ECB, in the implementation of the ECB's main refinancing operations. He agrees with the contents of Mr. Morley's affidavit and confirms as correct the explanations Mr. Morley gives in relation to the workings of the ECB MRO. In particular, he confirms that the ECB MRO interest rate is variously known and referred to in the context of the ECB MRO lending as the *"MRO refinancing rate"*, the *"MRO minimum bid rate"*, and the *"MRO REPO rate"*, all of which terms refer to the same one rate. He confirms that the ECB MRO interest rate was never discontinued or abolished and it never *"ceased to exist"*, as Mr. Lyons contends, either in 2008 or at all but has continued throughout from 1999 to date, being fixed and adjusted upwards and downwards from time to time by the ECB as it sees fit in its implementation of monetary policy and its management of liquidity within the Euro system.

**50.** On 6 November 2019, Mr. Lyons swore an affidavit which replied to the affidavit of Mr. Morley but not to that of Mr. Rogers. He discussed fixed rate tenders and variable rate tenders by banks applying for liquidity to the ECB. He then avers:

> *"10. I have had regard to a number of articles/papers which deal with the difference between fixed and variable rate tenders in the management of liquidity by the Eurosystem. I say this is quite a technical area which will require evidence to be given by an expert in banking matters at the hearing of this action but in summary Fixed Rate Tenders have a very specific method of calculation as opposed to the method of calculating the Minimum Bid Rate (Variable Rate Tenders) and a very specific*

*application in terms of the European Central Bank controlling both the rates and availability of monies to mainstream banks in Europe.*

*11. I say in the instant case it is clear that the interest rate was to be no more than 1.25% above what is described in the Letter of Loan Offer as the "European Central Bank Main Re-financing Operations Minimum Rate ("Repo rate") for the term of the loan. I say it is clear that the word 'bid' has been omitted by mistake by the Plaintiff from the Loan Offer – the weekly main re-financing operations were carried out at the time of the Loan Offer by way of variable rate tenders which are correctly and properly described as a minimum bid rate. This was the contractual stipulation and correct description of the Tracker Mortgage within the Loan Offer in this case as drafted by the Plaintiff. It seems clear the Plaintiff has unilaterally without lawful authority transferred the Second Named Defendant to another rate, whatever that rate might be.*

*…*

*13. I say it is clear that the rate which had to be applied by the Bank to the loan from inception to date is the Minimum Bid Rate. As previously indicated, this rate was not available from 8th October 2008 and accordingly there is no applicable interest rate. All of the figures averred to by the bank in this application are accordingly entirely erroneous and cannot be relied upon by them in support of this application.*

*14. I say it is clear that in October 2008 the Plaintiff materially and fundamentally breached the terms of the loan contract. I say it is an impossibility for a borrower to be tracking a particular contractually stipulated mortgage rate that is based on the Minimum Bid Rate tender procedure on MROs when that tender procedure was*

*replaced with a fixed tender procedure with full allotment on MRO's by the European Central Bank for settled operations from the 15th October 2008 onwards.*

*...*

*17. ...However, for the purposes of the instant contract namely the loan offer, Repo Rate is defined specifically for the purposes of that contract as being the European Central Bank Main Re-Financing Operations Minimum Rate, which as set out above, should read "bid" inserted into same. It is accordingly the case that the minimum bid rate is what was contracted for to apply to the loan for the term of the loan and not any other MRO interest rate which may be fixed or published by the European Central Bank."*

**51.** Mr. Rogers replied to the second affidavit of Mr. Lyons on 21 November 2019. He observes that Mr. Lyons appears to have confused the ECB's MRO interest rate and the ECB's MRO tender processes *"which are two quite different things"* and he says that Mr. Lyons' affidavit *"displays a fundamental misunderstanding of the monetary policy implementation framework of the ECB and of the use of differing tender procedures to allot liquidity within the euro zone using the weekly MRO of the ECB."*

**52.** At para. 6 he reiterates:

*"There is, and always has been, only one MRO interest rate at any point in time. It is not determined by the market but is set and published by the ECB's Governing Council. Separately to that, the ECB's Governing Council decides the quantum of liquidity to be made available and whether each MRO lending operation will be advanced through a Fixed Rate Tender procedure or through a Variable Rate Tender procedure. The allotment method of such an MRO operation is an entirely separate and distinct matter from the interest rate set for that operation."*

**53.** Mr. Rogers characterises Mr. Lyon's analysis as attempting an invalid contrast between a supply mechanism (i.e. *"fixed rate tenders"*) and the setting of an interest rate (*"the method of calculating the minimum bid rate"*). He says that Mr. Lyons is confused when he refers to two rates in para. 11 of his second affidavit and he confirms that there are not *"two rates"*; that there is only one MRO interest rate, and it is not *"arrived at…depending on which procedure is used…"*. He says that it is incorrect that any ECB interest rate ceased or became *"unavailable"* in October 2008. He confirms that it is incorrect to try, as Mr. Lyons appears to do, to equate an increase in the quantum of liquidity being released in a MRO operation, coupled with consequential change from a variable to a fixed rate tender procedure with the withdrawal or abolition of a specific ECB interest rate or interest rate category. He concludes his affidavit by averring:

> *"…there is, and has at all material times been, just "the MRO Interest rate", one of the three key ECB interest rates, which is set by the ECB's Governing Council which in turn, in organising its weekly MRO tenders, also chooses whether to operate through a Fixed or a Variable Rate tender procedure. The change in 2008 to the use of a Fixed Rate Tender procedure, coupled with the unlimited quanta of liquidity being made available to qualifying participating banks, did not involve the abolition of any ECB interest rate."*

**54.** This affidavit was not replied to by the defendants.

**55.** The evidence of Mr. Rogers may fairly be characterised as expert evidence. The evidence of Mr. Morley is undoubtedly very informed and knowledgeable evidence although, because he is employed by the bank, he is not an independent expert witness. No evidence as to their credibility was raised either on appeal or in the court below, and no expert evidence was adduced which either contradicted or otherwise cast doubt over their evidence. Mr. Lyons accepted that expert evidence was required on this issue and, quite

properly, he did not hold himself out to be an expert in the area. The trial judge was entitled to accept the evidence of Mr. Morley and Mr. Rogers in the circumstances. Based upon that credible evidence she was entitled to conclude that the appellant had raised no arguable defence by reference to either the absence of any applicable rate or the uncertainty as to the interest rate applicable to the facility. It is not open to a defendant to seek to raise an arguable defence by reference to expert evidence which is not before the court but which the defendant hopes to adduce in the future if the proceedings are referred to plenary hearing. Such an approach necessarily would involve absolving a defendant of the requirement to establish an arguable defence as a condition to referring the proceedings to plenary hearing.

**56.** In my judgment, the only expert evidence on the topic clearly establishes that there only ever was, and there continued to be, one ECB Repo rate, that the Repo rate was applied to the defendants' facility and that the appellant has not established an arguable ground of defence on this issue. Accordingly, I am of the view that this ground of appeal must be rejected.

***Additional matters***

**57.** In oral submissions, senior counsel challenged the credibility of Ms. De Courcy, a point which had not previously been raised in the proceedings. She said that the credibility of Ms. De Courcy was in question because in her affidavit she failed to mention the receivership and the sale of the property, and therefore her affidavit could not be based upon a *"diligent perusal"* of the bank's books and records as she asserted. A second and separate point advanced for the first time by counsel for the appellant was an alleged duty of full disclosure by a plaintiff when seeking summary judgment which, it was said, was breached in this case. It was argued that where a lending institution (or the holder of a loan) seeks summary judgment they are required to place the *"full file"* before the court as a condition of obtaining summary judgment.

**58.** It is not permissible to advance new arguments at this stage in the proceedings save in exceptional circumstances (which do not exist here) and for this reason alone I would reject these two additional points. In *AIB v Fitzgerald* [2022] IECA 286 this Court addressed the circumstances when new evidence and new arguments may be introduced on appeal.

> *"In Ennis v Allied Irish Bank plc [2021] IESC 12, the Supreme Court discussed the question of raising new arguments on appeal. Speaking for the court, McMenamin J. reviewed the law concerning new evidence/arguments on appeal in different categories of cases including plenary proceedings, interlocutory proceedings and summary proceedings. It was well settled since K.D. v M.C. [1985] 1 IR 697 that save in the most exceptional circumstances, the appellate court should not hear and determine an issue which had not been tried and decided in the High Court, although there may be exceptions in the interests of justice. At para. 18 of the judgment, he set out the basic rationale for the general principle that new points should not be raised on appeal for the first time:*
>
> > *"But, although a grant of leave to argue new points, or raise new evidence, may arise in the interests of justice, it must be viewed from another perspective. Exceptions are not to be seen as a licence for lax procedure. There are serious competing considerations which will also concern a court when new arguments are sought to be raised on appeal. A person entitled to win a case should not be faced with the prospect of losing it because a valid and decisive point was not made at the trial at first instance. There are real dangers in allowing a practice which is over-lax in permitting new grounds to be raised on appeal. Parties must be required to make their full cases at trial. An over-generous approach to permitting new grounds to be raised on appeal for the first time could only*

*encourage either sloppiness, imprecision, or lead to attempts to take a tactical advantage ( per Clarke J. (as he then was) in Ambrose paras. 4.11 – 4.13)."*

*47. It is true that at para. 21 of his judgment, McMenamin J. noted that "the courts tend to adopt a more flexible approach in applications to raise new arguments", referring to Lopes v Minister for Justice, Equality and Law Reform [2014] IESC 21; [2014] 2 IR 301; Irish Bank Resolution Company (in special liquidation) v McCaughey [2014] IESC 44; [2014] 1 IR 749; and Moylist Construction Ltd v Doheny [2016] IESC 9, [2016] 2 IR 283 as examples of cases of the "more flexible approach" in non-plenary cases. However, the Court emphasised in Promontoria (Arrow) v. Mallon [2021] IECA 130 that, notwithstanding this greater flexibility in non-plenary cases, the general principle is still of considerable importance. Noonan J. said:—*

*"However, lest it be thought that the Ennis decision has recalibrated the balance in this area of law in any dramatic way, it is fair to note that although McMenamin J. allowed for greater flexibility in non-plenary cases, he said (at paragraph 15 of his judgment) that the K.D. principle remained "the general principle" i.e. that it was a fundamental principle that save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried and decided in the High Court. He also said that while there were exceptions, they must be "clearly required in the interests of justice". McMenamin J. viewed the Ennis case as falling within the category of "truly exceptional"."*

*48. In the present case, there is no reason why the additional grounds now sought to be raised on behalf of the appellant could not have been raised in the High Court, she having had 11 months to consider her position and having been represented by solicitor and counsel in the High Court. Further, none of them appears to raise an issue which requires an exception to be made in the interests of justice."*

**59.** Insofar as it is asserted that the High Court ought to have discounted the evidence of Ms. De Courcy as lacking credibility, the issue was not raised in the High Court nor did the appellant seek to cross examine Ms. De Courcy on her affidavit. It would be completely unjust for this court at this very late stage in the proceedings, nearly seven years after Ms. De Courcy's affidavit was sworn, to permit this argument to be advanced. The bank has not been afforded the opportunity to respond to the allegation and neither has Ms De Courcy. Nor has she been cross examined to test her credibility. The appellant's case on this issue is based upon the omissions from Ms De Courcy's affidavit but as those issues were never raised until the hearing of the appeal it is not open to her to raise them at such a late stage in the proceedings, thereby depriving the bank and Ms De Courcy of the opportunity to address any perceived frailties in her evidence.

**60.** Entirely new grounds of defence such as these cannot be entertained in the absence of exceptional circumstances, any prior notification of the arguments to the respondent, the fact that they necessarily would involve cross examination of Ms. De Courcey, and the fact that they were not raised at all in the High Court. As Whelan J. observed in *KBC Bank Ireland plc v. Corrigan* [2021] IECA 9 at para. 81, *"Basic fairness requires that a respondent ought not be blindsided by the launch of unheralded novel points at an appeal hearing without even an application for leave being brought***."**

**61.** For these reasons I would not allow this issue to be raised and accordingly it does not afford a basis for overturning the decision of the High Court.

**62.** The second new argument, even if it were entertained by this court, does not assist the appellant. It has long been the law that in order to obtain summary judgment the moving party must adduce sufficient evidence to satisfy the court that it is entitled to judgment. It follows that it is not obliged to place additional evidence upon which it does not choose to rely, and which is not necessary to attain that end before the court. It is not, therefore, obliged to place *"the full file"* in relation to a loan before the court in order to obtain summary judgment. This argument likewise does not afford the appellant an arguable defence.

**Conclusion**

**63.** The High Court was correct to conclude that the appellant had not made out an arguable ground of defence and to refuse to refer the case to plenary hearing. The bank was not estopped from seeking judgment on the grounds contended. Even taking the appellant's case at its height, and overlooking the issues of credibility and vagueness, the bank could not be held indefinitely to any agreement to accept a lesser sum where the appellant was not abiding by that agreement. The appellant had not stated that she acted to her detriment in relying on the asserted agreement and therefore she could not establish a necessary ingredient of estoppel by representation.

**64.** The appellant can have no defence to these proceedings based upon complaints as to the appointment or conduct or actions of the receiver which are said to give rise to a counterclaim in circumstances where the receiver is not a party to these proceedings and the receiver is the agent of the appellant and the first named defendant.

**65.** The trial judge had credible evidence upon which it was open to her to find as a fact, as she did, that the bank complied with the requirements of the Code of Conduct for Mortgage Arrears and, even if it had failed to comply with the terms of the code, such failure

does not afford a defence to a claim for judgment in respect of the sum outstanding on the mortgage loan.

**66.** The only expert evidence in relation to the ECB MRO interest rate was that advanced on behalf of the bank. It was credible evidence which the trial judge was entitled to accept. It clearly established that there was only ever one ECB MRO interest rate. It was neither cancelled nor uncertain. The ECB MRO interest rate was applied to the defendants' account and the evidence established that the correct interest rate as agreed in the Letter of Mortgage Loan Offer was applied to the account.

**67.** The evidence of a solicitor in relation to ECB interest rates is not expert evidence and could not contradict the evidence from experts on this point. It is not open to a defendant to seek to defend a claim for summary judgment on the basis of expert evidence which it is intended will be led if the matter is referred to plenary hearing: the expert evidence must be before the court at the hearing of the application for summary judgment in order for the court to determine whether the evidence affords the defendant an arguable ground of defence.

**68.** It was not permissible for the appellant to raise a completely new ground of defence for the first time at the hearing of the appeal, or certainly not without first obtaining the leave of the court. The circumstances of the case are not exceptional and therefore, in accordance with the decision of the Supreme Court in *AIB v. Ennis*, it is not permissible for her to do so. Insofar as the appellant sought to challenge the credibility of a deponent for the bank, it was incumbent upon her to do so in the High Court and to seek to cross examine the witness. It is not appropriate to ask this Court for the first time on appeal to disregard the witness's evidence on the basis that it is not credible.

**69.** Finally, in an application for summary judgment, the plaintiff is required to adduce such evidence as is necessary to establish its claim; it is not required to place the *"full file"* in evidence and the failure to do so does not give rise to an arguable defence.

**70.** For these reasons I would dismiss the appeal.

**71.** My provisional view is that the bank has been entirely successful on the appeal, so it is entitled to the costs of the appeal as against the appellant. If the appellant wishes to contend for a different order, she may apply by 15 September 2023 to the office of the Court of Appeal for a short hearing and the office of the Court of Appeal will notify the parties of a date for a hearing. If no indication is received by 15 September 2023, the Order of the Court, including the proposed Order for Costs will be drawn and perfected.

**72.** Pilkington and Butler JJ. have each read this judgment in draft and authorised me to indicate their agreement with same.