THE HIGH COURT

[2022] IEHC 645

[Record No. 2014/1416S]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

NIALL HADE AND JOYCE HADE

DEFENDANTS

THE HIGH COURT

[Record No. 2014/4328P]

BETWEEN

NIALL HADE

PLAINTIFF

AND

BANK OF IRELAND MORTGAGE BANK AND MICHAEL MCATEER

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 25th day of November, 2022.

Introduction

1. This judgment deals with two actions which arise out of broadly the same set of circumstances concerning the alleged indebtedness of Mr. & Mrs. Hade with Bank of Ireland Mortgage bank in respect of two loans and concerning issues surrounding the lawfulness of the actions taken by the receiver, who was appointed by the bank over twelve properties, which had been provided as security for the two loans.

2. The two actions were heard together over seven days in October 2022. The bank and the receiver were represented in each action by solicitor and counsel. Mr. & Mrs. Hade represented themselves in the summary proceedings brought by the bank. Mr. Hade represented himself in his own action against the bank and the receiver.

3. It was agreed at the hearing, that given the overlap in the nature of the counterclaim that was put forward by Mr. & Mrs. Hade to the summary summons proceedings, which had been brought by the bank against them seeking judgment on foot of the two loans and the content of the counterclaim that they raised in that action; and the issues that arose for determination in the plenary proceedings brought by Mr. Hade against the bank and the receiver, that the evidence given in the first set of proceedings,

being the summary summons action brought by the bank, and the evidence given in the second set of proceedings, being Mr. Hade's plenary proceedings, would apply *mutatis mutandis* to the issues that arose for determination in each action.

4. The first action which was heard by the court was the summary summons proceedings brought by Bank of Ireland Mortgage Bank against Mr. & Mrs. Hade in which they sought a joint and several judgment against each of the defendants in the sum of €2,026,640.09, together with continuing interest thereon from 28th September, 2022 until date of judgment. The bank also sought the sum of €1,412,210.09 against Mr. Hade on foot of the second loan, which had been made to him solely, together with continuing interest from 28th September, 2022 until date of judgment.

5. The defendants filed a full defence to that action, together with a counterclaim, which sought damages for alleged negligence and failure on the part of the bank in disregarding protections afforded to the defendants under the Consumer Protection Act 1995 and for failure to follow the correct statutory processes in respect of obtaining possession and exercising a power of sale, where the properties were in respect of home loans, governed by the Land and Conveyancing Law Reform Act, 2009 (hereinafter "the 2009 Act").

6. The defendants also claimed damages for breach of an alleged agreement between the defendants and the bank, which they alleged had been reached through the bank's representative Mr. Pascal Naughton, whereby it was allegedly agreed that the interest only repayment period under the loans, would be extended beyond the initial five-year period, which had been agreed at the outset of the loan.

7. The defendants claimed damages for the alleged negligence on the part of the bank in appointing a receiver over home loans, where the second defendant had never signed any consent to the creation of a mortgage over such properties. The defendants also claimed damages for the unlawful sale of a number of their properties, without the receiver having obtained an order for possession, or an order for sale, in respect of the properties.

8. The defendants also claimed damages for the alleged violation of their constitutional right to their good name and privacy, due to the actions of the plaintiff in displaying a notice at one of the properties, which had been furnished as security for the loans. The defendants also claimed damages from the bank due to the alleged default on

the part of the receiver for unlawfully selling the properties and for permitting other properties, which he had retained, to be vandalised and to become devalued.

9. In the plenary proceedings brought by Mr. Niall Hade against Bank of Ireland Mortgage Bank and Michael McAteer, who had been appointed as receiver over the properties that had been given as security for the two loans, the plaintiff essentially repeated all of the matters that he had raised in his counterclaim to the summary summons proceedings. In particular, he pleaded that the loans in question were home loan contracts within the meaning of the 2009 Act. He alleged that the receiver had unlawfully taken possession of certain of the properties in respect of which mortgages had been created after the operative date of 1st December, 2009, and had sold three of them, without first obtaining either an order for possession of the properties, or an order for sale. He again alleged that the receiver had acted negligently and in breach of duty by (a) selling some of the properties at undervalue and (b) by failing to maintain the properties in respect of which he had retained possession and had thereby caused them to deteriorate to such an extent that they had lost substantial value. In addition, the plaintiff alleged that he had been forced to sign a number of mortgages in 2009 under duress.

10. The plaintiff alleged that his health had suffered greatly as a result of the actions on the part of the bank and the receiver in the conduct of the receivership of the properties and as a result, he claimed damages for negligence. The plaintiff also claimed the sum of €4m as damages and an order declaring that the mortgages executed by him were null and void, together with a claim for damages for breach of his constitutional right to a good name and his right to earn a livelihood and for interference with his right to bodily integrity.

11. A full defence was filed on behalf of the defendants to the plaintiff's amended statement of claim.

12. It will be appreciated from the very brief overview of the issues that are raised on the pleadings in each of the actions, that there is a significant number of issues which have to be determined by the court. In order to make the judgment readable, Bank of Ireland Mortgage Bank will be referred to throughout the judgment as 'the plaintiff', even though it was a defendant to the plenary proceedings brought by Mr. Hade. Mr. McAteer, who was named as a defendant in the plenary proceedings brought by Mr. Hade, will be referred to throughout as 'the receiver'. Mr. Hade will be referred to throughout as 'the first defendant'

and Mrs. Hade will be referred to throughout as 'the second defendant'. The bank's summary summons proceedings will be referred to as 'the summary proceedings'. The plenary proceedings brought by Mr. Hade against the bank and the receiver will be referred to as 'the plenary proceedings'.

The Loans

13. Both of the proceedings arise out of loans that were made by the bank in 2006 and 2007. The first loan offer was contained in a letter headed "mortgage loan offer", dated 22nd June, 2006 addressed to both of the defendants. It was in respect of a loan bearing account number 40520254 (hereinafter 'the 254 account'). Under the letter of loan offer, the amount to be advanced to the defendants was €2.7m, for a period of twenty five years. The repayment of the loan was to be by monthly instalments. It was agreed that the repayments would be on an interest only basis for the first five years. At the time of the letter of offer, the monthly interest only payments were stated to be €7,762.50, which would rise to €15,575.97 at the end of the interest only period.

14. The letter of offer also outlined that security would be provided for repayment of the loan by way of mortgages over eight properties, which were identified in the letter, and which were either owned jointly by the defendants, or were owned solely by the first defendant.

15. Clause 4(b) of the letter of loan offer provided that in the event of any repayment not being paid on the due dates, or any of them, or of any breach of the conditions of the loan, or any of the covenants or conditions contained in any of the security documents referred to in clause 2(a), the bank could demand an early repayment of the principle and accrued interest, or otherwise alter the conditions of the loan. The letter of loan offer was accepted by the defendants by signing the letter on 26th June, 2006. While in their defence, the defendants had initially denied signing the letters of loan offer, it was conceded at the hearing that the letter had indeed been signed by both of them.

16. The second loan was made by way of letter headed "mortgage loan offer" from the bank addressed to the first defendant on 7th September, 2007. This was in respect of account number 78345877 (hereinafter 'the 877 account'). The loan offered was in the sum of €1,237,000. It was to be for a period of twenty five years, with interest only repayments for the first five years; which at that stage, amounted to a monthly repayment of €5,102.63, rising to €8,115.70 at the end of the interest only period. Security for the

loan was to be provided by way of mortgages over four properties at St. Maelruns Park, Oldbawn, Tallaght, Dublin 24. The letter of loan offer was signed by the first defendant on 11th September, 2007.

17. The purpose of the first loan was to enable the defendants to refinance certain borrowings that they had on their family home and on a number of other properties and also to purchase some additional properties. The purpose of the second loan was to purchase the four properties in St. Maelruns Park, Dublin 24.

A brief overview of the loan accounts.

18. The history of the accounts and the genesis of the proceedings which have been brought before the court, can be summarised in the following way: the defendants fell into arrears in their repayments in respect of the 254 account. The first defendant did likewise in relation to his repayments on the 877 account. These arrears arose during the interest only repayment period. There were various contacts between the plaintiff and the defendants in relation to addressing the arrears situation that had arisen. This aspect will be gone into in greater detail later in the judgment.

19. While steps had been taken by the defendants to address the arrears; by August 2011, there were still arrears owing on both accounts. This coincided with the end of the interest only period on the 254 account. Having regard to the history of the defendants' performance in relation to the accrual of arrears during the interest only period on each account, letters of demand were sent to the defendants in respect of each of the accounts on 1st September, 2011, demanding immediate payment of the principal and interest due in respect of each account.

20. The letter dated 1st September, 2011 in respect of the 254 account was addressed to both of the defendants. It called for immediate payment of the principal and interest due on that account in the sum of €2,727,165.09. The letter referred to clause 4(b) of the conditions attached to the facility letter dated 22nd June, 2006. The letter stated that it constituted a demand under clause 4(b) as set out in the facility letter. The defendants were informed that if they failed to pay the amount demanded within the following ten days, the bank would proceed to enforce its security, including by way of exercising its powers to sell the properties and to take any other legal action which the bank may deem expedient.

21. A letter of demand, also dated 1st September, 2011, in similar terms was sent to the first defendant in respect of the 877 account. It called for immediate payment of the sum of €1,285,466.47. The letter also referred to clause 4(b) as in the previous letter of demand.

22. Later in the judgment it will be necessary to go into the circumstances surrounding the issuing of the letters of demand in September 2011 in some detail. This is due to the fact that the defendants maintain that they had an agreement with the bank, through Mr. Pascal Naughton, that the interest only repayment period would be extended in respect of the 254 account and that therefore the bank was not in a position to validly call in the loan when it did. The bank denies that there was any such agreement reached between the defendants and Mr. Naughton on its behalf.

23. When the amounts demanded in the two letters were not repaid by the defendants, the bank appointed Mr. McAteer as receiver over all twelve properties, which had been provided as security for the loans. He was appointed as receiver over the properties on diverse dates between 17th November, 2011 and 22nd February, 2013.

24. As of the date of the hearing of the actions in October, 2022, the receiver had sold five of the properties, which had been provided as security for the loans. He had secured vacant possession of the remaining properties, but had been instructed by the bank to place these "on hold" pending the outcome of the proceedings brought by the first defendant against the bank and the receiver.

Summary of grounds of defence and counterclaims raised by the defendants.

25. At all material times the defendants have represented themselves as lay litigants in the two actions. It is fair to say that they have raised a very large number of issues, which will have to be addressed by the court in the course of this judgment. The main grounds of defence and claim raised by the defendants can be summarised under the following headings: -

(1) The defendants maintain that they had an agreement with the bank through Mr. Naughton that the interest only period on the 254 account would extend beyond the initial five year period; meaning that the bank was not entitled to call in the loan in September 2011.

(2) The defendants acted as consumers when taking out the loans in 2006 and 2007.

(3) The five mortgages created after 1st December, 2009 were housing loan mortgages in respect of housing loans, within the meaning of the 2009 Act. As the receiver had not obtained either an order for possession or an order for sale in respect of those of the properties sold by him, which were covered by mortgages created after 1st December, 2009, he had acted unlawfully in taking possession of the properties and in selling three of them.

(4) The five mortgages executed on 17th December, 2009, were executed under duress and are therefore unenforceable at law.

(5) The bank was not entitled to appoint a receiver over the properties.

(6) The receiver acted negligently and in breach of duty in selling five of the properties at a gross undervalue.

(7) The receiver acted negligently and in breach of duty in his management of the remaining properties, by allowing them to become vacant and in some cases to become derelict, when he ought to have rented them out, pending conclusion of the present actions; as a result of which negligence and mismanagement of the properties, the defendants have suffered loss and damage.

(8) Some of the mortgages created were invalid because a consent form was not signed by the second defendant, as spouse of the first defendant, in respect of two of the properties in respect of which mortgages were executed on 17th December, 2009.

(9) The letters of demand were deficient as they did not state the amount of arrears owing on each account at the date of the said letters.

(10) Irrespective of the agreement with Mr. Naughton, the interest only period on the 254 account had not expired at the date alleged by the bank, being 30th August, 2011; the bank had applied capital and interest one month early, so as to contrive a default on the repayment of the loan by the defendants, thereby entitling the bank to call in the loan.

(11) A notice was placed on the door of one of the properties, which the bank was not entitled to serve on the defendants in that manner and as a result of which, the defendants' reputations were diminished in the area.

26. While the defendants pursued all grounds of defence and counterclaim with vigour, some of the grounds put forward were more important than others. It will be necessary to look at them in some depth. However, it will be possible to take some of the other grounds together in a relatively succinct manner.

27. Before turning the grounds of defence and counterclaim raised by the defendants, it will be helpful to the reader to set out the list of the mortgaged properties and what became of them. This is set out in the following table:

Property	**Date of Mortgage**	**Date of Affidavit of Receiver**	**Date of Sale**
107 Jervis Place	17/12/2009	17/11/2011	Sold for €180,000.
92 Moy House	17/12/2009	20/11/2012	Sold for €335,000.
29 Kingswood Heights	17/02/2009	22/2/2013	Application to Circuit Court for Order for Sale in respect of this property. It remains on hold.
4 Taobh Na Coille	17/12/2009	17/11/2011	On hold.
5 Taobh Na Coille	12/12/2009	17/11/2011	Sold for €220,000.
51E Virginia Hill, Belgard Square	24/08/2006	17/11/2011	Sold.
24, 24A, 24B & 24C St. Maelruns	30/10/2007	17/11/2011	All properties remain on hold.

752A Virginia Heights	08/06/2006	09/01/2012	On hold since 2018.
752 Virginia Heights	08/06/2006	09/01/2012	Sold for €100,000.

The Grounds of Defence and Counterclaim

(i) The alleged agreement with Mr. Naughton for extension of the interest only period on the 254 account.

(a) The evidence on this issue.

28. In his evidence to the court, Mr. Naughton stated that he joined the business banking section in the bank in 1996. In November 2009, the bank had set up a unit known as the Challenged Unit, for non-performing loans. He was transferred to that unit at that time. He was located in Tullamore. He was portfolio manager in the Challenged Unit in relation to business banking debt.

29. Mr. Naughton stated that in December 2009, he was asked to take over from his colleague, Ms. Mary McCarthy, in relation to her dealings with the first defendant. Mr. Naughton had had dealings prior to that with the first defendant in relation to two business banking loans that he had with the business side of the bank. Those loans were in relation to a premises known as Portlick Castle and another business premises operated by the first defendant at Killakee Way, Dublin. Those loans were in the order of €400,000. Mr. Naughton stated that having regard to his history of dealings with the first defendant in relation to his business loans, he was asked to act as a liaison person between the bank and the first defendant in relation to his existing mortgage debt, being the loans of 2006 and 2007, which were secured by mortgages over twelve residential properties.

30. Mr. Naughton stated that while he agreed to act as a liaison person with the first defendant in respect of the mortgage debt, he had no authority to negotiate, or to agree anything to do with the mortgage banking loans. He stated that he had made that clear to the first defendant at all times.

31. Mr. Naughton stated that in November 2010, he had had a meeting with the first defendant in respect of the various loans that he had with the bank at that time, covering both his business loans and the mortgage loans. Arising out of that meeting, the first defendant made a proposal that he would increase his monthly repayments in respect of

the mortgage debt to €8,500 per month. That was designed to cover interest on both loans and provide €2,000 per month towards the arrears which had accrued. At that rate, it would have taken twenty-four months to clear the arrears. In addition, he had promised to pay €2,000 per month towards the business loans, which Mr. Naughton was supervising.

32. In an email dated 18th November, 2010, Mr. Naughton relayed this proposal to Mr. Stephen Healy in the Mortgage Collections Unit. In that email, Mr. Naughton offered his opinion that he did not think that the bank should agree to the repayment schedule for two years. He suggested that the agreement should only last for six months. He noted that he thought that Mr. Healy's loans were due to convert to capital and interest in July of the following year. He stated that that would give the bank an opportunity to squeeze a further repayment at that time. He left the matter with Mr. Healy, but stated that he felt that it was progress. He stated that he would "leave it with you", meaning that he would leave it to Mr. Healy to decide on the proposal.

33. Mr. Naughton stated that the proposal which had been made by the first defendant and which had been relayed by him to the mortgage side of the bank, was not deemed acceptable. That decision was recorded in a decision memorandum dated 8th December, 2010, signed by Mr. Shane Reid of the Retail Credit Underwriting (Mortgages) Challenged Business section. In that memorandum, it was recorded that the first defendant would have to make a minimum monthly repayment of €10,500 until June 2011, when the arrangement would be reviewed again.

34. Mr. Naughton stated that on 7th January, 2011, he had a further meeting with the first defendant, at which they went through his financial affairs and his tax affairs in some detail. He drew up a statement of affairs which he sent by email to the first defendant for signature.

35. In an email dated 14th January, 2011 from Mr. Naughton to Mr. Healy, he relayed the outcome of his meeting with the first defendant the previous week. He attached a copy of the up-to-date statement of affairs, which had been agreed and signed by the first defendant. He informed Mr. Healy that the repayment proposal from the first defendant remained the same. He expressed the opinion that the proposal represented the best deal that was available for the bank at that time. His concluding paragraph in that email was in the following terms: -

> *"We need to agree a strategy; I am beginning to feel like 'piggy in the middle'. This is the best that I can achieve after discussions with the client. If BOIMB want to pursue a different strategy; then this is something they will need to take up directly with the client."*

36. Mr. Naughton stated that at that stage, his interactions with the first defendant in respect of the mortgage debt ceased. He felt that he had brought the matter as far as he could. He had left matters in relation to the mortgage debt to be progressed directly between the mortgage department and the first defendant. Mr. Naughton stated that he continued to have meetings with the first defendant, but they were in relation to the business debts that he had with the bank.

37. On 6th July, 2011, Mr. Naughton completed a review memo in respect of the indebtedness of the first defendant with the bank. In that he dealt with the two outstanding business loans that he had been dealing with. He also mentioned the mortgage debt, which the first defendant had with the bank. He noted that the loans then stood at just over €4m in mortgage debt. Both loans were on interest only and there had been interest arrears of €47,000 at one time. Interest repayments were noted to have been made on an *ad hoc* basis; however, one of the loans was effectively up to date and the first defendant was making slow inroads into the other one. He noted that the loans were due to convert to capital and interest shortly. He noted:

> "*BOIMB deal with Hade directly as I failed to get an agreement that suited both the client and BOIMB. I understand that they may be considering calling in the debt, see summary sheets/DMs attached*."

38. Mr. Naughton was asked whether he had had any discussion with the first defendant in relation to the mortgage debt from January 2011 onwards. He stated that he had not done so. He denied that he had ever entered into any agreement with the first defendant to extend the interest only repayment period on the 254 account. He stated that he never made any such agreement; nor did he have the authority to enter into any agreement of that type on behalf of the mortgage side of the bank.

39. Mr. Naughton stated that he had received an email from a colleague, Ms. Widger, on 10th August, 2011, which attached a letter from the first defendant, which had been sent in response to a letter from the bank notifying him that his repayments would shortly

convert to capital and interest. Mr. Naughton stated that when he told Ms. Widger that he would deal with that matter, he had passed the first defendant's letter to the mortgage side of the bank, as they were dealing with him at that time in relation to his mortgage debt. He confirmed that he had had no dealings with the first defendant in relation to the mortgage debt after January 2011. Mr. Naughton stated that he had not had any communication or dealings with the first defendant in the aftermath of his receiving the letters of demand calling in the loans which the bank had issued on 1st September, 2011.

40. In cross-examination, the first defendant put it to the witness that he had had an agreement with him that the interest only period would be extended beyond the initial five-year period agreed in the letter of offer dated 22nd June, 2006. Mr. Naughton denied that he had ever entered into any such agreement with the first defendant. Mr. Naughton reiterated that he did not have any authority to conclude any such agreement with the first defendant in respect of the mortgage debt. He reiterated that he had ceased liaising with the first defendant in respect of the mortgage debt in January 2011. Mr. Stephen Healy had taken over dealing with him after that in relation to the mortgage debt.

41. In his evidence, the first defendant stated that he had had two agreements with Mr. Naughton. The first was in relation to how the arrears would be dealt with. To that end, it had been agreed that he would make repayments firstly, to deal with the arrears on the 254 account. He had done that and the account had been brought more or less up to date. It had been part of that agreement that he would then start servicing the arrears on the 877 account. The first defendant stated that he had had a further oral agreement with Mr. Naughton which had been concluded in the spring/summer of 2011, that the interest only repayment period on the 254 account, would continue beyond the initial five-year period.

42. In his evidence in chief in the plenary proceedings, the first defendant produced a letter dated 2nd December, 2011, which he had sent to Mr. Naughton. In that letter, he referred to the fact that in May of 2011 he had spoken with Mr. Naughton in relation to the interest only situation which was going to expire and he alleged that Mr. Naughton had said at that stage, that he would talk to the bank and had said that the first defendant was paying enough and what did they expect. He understood that Mr. Naughton would be talking to the bank about his situation.

43. The first defendant went on in that letter to state that when he received the letter from the bank in July 2011, informing him that the interest only period was about to expire, he telephoned Mr. Naughton in August, at which time Mr. Naughton said that he was going on holidays, but that the first defendant should not worry. He alleged that Mr. Naughton had said: "*we will sort this out when I get back from holidays and that you would phone Stephen Healy in mortgages*". He went on in the letter to state that when he heard nothing more on the matter, he presumed that the interest only period had been extended. He ended that letter by saying "*if you can help to sort things out now please try. I will be making a full report to the Financial Ombudsman. I don't think I have been treated well or fairly during this situation at all.*"

44. Counsel for the bank objected that this letter had never been put to Mr. Naughton in the course of cross-examination. The first defendant stated that he had only come across the letter at 02:00 hours that morning, as he had a huge amount of documentation in his garage.

45. The first defendant also referred to a letter dated 7th March, 2012, which was addressed to Mr. Naughton, but was headed "Dear Mr. Healy", so it was probably sent to Mr. Healy, in which the first defendant had stated "*On 30th August an amount of €14,253.65 was added to the account which is made up of interest and capital, of which it was agreed with Pascal Naughton, Senior Manager at the Midlands branch of the bank that the interest only would continue*".

46. The first defendant went on in that letter to state that he had explained to Mr. Naughton that he could not afford to pay the capital and interest because rents were falling and it was hard to get paid. He stated that Mr. Naughton "*said he would talk to Mr. Healy and confirm to me later on the next day that he had sorted it out. I took this as fact and I heard nothing from Mr. Healy or Bank of Ireland Mortgages until 1st September, 2011. There is a similar line of errors on the second internal letter for account 78345877*". He concluded the letter by stating that he intended to take a case against the bank and Mr. Naughton for damages. Again, that letter had not been put to Mr. Naughton, as the first defendant stated that he had only discovered it at 02.00 hours that morning.

(b) Conclusions on this issue.

47. Having considered the oral and documentary evidence, the court prefers the evidence of Mr. Naughton to that of the first defendant on this issue. Accordingly, the court

finds as a fact that there was no agreement between either Mr. Naughton, or the bank, and the first defendant, that the interest only repayment period on the 254 account would extend beyond the initial five-year period.

48. The court has reached that finding for a number of reasons. First, the court was impressed by the evidence given by Mr. Naughton. He gave his evidence in a clear and straightforward manner. He did not avoid any difficult questions. Secondly, his evidence to the effect that he never reached any such agreement as alleged by the first defendant, is entirely consistent with the documentary evidence from that period. All of the internal bank documentation, in the form of emails and memoranda drawn up by Mr. Naughton, support his contention that at all times he was acting as a liaison person between the mortgage section of the bank and the first defendant, in relation to the first defendant's mortgage debt with the bank. It is clear from these documents that he liaised with the first defendant in relation to that aspect of his debt. He certainly made representations on behalf of the first defendant to the mortgage department in relation to the level of repayments that he could make at various stages.

49. The email dated 18th November, 2010 from Mr. Naughton to Mr. Healy, following Mr. Haughton's meeting with the first defendant on the previous day, makes it clear that he was passing on the proposal made by the first defendant at that meeting to pay €8,500 per month towards the mortgage debt. In addition, he noted that the first defendant had promised to pay him €2,000 per month towards "my loans", meaning the business loans. Of perhaps more significance, was his comment in the third paragraph of that email, where he advised that the bank should not agree to the suggested repayment schedule for a period of two years, but should only do so for a period of six months. He noted that he thought that Mr. Healy's loans were due to convert to capital and interest in July of the following year. He finished that email by saying that he would leave the matter with Mr. Healy to decide. The content of that email is entirely consistent with Mr. Naughton's evidence that he acted as a liaison person in relation to the first defendant's mortgage debt and the mortgage department in the bank.

50. It is clear from the documentation that was presented to the court, that when that proposal was not acceptable to the mortgage department in the bank, Mr. Naughton had a further meeting with the first defendant on or about 7th January, 2011. The first defendant agreed that that meeting had taken place. He also agreed that it had been a detailed

meeting, at which he had presented evidence to Mr. Naughton of his financial state at that time, including his tax records. The email dated 7th January, 2011 from Mr. Naughton to Mr. Hade enclosing a draft statement of affairs for approval and signature by Mr. Hade, confirms the content of that meeting.

51. The email from Mr. Naughton to Mr. Healy dated 14th January, 2011, in which Mr. Naughton attached the up-to-date SOA and set out some further information about the first defendant's rental income. The content of that email has been summarised earlier in the judgment. That email is entirely consistent with the evidence given by Mr. Naughton that he had again put the proposal to the mortgage side of the bank and had indicated to them that that was as far as he could take the matter. It is also consistent with his evidence that that was his last effective engagement with the first defendant in relation to the mortgage debt.

52. The content of that email is further supported by the email dated 20th January, 2011 from Mr. Naughton to Mr. Shane Reid in relation to the capacity of the first defendant to make repayments. He reiterated that he had done as much as he could with the first defendant. He thought that it was the best that could be achieved at that time. However, he stated that if Mr. Reid thought that a better deal could be achieved, then he suggested that Mr. Reid should meet and negotiate directly with the first defendant. This email also supports the contention of Mr. Naughton that he had brought the matter as far as he could at that time.

53. In a decision memorandum issued by Mr. Reid on 20th January, 2011, the bank indicated that it would accept a slightly reduced repayment figure in respect of the mortgage debt of €10,000 per month. The content of that decision was brought to the attention of the first defendant in a phone call from Mr. Stephen Healy to the first defendant on 26th January, 2011. Mr. Healy provided a memo of his conversation with the first defendant on that occasion. This supports the evidence of Mr. Naughton that at that time he had handed the matter back to the mortgage bank to deal directly with the first defendant. That is precisely what they did.

54. By letter dated 3rd February, 2011, the first defendant wrote to Mr. Robert Lynch in the bank in relation to the mortgage debt and in particular in relation to his telephone call with Mr. Healy some days previously. In that letter, he indicated that he would be unable to pay the level of repayments that had been demanded by Mr. Healy in the phone call of

26th January, 2011. He made a proposal in relation to paying all the rent received from the rental properties directly to the bank and that he would absorb the running costs himself. Thus, it is clear that there was no agreement in relation to extension of the interest only period at that time.

55. Of more significance, was the letter sent by the bank on 26th July, 2011, advising the defendants that the interest only period on the 254 account would shortly expire and that as and from 25th August, 2011, it would be necessary for the defendants to make repayments in respect of both capital and interest. In response to that letter, the first defendant wrote to the bank by letter dated 8th August, 2011, in which he stated that the increase in repayment to cover capital and interest would not be realistic given the level of rents that he was receiving at that time. He went on to state "*The current level of interest only would have to be extended in order for me to continue to service the debt. Is there any paperwork for me to fill in, if so could you post it to me*." It is clear from this letter, that as of 8th August, 2011, no agreement had been reached between the first defendant and Mr. Naughton in relation to extension of the interest only period. This runs counter to the evidence given by the first defendant that he had concluded such an agreement orally with Mr. Naughton in the spring/summer of 2011.

56. In response to that letter, Ms. Nora Widger sent an email on 10th August, 2011 to Mr. Naughton noting that the first defendant was seeking an extension of the interest only period and asking Mr. Naughton to deal with the matter. Mr. Naughton replied to Ms. Widger by email dated 15th August, 2011, stating that he was just back from holidays and that he would deal directly with the first defendant. However, there is no evidence that he had any dealings in relation to the mortgage debt with the first defendant at that time. In his evidence, Mr. Naughton stated that he would have passed the letter to Mr. Healy in the mortgage department to deal directly with the first defendant, as he had ceased dealing with the first defendant in relation to the mortgage debt. There is no documentation before the court that suggests that there was any further communication between, either Mr. Naughton, or the mortgage department, and the first defendant prior to the issuance of the letters of demand on 1st September, 2011.

57. In response to the letter of demand in respect of the 254 account, the first defendant wrote to Mr. Healy on 5th September, 2011 and asserted that he had not defaulted in relation to his repayments on that account. He stated that he had complied

with the letters issued by the bank in relation to the changeover to capital and interest repayments. He finished by stating that he would welcome a meeting with the bank to "sort this out". It is significant that in that letter there was no mention of any concluded agreement between the first defendant and Mr. Naughton in relation to extension of the interest only period.

58. Two days later on 7th September, 2011, the first defendant sent another letter to Mr. Healy in which he requested production of documentation in relation to both loan accounts. In that letter, he did refer to having had dealings with Mr. Naughton in the following terms: -

> *"I received no notification from BOI to missed payment on this account (40520254), in the past fifteen months or phone calls. The letter you sent me on Monday is a mistake, please check with Pascal from BOI. I have been talking to him since January about the capital situation, he explained to me that I was not to worry about this as I was doing my best and that he would head it up for me."*

59. Thus, as of 7th September, 2011, when the issue of moving to capital and interest repayments was sharply in focus and when the bank was alleging that he had defaulted in making the repayments due, the first defendant did not explicitly allege that he had an agreement with Mr. Naughton on behalf of the bank that the interest only period would continue. The furthest that he put it in that letter, was that Mr. Naughton had said that he would "*head it up for me*" in relation to the repayments reverting to capital and interest. That is entirely consistent with the representations that Mr. Naughton had made earlier in the year, where he had put forward the proposal that the first defendant would make a monthly repayment of €8,500 and had supported that proposal as being the best that could be obtained. However, that is very far from asserting, or establishing, that there was any concluded agreement between Mr. Naughton and the first defendant that the interest only period would continue.

60. In his evidence in chief in the plenary proceedings, which was heard directly after the summary summons proceedings, the first defendant introduced a letter dated 2nd December, 2011 which he had sent to Mr. Naughton. That letter had not been put to Mr. Naughton in cross-examination in the summary proceedings. The first defendant stated that he had not put this letter to the witness due to the fact that he had only found it that morning amoung a large volume of papers in his garage. While normally, it would not be

permissible to allow a witness to introduce a document which had not been put to a previous witness in cross-examination, the court allowed this document into evidence, as the bank, being a defendant in the plenary action, could have called Mr. Naughton as a witness in that action to deal with the letter, had they wished to do so.

61. In that letter, the first defendant informed Mr. Naughton that a receiver had been appointed by the bank over his properties. He stated that he had not found the staff in the mortgage department very helpful, so for that reason Mr. Naughton had "*at an early stage fronted my communication with them*". The second paragraph in that letter is of significance: -

> *"Back in May this year we spoke about the up [sic] interest only situation was going to expire, you at that time said you would talk to them, and said that I was paying enough, and what do they expect. So I understood that you would be talking to the bank around this. Then in July I received a letter from the bank of which it stated that the interest only was ending in September. I wrote back to the Bank of Ireland Waterford, and explained that I would not be able to pay Cap and interest under the current market conditions. In August I phoned you to again mention this, you were going on holidays and said don't worry we will sort this out when I get back from holidays and that you would phone Stephen Healy in mortgages."*

62. He went on in the letter to state that the bank had acted in a sneaky way in getting mortgages signed by him in 2009 and that they were like snakes in the grass waiting to pounce. He stated that he took comfort in knowing that Mr. Naughton was dealing with matters for him. He concluded the letter by stating "*If you can help to sort things out now please try, I will be making a full report to the Financial Ombudsman, I don't think I have been treated well or fairly during this situation at all.*"

63. The court is satisfied that this letter does not support the first defendant's contention that he had a concluded oral agreement with Mr. Naughton, which had been made at some time in the spring/summer of 2011, that the interest only period would continue beyond the initial five-year period. At most, the first defendant felt that his interests were being looked after, because Mr. Naughton had stated that he would try to sort things out for him. It was clear from the letter that he was requesting Mr. Naughton to

continue his efforts on his behalf. The letter does not support the existence of any concluded oral agreement of the sort contended for by the first defendant.

64. The first defendant introduced in evidence a further letter dated 7th March, 2012, which he had written to Mr. Naughton. This letter was written after he had received a copy of his files form the bank. However, while the letter appears to be addressed to Mr. Naughton, it commences "Dear Mr. Healy" and refers to Mr. Naughton in the third person. Accordingly, the court is of the view that the letter was in fact sent to Mr. Healy. In the third paragraph of the letter, he refers to an alleged agreement with Mr. Naughton in the following terms:

> *"On 30th August an amount of 14,253.65 was added to the account which is made up of interest and capital, of which it was agreed with Pascal Naughton Senior Manager at the Midlands branch of the bank that the interest only would continue"*.

65. The first defendant went on in the letter to refer to his telephone call with Mr. Healy on 26th January, 2011. Although portion of this letter has been quoted before, it is necessary to set out the relevant portion in full:

> "*I never agreed to this at the time on the phone, our [sic] did I ever receive anything in writing from the bank to explain what the new plan was. I wrote a letter at the time and met with Mr. Naughton, gave him a copy of this letter, to explain that I could not afford to pay the extra money, because rents were falling and hard to get paid. He said he would talk to Mr. Healy and confirm to me later on the next day that he had sorted it out. I took this as fact and I heard nothing from Mr. Healy or Bank of Ireland Mortgages until 1st September, 2011. There is a similar line of errors on the second internal letter for account 78345877*".

The first defendant concluded the letter by stating that he intended to take a case against the bank and Mr. Naughton for damages once his investigations had finished.

66. The court does not view this letter as providing any evidence that there was a concluded oral agreement between Mr. Naughton and the first defendant that the interest only period would continue. At its height, the letter seems to imply that it was the understanding of the first defendant that Mr. Naughton would make representations to the mortgage department on his behalf. The assertion that Mr. Naughton told him that he had

"*sorted it out*", is not supported by any of the internal documentation provided by the bank.

67. It appears that, at the request of the first defendant, a meeting was held between him and Mr. Naughton in the Tullamore branch of the bank on 23rd May, 2012. A memo of that meeting was drawn up by Mr. Naughton and was admitted in evidence. It was a fairly detailed meeting which was held to review the first defendant's financial position and his exposure of circa €3.9m on the two mortgage loan accounts.

68. In the memo, Mr. Naughton set out that the first defendant had lost the government contract for the running of a hostel at Killakee Way, Dublin. That had involved a loss of income of approximately €138,000 per annum. The property was rented at €1,500 per month. The memo noted that the first defendant had difficult financial circumstances. His car had been repossessed. He and his wife were surviving with financial help from his wife's parents. Mr. Naughton noted that the first defendant was very much a man under pressure.

69. He noted that the first defendant stated that he would like to have a meeting with BOIMB to discuss various issues in relation to the receivership and how best to resolve matters. Mr. Naughton concluded that the first defendant was under very severe pressure. He was not sure what a meeting would achieve; however, as the first defendant had requested one, he stated that morally the bank should try and facilitate the request. He concluded the memo by stating that the first defendant had texted him looking for an update on the meeting. He requested that the memo should be considered and that the mortgage department should revert as soon as possible.

70. The court is satisfied that this memo supports the evidence of Mr. Naughton, that he was at all times a liaison person between the first defendant and the mortgage department in the bank. It does not support any contention that the first defendant had a concluded oral agreement with Mr. Naughton that the interest only period would continue. He did not appear to have raised the existence of any such agreement in his meeting with Mr. Naughton on that occasion.

71. Turning to the oral evidence given by the first defendant, the court was not impressed by his evidence on this issue. He shifted his evidence a number of times in relation to a number of aspects of the alleged oral agreement. First, when it was put to him that he had alleged that the agreement was concluded in the spring/summer of 2011,

and that that was inconsistent with the content of his letter of 8th August, 2011; he stated that it was in fact after that date that he had concluded the agreement.

72. Secondly, when it was put to him that he had initially pleaded that the oral agreement was that the interest only period would continue "indefinitely", he changed that to say that it was agreed that it would continue for a period of in or about six months and would then be subject to review. Thirdly, in the course of his evidence, he continually conflated a number of meetings and a number of agreements as being the time when the alleged oral agreement had been concluded. His evidence on this aspect was not clear or persuasive.

73. For all of these reasons, the court is satisfied that it must find that there was no concluded oral agreement between Mr. Naughton and the first defendant, to the effect that the interest only repayment period on the 254 account would continue beyond the expiry of the initially agreed five-year period.

(ii) Did the Defendants act as Consumers when taking out the two Loans?

74. The defendants have alleged that in taking out the two loans, they acted as consumers. As such, they argue that they are entitled to various protections provided for under the consumer protection legislation. In addition, this issue is relevant to a later ground of defence put forward, to the effect that the loans were housing loans within the meaning of the Land and Conveyancing Law Reform Act 2009.

75. In order to address this issue, it is necessary to briefly outline the business interests of the first defendant and the family circumstances of the defendants. The first defendant owned two plant hire companies, which he operated between in or about 1985 and 1999. Between 1999 and 2016, he operated a hostel under contract with the government, from the premises at Killakee Way, Dublin. It initially operated as a hostel for asylum seekers and then became a hostel catering for homeless people.

76. The first and second defendants are husband and wife. They have five children, two of whom are profoundly disabled with autism. It was stated that those children will never be in a position to earn a living in the workplace.

77. The first defendant stated that in owning the portfolio of twelve properties, eight of which had been given as security for the 2006 loan and the remaining four had been given as security for the 2007 loan, it had been the intention of the defendants that the purchase

and renting of these properties would provide for them in their retirement and also for their children, and in particular, for their two disabled children.

78. The first defendant stated that it was his hope that over time, the value of the properties would increase to such an extent that the sale of the larger portion of the portfolio, would generate enough profit to enable the defendants to clear the mortgage on their family home, which was not part of the properties in the portfolio, and also to provide for the purchase of two properties to be used by their two disabled children. In this regard, the defendants hoped that there would be sufficient profit on the sale of the properties to buy out the loans outstanding on numbers 4 and 5 Taobh na Coille, Tallaght, Dublin 24, which would then be used by the two children. In the interim, the intention was that the rental income generated by the properties would be sufficient to cover the mortgage repayments on the properties, both during the initial five-year interest only period and the intention had been that it would also cover the capital and interest repayments when they began.

79. It was submitted on behalf of the defendants that where the object of the taking out of the loans and the investment in the property had been to provide for the long term future of the defendants and their children, it was clear that in taking out the loans and purchasing the properties, they had acted as consumers, rather than engaging in an activity as part of their trade, business or profession. Accordingly, it was submitted that they were consumers for the purposes of the contracts of loan.

80. In response to that submission, it was submitted on behalf of the plaintiff that the defendants and in particular, the first defendant, had engaged in a number of business activities. Initially he had owned the plant hire companies, then he had operated the hostel and at the same time, he had borrowed significant sums of money to acquire a substantial portfolio of properties. It was submitted that he had purchased the properties as a business proposition, which he had hoped would provide a profit for him and his family in the future. The fact that he had intended to use the properties to pay off the loan outstanding on his family home and possibly to provide for the purchase of two of the properties on behalf of some of his children, did not mean that the activity was not a business activity.

81. It was submitted that it was significant that the first defendant had taken an active part in the purchase and management of the properties in his capacity as landlord. It was

submitted that the fact that he was running the hostel for a large portion of the time, did not mean that he was necessarily a consumer in relation to the acquisition of the property portfolio. It was possible for a person to have a number of different businesses or professions at the same time. It was submitted that in reality, the first defendant had engaged in property investment as a business activity, with a view to providing for himself and his family. That was a business activity and therefore he did not come within the definition of a consumer at law.

82. The parties were largely agreed as to the applicable case law in relation to the definition of what constitutes a consumer. The following definition of a "consumer" which was given by the CJEU in *Benincasa v. Dental Kit* [Case C-269/95], has been applied in a number of Irish cases:

> "*15. As far as the concept of 'consumer' is concerned, the first paragraph of Article 13 of the Convention defines a 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities (Shearson Lehman Hutton, paragraphs 20 and 22).*
>
> *16. It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. As the Advocate General rightly observed in point 38 of his Opinion, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.*
>
> *17. Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an*

activity is in the nature of a future activity does not divest it in any way of its trade or professional character."

83. In *AIB plc v. Higgins & Ors.* [2010] IEHC 219, Kelly J. (as he then was) held that where the defendants had formed a partnership and borrowed in excess of €6m for the purpose of acquiring and developing certain lands in County Meath, they did not act as consumers. Having referred to the definition of "consumer" as given in the *Benincasa* case, the learned judge stated as follows in relation to the definition of a consumer: -

"The European Court of Justice clearly envisaged that the concept of the consumer was confined to a person acting in a private capacity and not engaged in trade or professional activities. The self same person can be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. Only contracts concluded for the purpose of satisfying an individual's needs in terms of private consumption are protected by the Directive. There is nothing in the Act suggesting that the legislature here sought to go further than the Directive, still less to confine the interpretation of the term 'business' in the definition of 'consumer' to a single business activity."

84. In *Gruber v. Bay Wa AG* [Case C-464/01], the CJEU had to consider whether a farmer, who had bought tiles for use on a building, which he used 60% of for his private residence and the remainder for his farming business, could be deemed to be a consumer in relation to that contract. Having ruled that the burden of proof lay on the person who wished to assert that he was a consumer to establish that fact, the court went on to hold that while the question was essentially one for the national court seised of the case, a contract could only be regarded as being a consumer contract, if the contract was only intended to meet the business needs of the person to a negligible extent and was primarily concerned with his private needs. The court stated as follows at para. 47: -

"*In the light of the evidence which has thus been submitted to it, it is therefore for the court seised to decide whether the contract was intended, to a non-negligible extent, to meet the needs of the trade or profession of the person concerned or whether, on the contrary, the business use was merely negligible. For that purpose, the national court should take into consideration not only the content,*

nature and purpose of the contract, but also the objective circumstances in which it was concluded."

85. A similar conclusion was reached by the CJEU in *Milivojevic v. Raiffeisen Bank* (C-630/17), where the court held that only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down in Regulation 1215/2012 for protection of consumers (see paras. 86-88 of the judgment). The court also held that where a contract was concluded for a dual purpose, partly for a person's professional activity and partly for private matters, he could rely on the consumer protection provisions in the regulation, only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and therefore had only a negligible role in the context of the transaction. The court held that in determining this question the national court should take into consideration not only the content, nature and purpose of the contract, but also the objective circumstances in which it was concluded (see paras. 91 and 92).

86. The decisions of the CJEU in *Benincasa* and *Gruber* and the decision of Kelly J. in the *Higgins* case, were applied by O'Malley J. in *AIB plc v. Fahey & Ors* [2015] IEHC 334. In the course of her judgment, the learned judge noted that in *Higgins*, Kelly J. had rejected the proposition that a person could only have one business, trade or profession, outside of which any borrowings must be made as a consumer. She noted that in *Benincasa*, the court had held that reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract and not to the subjective situation of the person concerned. The judge stated that she could see no reason to depart from the general principle that "*he who asserts must prove*", in relation to the burden of proving the status of the borrower (see para. 156).

87. In the course of his submissions, the first defendant relied strongly on certain dicta of Barrett J. in *Ulster Bank v. Healy* [2014] IEHC 96. That was an application for summary judgment brought by the plaintiff bank against the defendant, who had taken out a loan with the bank. The defendant was an accountant employed in a company which manufactured construction materials. He had borrowed money to invest in property to provide for himself in his retirement and also to provide for his family. Barrett J. held that he had raised an arguable defence that in taking out the loans he had acted as a consumer

and accordingly he remitted the action to plenary hearing. The first defendant relied heavily on the following dicta at para. 9 of the judgment:

> "*For his part, Mr. Healy has engaged in some property side-investments to provide for his retirement and his family. In this he is not unusual. Many prudent people are concerned to provide for their retirement income. Some may invest in stocks and shares. Some may invest in property. Some may use saved or borrowed monies to avail of these investments in the hope of funding a better quality of retirement for themselves or a better quality of life for their families. The court does not consider that a consumer who on one or more occasions places saved or borrowed monies in a particular form of investment, such as property, with a view to making a profit therefrom necessarily becomes a person whose business, trade or profession is that of professional investor or property investor and thus no longer a "consumer" for the purposes of the Consumer Credit Act. Of course there must come a point when a person crosses the Rubicon from consumer to professional. However, it could be contended that a man such as Mr. Healy who has invested not insignificant but not extravagant sums in property in order to provide for his retirement and to benefit his family has not necessarily crossed this line*."

88. The first defendant also relied on the decision in *Stapleford Finance Limited v. Lavelle* [2016] IEHC 385, where the assignee of a debt which had originally been held by Anglo Irish Bank plc, sought summary judgment against the defendant on foot of five loans that had been advanced to him between 2nd June, 2006 and 14th December, 2007. The loans had been taken out by the defendant to finance certain investments that he wished to make in property developments being funded by the investment firm, Quinlan Private. When the plaintiff sought summary judgment, the defendant raised the defence that he had acted as a consumer, because he had taken out the loans as investment opportunities, which were entirely separate to his trade or profession as a trader in the city of London.

89. In the course of her judgment, Baker J. noted that the offer for the first two loans had been contained on a single page document which was headed "Credit Agreement regulated by the Consumer Credit Act 1995". It was noted that in bold print there was a statement that the borrower could withdraw from the agreement at any time within ten

days of receiving the agreement and that legal advice should be taken before it was signed. The borrower had signed an acceptance in standard form and also on a separate page, by which he waived the ten day cooling off period under ss. 30 and 50 of the Consumer Credit Act 1995.

90. Baker J. held that it was established as a matter of law that the question of whether a person was a consumer, was a matter to be determined objectively and irrespective of the characterisation that the parties might have applied to the loan. She noted that in *ACC Loan Management Limited v. Brown* [2015] IEHC 722, on which both parties had relied in support of the proposition, it had been stated by her that the label or characterisation that the parties themselves "*may be deemed to have put on a loan is not determinative*", although the characterisation put by the parties themselves may be of some benefit to that analysis. She said that the point was not controversial and was established in the authorities (para. 51).

91. Baker J. went on to note that the defendant had borrowed for the purpose of investing in commercial property funds, or investment instruments, in all cases managed by a firm of investment managers, Quinlan Private. She stated that the case law had identified that the purpose of the loan was the defining or identifying characteristic, as to whether a person was a consumer, and not the quantum of the loan. That was a position which was consistent with common sense. It was perfectly possible for a person to borrow a very substantial amount of money, for example for the purposes of acquiring a private residence or a holiday home for personal use, and in those circumstances such a person would readily be identified as a consumer.

92. Baker J. had regard to the fact that the defendant did not manage any of the funds that he had invested, but left that to the investment managers. She noted that the fifth loan was for investment in a project to be handled by Quinlan Private, which had not at that time even been identified; in these circumstances she held that it was at least arguable that in taking out the contracts of loan, the defendant had acted as a consumer. Accordingly, he was given leave to defend the proceedings and the action was remitted to plenary hearing.

93. A case that involved the argument that the loan had been taken out to provide for the retirement needs of the borrowers, occurred in *ACC Bank plc v. McEllin & Ors* [2013] IEHC 454. In that case, the first defendant, persuaded the second and third defendants,

who were his parents, to take out loans to purchase and develop an adjoining site to their business premises, with a view to developing the lands as a mixed use commercial/residential development. The loans were obtained for that purpose. When the plaintiff bank sought summary judgment on foot of the loans, the second and third defendants argued that they had entered into the loan agreements to provide for their retirement and they were therefore consumers.

94. In the course of his judgment, Birmingham J. (as he then was) rejected the argument that had been put forward on behalf of the second and third defendants. He noted that their argument faced insuperable obstacles. First, the documentation which they had signed involved a warranty by them that in taking out the loan, they were acting within their trade, profession or business and thereby, were not acting as consumers within the meaning of the 1995 Act. He went on to hold that even if one were to ignore that representation, the transaction had all the hallmarks of a commercial transaction. That remained the case, notwithstanding that the second and third defendants may never have been involved in property development previously. He held that it was beyond argument that the second and third defendants, when entering into this manifestly commercial transaction, were not acting as consumers. He held that no arguable case had been made out that they had acted as consumers, or that the provisions of the 1995 Act had not been complied with, thereby rendering the agreement unenforceable. He held that notwithstanding the low threshold that had to be crossed before a defendant was granted leave to defend an action, no arguable defence had been made out. The plaintiff was held to be entitled to the orders that it sought against all three defendants.

Conclusions on this issue.

95. Having considered the evidence on this issue, both oral and documentary, and having regard to the case law outlined above, the court is satisfied that in the circumstances of this case the defendants did not act as consumers in relation to the two loans that were taken out in 2006 and 2007.

96. It is common case that the second named defendant had participated in the loan taken out in 2006, because this was a venture being undertaken by her husband. She left all relevant negotiations and decisions to him. She was only included in the loan because it transpired that some of the properties that were been given as security for the loan, were

held in their joint names. Accordingly, the determining factor that has to be looked at, is the position of the first named defendant in relation to both loans.

97. I am satisfied that the first named defendant, in taking out the loans to purchase or refinance his existing loans in respect of this large portfolio of twelve properties, was engaged in a business activity. The fact that he may have had another business activity at that time, namely running the hostel in Tallaght, does not mean that any other activity carried out by him, had to be done as a consumer. The case law makes it clear that a person can carry on more than one business or trade activity at the same time.

98. The court is satisfied that this was a business activity and was not merely an investment opportunity similar to that in the *Lavelle* case. In the *Lavelle* case, the defendant had, at all times, worked as a trader in the city of London. He had acquired a very large fortune as a result of that activity. In the judgment, it was stated that he had amassed the sum of €9m in a bank account in the Isle of Man. For some reason that is not entirely clear, he elected to take out borrowings from Anglo Irish Bank, so as to make further investments through Quinlan Private. One of the key reasons it was held that he had an arguable case that he had acted as a consumer in taking out those loans, was because he would invest the money with Quinlan Private and leave the actual management of the portfolio entirely to them. He took no active part in managing the projects that were being undertaken, or financed through Quinlan Private, being the development of a shopping centre in Sofia, Bulgaria; a gallery in Cologne, Germany; an investment in a Jurys Hotel deal and in four Davy promoted investments, together with a further €1 million for an investment to be decided by Quinlan Private. It is important to note that in that decision Baker J. did not hold that the defendant was a consumer within the meaning of that term at law, but rather, that he had an arguable case that he had acted as a consumer, and allowed the matter to go to plenary hearing.

99. The circumstances of the present case are quite different to those that pertained in the *Lavelle* case. In the present case, the first defendant had actively purchased the twelve properties. He also actively managed the properties by renting them out. It was he who was responsible for taking in the rents from the tenants. He also looked after all the necessary outgoings in relation to the management and maintenance of the properties. In these circumstances, the court finds that he was engaged in a business activity of acquiring and renting a portfolio of properties.

100. The court is satisfied that this case is similar to the facts that pertained in the *McEllin* case, where it was held that the transaction in relation to the taking out of a loan to fund the acquisition of land and the development of property thereon, was manifestly a commercial transaction. The fact that the second and third defendants had never engaged in property development prior to that time, did not affect the commercial nature of the transaction. Similarly, the fact that the defendants in that case had engaged in the transaction so as to provide for their retirement, did not mean that the transaction could not be regarded as being a commercial transaction.

101. In the present case, the first defendant has argued that because he had the ultimate intention of earning enough profit from the management and sale of his property portfolio, to eventually buy out the debt owing on his family home and also to purchase two properties for the use of his children; does not mean that the acquisition of those properties, was not a commercial transaction. The fact that he may have had some ultimate goal, which might have been achieved many years later, if the property market continued to increase in the way that he expected, did not mean that he acted as a consumer in entering into the loans to purchase, or refinance the purchase, of the twelve properties.

102. The court is further supported in this conclusion by the statements made by the first defendant in the course of his correspondence. After he had received the letters of demand dated 1st September, 2011, he wrote two letters on 9th September, 2011. The first of these was sent to Mr. Richie Boucher, the Chief Executive of the bank. The second letter was written on the same date to Mr. Michael Noonan TD, who was then Minister for Finance. In each of these letters, the first defendant complained about the way he had been treated by the bank in relation to the service upon him of the letters of demand. In each of those letters he stated "*I am a fulltime landlord*". This clearly supports the proposition that the first defendant was not acting as a consumer, nor did he believe himself to be.

103. In his plenary proceedings, the first defendant sought damages against the bank and the receiver, for *inter alia*, breach of his right to earn a living: see para. 19 and relief (ii) in his amended statement of claim. Given that he was complaining about the seizure and maintenance of the properties by the receiver, it is clear that the first defendant was

alleging that he was earning his living from them. This further supports the proposition that he was acting as part of his business or trade in this regard.

104. The court is satisfied that in putting together this portfolio of properties, the first and second defendants were engaged in a business enterprise, which they hoped would be profitable and would ultimately enable them to buy out any loan outstanding on their family home and provide properties for their two disabled children. That was a perfectly legitimate aim to have. However, it does not deprive the activity of its character as being a business, or trade carried on by the defendants for that purpose. Accordingly, I find as a fact that the defendants did not act as consumers when taking out the loans in 2006 or 2007.

(iii) Were the Loans "housing loans"?

105. The 2009 Act has certain provisions in relation to the conduct of receiverships. The most important of these is the duty on a receiver in respect of certain mortgages created after 1st December, 2009, to obtain an order from the court to enable him to take possession of the mortgaged property and an order from the court to enable him to sell the property.

106. Those provisions can be circumvented by the terms of the mortgage deed itself; with the exception of loans that are deemed to be "*housing loans*", within the meaning set out in the Act. Mortgage deeds of "housing loans" cannot exclude the protections provided for in the 2009 Act, which is set out at s. 96(3) as follows:

> "*(3) The provisions relating to the powers and rights conferred by this Chapter apply to any housing loan mortgage notwithstanding any stipulation to the contrary and notwithstanding any powers and rights expressly conferred under such a mortgage, but in relation to any other mortgage, except where this Part provides to the contrary, take effect subject to the terms of the mortgage.*"

107. The first defendant claimed that the five mortgages which were executed on 17th December, 2009, constituted housing loan mortgages and were therefore covered by the provisions of the 2009 Act. Thus, the first question which has to be determined is whether the loans were housing loans and whether the mortgages were therefore housing loan mortgages.

108. The definition of housing loan for the purposes of the 2009 Act is set out in part 12 of schedule 3 of the Central Bank and Financial Services Authority of Ireland Act 2004. It provides as follows:

> "'*housing loan' means—*
>
> *(a) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land—*
>
> *(i) for the purpose of enabling the person to have a house constructed on the land as the principal residence of that person or that person's dependants, or (ii) for the purpose of enabling the person to improve a house that is already used as the principal residence of that person or that person's dependants, or (iii) for the purpose of enabling the person to buy a house that is already constructed on the land for use as the principal residence of that person or that person's dependants, or*
>
> *(b) an agreement for refinancing credit provided to a person for a purpose specified in paragraph (a)(i), (ii) or (iii), or*
>
> *(c) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is constructed where the house is to be used, or to continue to be used, as the principal residence of the person or the person's dependants, or*
>
> *(d) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is, or is to be, constructed where the person to whom the credit is provided is a consumer*;''

109. The court is satisfied that the defendants do not come within the statutory definition of housing loans, because the loans that were given in 2006 and 2007 to either purchase or refinance the purchase of the properties, were given in respect of properties that were not bought as the principal residence of the defendants, or their dependents. The loans were given to facilitate the purchase of a number of properties, which it was intended would be let out by the defendants to tenants to provide an income for them.

110. For the reasons set out in the preceding section of this judgment, the court is satisfied that the defendants did not act as consumers when taking out the 2006 loan, not did the first defendant act as a consumer when taking out the 2007 loan. Accordingly, the court finds that the loans in 2006 and 2007 were not housing loans within the meaning of the 2009 Act.

111. However, that is not the end of the matter. While it is trite law that parties to a private agreement cannot deem one another to come within a statutory definition of people who are entitled to a particular benefit under a statute; that being a matter of public law. However, it is certainly possible for parties to a private agreement to agree that one or other of them shall be treated as having the benefit of certain statutory protections, even though they would not come within the definition of those who are entitled to protection under the statute. This can happen, for example, where an employer may agree with a prospective employee that he will treat them as being entitled to all relevant statutory benefits, even before they have completed the necessary time in employment, so as to come within the class of persons intended to be protected by the statute. In other words, parties can agree that one party shall have the benefit of certain statutory entitlements in their private dealings *inter se*, even though that person may not strictly speaking be entitled to the statutory protection as of right.

112. In the present case, the first defendant submitted that having regard to the content of the documentation that he and, in some cases, his wife, signed in relation to the mortgages executed on 17th December, 2009, it was abundantly clear that the bank was agreeing that the loans and the mortgages would be treated as housing loans and as housing loan mortgages for the purposes of the 2009 Act. Having considered this submission carefully, the court is of the view that there is considerable validity to the argument put forward by the first defendant.

113. Each of the mortgages executed on 17th December, 2009 were in identical terms. They were on a standard form document which had been issued by the Irish Banking Federation headed "Housing Loan Mortgage". The front page of the document provided under the heading "General Mortgage Conditions", that the mortgage would incorporate the Irish Banking Federation's General Housing Loan mortgage conditions (version 1.0 2009) as if they were set out in the mortgage in full. The mortgagor acknowledged that he

had been given a copy of the general mortgage conditions and had read them and agreed to be bound by them.

114. The document went on to provide that, as security for the payment and discharge of the secured liabilities, the mortgagor as beneficial owner and also in the case of registered land as the registered owner, or as the person entitled to be registered as registered owner, thereby (a) granted and conveyed to the secured party the mortgaged property and (b) charged in favour of the secured property, so much of the mortgaged property as was registered in the Land Registry with payment of the secured liabilities. However, the document went on to provide that for mortgages executed on or after 1st December, 2009 clauses (a) and (b) would be deemed to be deleted and replaced by the following clause: "*Charges the mortgaged property with the payment and discharged to the secured party (as trustee for itself and each associate) of the secured liabilities and assents to the registration of this charge for present and future advances as a burden on the mortgaged property*".

115. The Irish Banking Federation General Loan Mortgage Conditions, which were incorporated as part of the mortgage, provided in the definition section that the "Act" meant the Land and Conveyancing Law Reform Act 2009. Clause 12 of the general conditions dealt with the enforcement of the security by the mortgagee. It provided, *inter alia*, at clause 12.1, that at any time after the security constituted by the mortgage and the conditions had become enforceable, but subject to compliance with the Act, the secured party may enter into possession of the secured assets and exercise the power of sale and the other powers conferred on the mortgagees by the Act.

116. Clause 12.3 provided a discretion as to the method of enforcement and provided that the secured party could in its absolute discretion, but subject to the provisions of the Act, enforce all or any part of the security in any manner as it saw fit. Clause 12.9 provided that each receiver and the secured party was entitled to all the rights, powers, privileges and immunities conferred by the Act.

117. Clause 13 dealt with the position of the receiver. Clause 13.1 dealt with the power to appoint a receiver. It provided that at any time after the mortgagor so requested, or the security constituted by the mortgage and the conditions had become enforceable, but subject to compliance with the Act, the secured party could exercise the statutory power to appoint a receiver.

118. Clause 13.2 dealt with the powers of a receiver. It provided that a receiver so appointed shall have and be entitled to exercise all powers conferred by the Act; in addition, pursuant to s.108(3)(c) of the Act, the mortgagor and the secured party thereby delegated the following additional powers to the receiver: it then contained a list including the power to take possession of the secured property, compromise any claims or disputes; protect secured assets; appoint advisers *etc*; redemption of secured interests; take indemnity and, at clause 13.2.7, sell the secured assets by public auction or private contract and generally in such manner and in such terms and conditions as the receiver shall think proper. Clause 13.5 provided that the receiver would be deemed to be the agent of the mortgagor.

119. The court is satisfied that, having regard to the provisions of the document which created the mortgage on 17th December, 2009 and having regard to the general conditions as outlined above, there was an agreement between the bank and the defendants, that the properties, which were covered by the mortgages created on that date, would be treated as housing loans and housing loan mortgages, even though they did not strictly come within the qualifying criteria set out in the 2009 Act.

120. The significance of this finding is that it calls into question the lawfulness of the actions taken by the receiver in taking possession of the five properties covered by the mortgages executed on 17th December, 2009, and in selling three of those properties.

121. Chapter 3 of the 2009 Act deals with the obligations, powers and rights of a mortgagee. Section 96(3), which has been set out earlier in the judgment, provides that the provisions relating to the powers and rights conferred by that chapter apply to any housing loan mortgage notwithstanding any stipulation to the contrary and notwithstanding any powers and rights expressly conferred under such a mortgage, but in relation to any other mortgage, except where that part provided to the contrary, should take effect subject to the terms of the mortgage. Section 97(1) provides that a mortgagee shall not take possession of the mortgaged property without a court order granted under that section, unless the mortgagor consents in writing to such taking of possession, not more than seven days prior to such taking.

122. The power of sale enjoyed by a mortgagee is set out in s.100 of the Act. It provides that a mortgagee may sell the mortgaged property if either, following service of a notice on the mortgagor requiring payment of the mortgage debt, default has been made

in payment of that debt, or part of it, for three months after such service; or some interest under the mortgage, or in the case of a mortgage debt payable by instalments, some instalment representing interest or part interest and part capital, is in arrears and unpaid for two months after becoming due; or there has been a breach by the mortgagor, or some person in concurring in the mortgage, of some other provision contained in the mortgage or any statutory provision, including this Act, other than a covenant for payment of the mortgage debt or interest, and provided in each such case twenty-eight days notice in the prescribed form has been served on the mortgagor warning of the possibility of such sale.

123. Section 100(2) provides that the power of sale shall not become exercisable without a court order granted under sub. (3), unless the mortgagor consents in writing to such exercise not more than seven days prior to such exercise.

124. Section 100(5) provides that a mortgagee is not answerable for any involuntary loss suffered due to the exercise or execution of the power of sale under that chapter, of any trust connected with it, or of any power or provision contained in the mortgage.

125. Section 101 provides that upon an application for an order under s.97(2) or 100(3), where it appears to the court that the mortgagor is likely to be able within a reasonable period to pay any arrears, including interest, due under the mortgage, or to remedy any other breach of obligation arising under it, the court may adjourn the proceedings, or make an order staying the enforcement or implementation, or postpone the date for delivery of possession to the mortgagee, or suspend the order for such period or periods as it thinks reasonable.

126. Section 108 deals with the appointment of receivers. It provides that where following service of a notice on the mortgagor there has been default in payment of the mortgage debt for three months after such service, or where some payment being due under the mortgage has been unpaid for two months after becoming due, or where there has been a breach by the mortgagor of a term of the mortgage, the mortgagee may appoint by writing such person as the mortgagee thinks fit to be a receiver of the mortgaged property. Subsection (2) provides that a receiver appointed under subsection (1) is the agent of the mortgagor, who is solely responsible for the receiver's acts or defaults, unless the mortgage provides otherwise.

127. As already noted, five properties were covered by mortgages executed on 17th December, 2009. Those properties were: 107 Jervis Place, Dublin 7; 92 Moy House, Dublin 1; 29 Kingswood Heights, Dublin 24 and numbers 4 and 5 Taobh na Coille, Dublin 24. The receiver was appointed over 107 Jervis Place and numbers 4 and 5 Taobh na Coille on 17th November, 2011. The receiver was appointed over 92 Moy House on 20th November, 2012 and over 29 Kingswood Heights on 22nd February, 2013.

128. The receiver sold 107 Jervis Place for €180,000. He sold 92 Moy House for €335,000 and he sold number 5 Taobh na Coille for €220,000. The receiver did not obtain orders for sale prior to selling these properties.

129. Somewhat curiously, the receiver did elect to apply to the Circuit Court for an order for sale in respect of 29 Kingswood Heights. In a civil bill issued on 21st April, 2016, the receiver and the bank sought an order for sale in respect of that property. Paragraph 12 of the endorsement of claim stated as follows: -

> *"These proceedings are commenced in the Circuit Court pursuant to section 101(5) of the Land and Conveyancing Law Reform Act 2009 as they include an application under section 100(3) of the Land and Conveyancing Law Reform Act 2009 concerning property which is subject to a housing loan mortgage created on or after 1st December, 2009."*

130. The grounding affidavit in support of the application for an order for sale of the property was sworn by Ms. Deborah Leonard, a legal case manager in the Arrears Support Unit of the bank on 15th April, 2016. In that affidavit at para. 21, she stated that she had been advised that it was necessary for the plaintiffs to obtain an order pursuant to s.100(3) of the 2009 Act, allowing the plaintiffs to exercise their power of sale pursuant to the mortgage and charge in order to give effect to the sale of the mortgaged lands. At para. 23 she repeated the assertion that the proceedings had been commenced as they included an application under s.100(3) of the 2009 Act concerning property, which was subject to a housing loan mortgage created on or after 1st December, 2009. She stated at para. 25 that the order sought was to satisfy a legislative requirement. At para. 26, she stated that the orders sought in the endorsement of claim were necessary in order to facilitate the sale of the mortgaged lands by the plaintiff to recover the monies advanced to the defendant.

131. Thus, it is clear from the documents that were filed on behalf of the receiver and the bank in that application, that they regarded the mortgage that had been created in respect of 29 Kingswood Heights as being a "housing loan", withing the meaning of the 2009 Act.

132. In the course of his cross-examination of the receiver, the first defendant put it to the receiver that there was no logical reason why he had sold three of the properties, that were covered by identical mortgages executed on the same date, without an order for sale; when he had sought an order for sale in respect of a further property, which was also covered by a mortgage executed in identical terms on that date. The receiver was asked why he had brought that application. He could not answer that question. The question was put to him at Q.117 on day 7 as follows: -

> "*Q. But you also brought a case to allow you to have power of sale, power of possession on that property in 2016?*
>
> *A. No, I don't have the knowledge.*"

133. Evidence was also given by Ms. Lisa McCarthy, who is a member of the receiver's team dealing with these properties. She was asked by counsel on behalf of the bank, whether efforts had been made to put 29 Kingswood Heights on the market for sale. Ms. McCarthy stated that she was aware that efforts had been made to go to the market with the property, but they had to proceed to obtain a court order in order to sell the property (day 6, Q.748).

134. In the course of supplemental legal submissions submitted on behalf of the receiver and the bank on 28th October, 2022, it was stated that the position of the bank was that it was not necessary to make application to the Circuit Court for an order for sale of any of these properties, as the defendants were not consumers. It was stated that the application to the Circuit Court had simply been "*a 'belt and braces' approach by the bank*". It was submitted that the making of that application did not establish that application should have been made in respect of the other properties which had been sold.

135. The court is of the view that it is improper in legal submissions to attempt to slip in evidence as to why the application had been made to the Circuit Court. No evidence had been led on behalf of the bank, or the receiver, as to why an application had been made to the Circuit Court for an order for sale in respect of number 29 Kingswood Heights, when no

such application had been made in respect of the other properties sold by the receiver, which were covered by identical mortgages executed on the same date. No witness on behalf of the bank or the receiver gave evidence that the application to the Circuit Court had merely been a "belt and braces" approach by the bank or the receiver.

136. While the receiver's conduct in seeking such an order might be seen as being consistent with him adopting a "belt and braces" approach; it is equally consistent with him realising that he was legally obliged to obtain a court order before proceeding to sell the property the subject matter of this mortgage. The content of the civil bill and Ms. Leonard's affidavit, tend to favour the latter interpretation of his motivation in seeking the court order.

137. The court is satisfied that having regard to the terms of the mortgage deed and the documents incorporated therewith, the bank had agreed that the mortgages executed on 17th December, 2009 would be treated as housing loan mortgages. As such, the defendants were entitled to the protections afforded by the 2009 Act in respect of housing loans. This meant that orders for possession of the mortgaged properties ought to have been obtained pursuant to s.97 of the 2009 Act and orders for sale should have been obtained prior to the sale of any of the properties pursuant to s.100 of the 2009 Act. No explanation has been forthcoming from the bank, or the receiver, as to why it sought an order for sale in respect of one of the properties, being number 29 Kingswood Heights, when it did not seek such an order in respect of the other properties sold by the receiver, which were covered by identical mortgages created on 17th December, 2009.

138. The court holds that in taking possession of the properties which were subject to the mortgages created on 17th December, 2009, without an order for possession and in selling three of those properties without an order for sale, the receiver acted without lawful authority.

(v) Consequences of the Receiver's unlawful actions.

139. For the reasons that are set out later in this judgment, the court is satisfied that in all the circumstances of the case, while the receiver unlawfully took possession of the five properties, he did not sell three of them at an undervalue; nor did he mismanage any of the properties that came under his control. This aspect will be dealt with in greater detail later in the judgment. Given these findings, the court is satisfied that the defendants have

not suffered any direct financial loss due to the fact that the receiver had possession of the properties, or sold some of them in the course of the receivership.

140. However, that does not end the consideration of the issue of damages. The court is satisfied that in appropriate circumstances, the court is entitled to mark its disapproval of the unlawful actions of a receiver by making an award of exemplary damages.

141. While it is the case that exemplary damages were not specifically pleaded by the defendants in the counterclaim, or in the plenary proceedings, there is some authority for the proposition that exemplary damages do not have to be specifically pleaded: see *McIntyre v. Lewis & Ors* [1991] 1 IR 121, where Hederman J. stated at p.11 of the judgment: -

> *"It is true that exemplary damages were not claimed in the pleadings but they do not have to be expressly claimed in the pleadings under the rules of court. I believe it might be desirable if the plaintiff did indicate in advance (even if it does not form part of the formal pleadings) that he does intend to claim exemplary damages. This is to afford a defendant an opportunity to meet such a case."*

142. In light of more recent developments in relation to the duty on parties to plead cases with sufficient particularity, it may well be that the decision on this aspect in the *McIntyre* case may have to be revisited in an appropriate case. However, I do not think that it is necessary to decide that issue in this case. This is due to the fact that in his pleadings, the first defendant claimed damages in the sum of €4m in respect of what he perceived were the wrongful actions on the part of the receiver. The court is satisfied that as the first defendant must be given some latitude in relation to the manner in which his claim was pleaded; the court is satisfied that while the term "exemplary damages" was not specifically used, it was obvious to the plaintiff from the nature of the claim made by the first defendant in his pleadings, that he was including a *de facto* claim to exemplary damages for the alleged wrongful actions of the receiver.

143. That exemplary damages can be awarded in cases where a receiver has been wrongfully appointed and has wrongfully taken possession of a mortgagor's property, has been established in two recent cases. In *Harrington v. Gulland Property Finance Limited (No. 2)* [2018] IEHC 445, Baker J. held that the bank had wrongfully called in loans from its customer and had wrongfully appointed a receiver, who had taken possession of the mortgagor's lands. He had only been in possession of the lands for a period of

approximately five weeks, before the mortgagor obtained an interim injunction restraining the continuation of the receivership. That injunction was converted into an interlocutory injunction, which remained in place until the trial of the action. So effectively, the receivership only lasted for a period of five weeks.

144. In looking at the issue of damages for the wrongful taking of possession of the mortgagor's property for that period, Baker J. was satisfied having regard to the decisions in *Conway v. INTO* [1991] 2 IR 305, *Garvey v. Ireland* [1979] ILRM 266 and the Canadian decision of *Haggart Construction Limited v. Canadian Imperial Bank of Commerce* [1998] ABQB 5, that she had jurisdiction to award exemplary damages to mark the court's disapproval of the fact that the plaintiffs were wrongfully kept out of possession of their property for the five week period that the receivership lasted. She awarded each of the plaintiffs the sum of €20,000.

145. The decision in *Harrington v. Gulland Property Finance Limited* was affirmed by the Court of Appeal in *Donlon v. Burns & Ors* [2022] IECA 159. The court noted that in *McCleary v. McPhillips* [2015] IEHC 591, it had been held that receivers who had been invalidly appointed were constituted trespassers upon the land and therefore the plaintiffs were entitled to damages for trespass. The court found that where a receiver had been invalidly appointed, and had wrongfully taken possession of the lands, that constituted a trespass. In the case before them, the receivership had remained in place over the lands for almost six years. The court awarded the plaintiff exemplary damages of €30,000 against the first, second and third respondents, one of whom was the receiver in the present case.

146. The purpose of an award of exemplary damages is to mark the court's disapproval of the conduct of the party who commits the wrongful act. The court is satisfied that it is appropriate to make such an award of damages in this case in respect of the wrongful action of the receiver in taking possession of the five properties, which were the subject of the mortgages executed on 17th December, 2009, without first obtaining an order of the Circuit Court and for selling three of those properties, without obtaining an order for sale from the Circuit Court.

147. Having regard to the fact that the receiverships in question have lasted for periods varying between nine and eleven years, and having regard to the quantum of exemplary damages awarded in the *Harrington* and *Donlon* cases, the court awards the first

defendant exemplary damages of €50,000 in respect of each of the two properties which were taken possession of by the receiver, but which were not sold; that is the properties at 4 Taobh na Coille and 29 Kingswood Heights. This makes an overall award of €100,000 in respect of those properties.

148. In respect of the three properties that were sold by the receiver without obtaining the authority of the court to do so, the court is of the view that that constitutes an egregious action by the receiver. To deprive a landowner of his property is a gross interference with his constitutional right of ownership of the property. The court is of the view that it is appropriate to award the first defendant a sum of €150,000 in respect of each of the three properties that were sold; those properties were 107 Jervis Place, 92 Moy House and 5 Taobh na Coille. This makes an overall award of €450,000 under this heading.

149. This award of damages is made in favour of the first defendant, and not both defendants, because the award is made as against the receiver, who was not a party to the counterclaim in the summary proceedings. Mrs. Hade was a party to that action, but she was not a party to the plenary proceedings, in which the receiver was sued.

(vii) Did the Defendants act under duress when executing the mortgages on 17th December, 2011?

150. The first defendant alleged that the mortgages which had been executed by him on 17th December, 2009; some of which were also executed by his wife, had been procured under duress. However, when he came to describe the duress, he merely stated that his dealings with Mr. Robert Lynch in the bank, were somewhat frosty. He stated that Mr. Lynch was at times aggressive in his tone when speaking to him. He stated that on occasions Mr. Lynch told him that he would have to do such and such, or else the bank would proceed to call in the loan or appoint a receiver.

151. The first defendant accepted in cross-examination that when he and his wife signed the letter of loan offer of 22nd June, 2006, it had been agreed that security by way of mortgages would be provided in respect of the properties identified in that letter. The first defendant also agreed that when he took out the further loan in 2007, he had agreed to provide the bank with mortgages over the four units in St. Maelruns Park, Tallaght, Dublin 24, which he had duly provided. He also accepted that not all the mortgages had been put in place at the time that he had had his dealings with Mr. Lynch. It was for that reason that the five outstanding mortgages were signed on 17th December, 2009.

152. In his evidence on this aspect, Mr. Lynch stated that he had had dealings with the first defendant in relation to the arrears that existed on the relevant accounts. He had also told the defendants that they would have to execute the outstanding mortgages that they had agreed to put in place. He accepted that some of his conversations with the first defendant had been frank and that he had been firm in his request to obtain the mortgages. However, he denied that he had been aggressive, or had otherwise acted in an improper fashion.

153. Mr. Lynch stated that he felt that he had had a good relationship with the first defendant. He stated that at some time after he had ceased having dealings with the first defendant, he received a Christmas card from the first defendant. He recalled the card, because it was a card that had been drawn by a son of the first defendant and had been produced as part of a project in his primary school. Included with the Christmas card, were two tickets for the cinema in Dundrum Shopping Centre. Mr. Lynch was of the view that his relationship with the first defendant had been reasonably cordial.

154. Although the plea of economic duress has its origins in the criminal defence of duress, it has evolved significantly since then. As noted by Charleton J. in *ACC Bank v. Dillon* [2012] IEHC 474, the threat of violence is no longer necessary to prove that a contract was entered into under duress. The learned authors of the textbook 'McDermott on Contract Law', 2nd edition, outline that economic duress occurs where one party obtains a benefit from another by exerting commercial or economic pressure. The distinction between economic duress and legitimate commercial pressure is not easily drawn. Often, in the commercial sphere, contracts are executed under pressure, which may not necessarily constitute duress in the legal sense.

155. This point was explained by Charleton J. in the *Dillon* case, wherein he stated that a difference in the relative bargaining powers of parties to an agreement is not sufficient as to amount to illegitimate pressure to enter a contract. The judge noted that the plaintiff in that case was entitled to appoint a receiver over the defendant's property, and it was therefore lawful for the bank to use this final step to bargain with the defendant. The judge stated at para. 7: "*All of that is within the level of appreciation that must be allowed in commercial bargaining. It is not duress*."

156. In *Danske Bank v. Miley* [2016] IEHC 105, Baker J. refused to accept a plea of economic duress made by the defendants in seeking to avoid a contract entered into with the plaintiff. She stated as follows at para. 23:

> "*Mrs. Miley may have been under pressure, but the pressure was one caused by her circumstances, and arose from the fact that she was the sole surviving co-borrower of a loan in default, and in respect of which demand was made.*"

157. Having considered the evidence on this aspect in light of the authorities mentioned above, the court is not satisfied that the mortgages that were executed by the defendants on 17th December, 2009, were procured as a result of duress, or any improper conduct on the part of Mr. Lynch, or any servant or agent of the bank. While undoubtedly it was a difficult period, given that it was in the middle of the economic crash, the bank was entitled to put pressure on the defendants to honour the terms of the loan agreement, by providing the outstanding mortgages. The bank was entitled to indicate to them that if they did not honour the terms of the loan agreement, the bank would take whatever steps were necessary to protect its position. Any pressure experienced by the first defendant, was as a result of the gravity of the situation he found himself in; rather than any economic duress on part of the bank. The court finds that these mortgages were not executed under duress, in the legal sense of the term.

(viii) Alleged invalidity in the letters of demand.

158. There are two grounds of defence raised by the defendants under this heading. The first is that the bank was not entitled to issue the letters of demand, because the initial five-year interest only period, was not due to expire until September 2011 in respect of the 254 account. The first defendant alleged that the bank had deliberately applied the capital repayment obligation a month early, so as to contrive a default on his part, thereby giving the bank a purported right to issue the letter of demand calling in the entirety of the loan. In the alternative, the first defendant submitted that the letters of demand that issued on 1st September, 2011 were defective, because they did not specify what arrears had accrued at that time, nor the amount of interest that had been paid since the inception of the loan.

159. Having considered the matter, the court is satisfied that there is no substance in either of these grounds of defence. The initial interest only period was stated to have been five years, which was to comprise sixty monthly instalments. The court is satisfied that the

first of those instalments arose in August 2006, meaning that the repayments would revert to capital and interest in respect of the payment that was due in August 2011. This is evident from the statements of account that were proved in evidence by Mr. Downes.

160. Accordingly, the court holds that the bank did not apply the capital repayment obligation one month early, as asserted by the first defendant. Even if the court is wrong in that, the defendants were still in arrears in respect of the interest only payments at the time that the letters of demand were issued; so the bank was entitled to issue the letters of demand even without the obligation to repay capital.

161. In relation to the assertion that the letters of demand were defective due to the fact that they did not specify the arrears that had arisen as of the date of the letter, nor the amount of interest that had been paid up to that time, the court is satisfied that there was no term in the loan documentation or mortgage deeds for the letter of demand to have specified these matters.

162. Furthermore, having regard to the decision in *Bank of Baroda v. Panessar* [1987] CH 335, which was applied by Cregan J. in *Flynn v. National Asset Loan Management* [2014] IEHC 408, even if there is a mistake in the content of the letter of demand, that is not fatal to its validity.

163. The essential object of a letter of demand is that it make an unequivocal demand for repayment of the loan under the terms of the loan agreement. That was done in this case. The relevant clause giving the right to call in the loan, was identified in the letter. The letter itself was clear in its terms. While the first defendant was upset at receiving the letters, it is clear from his correspondence in September 2011, and in the months thereafter, that he was under no misapprehension about the content, or effect of the letters of demand. Accordingly, the court finds that the letters of demand were valid in all respects.

164. Flowing from that finding, the court can also deal with a further submission that was made by the first defendant, to the effect that the bank did not have the power to appoint a receiver over any of the properties which had been the subject of the mortgages created both before and after 1st December, 2009. The first defendant did not adduce any evidence or argument as to why the bank did not have power to appoint a receiver in respect of the mortgages executed prior to that date. His argument focussed on the mortgages that had been created on 17th December, 2009. The court is satisfied that

having regard to the provisions of s.108(1)(b) of the 2009 Act, the bank did have the power to appoint a receiver over the five properties covered by the mortgages executed on 17th December, 2009, due to the fact that there were instalments of interest and/or capital and interest, that had been unpaid for in excess of two months prior to the date that the receiver was actually appointed over those properties. Thus, there is no substance in this ground of defence or counterclaim.

(ix) Were any of the properties sold at undervalue by the Receiver?

165. The first defendant submitted at the hearing of the action, that in his view the receiver had sold some or all of the five properties at an undervalue. The first defendant based this opinion on two factors: first, based on the price that he had paid for the various properties; and secondly, based on searches that he had done on the internet in relation to prices of similar properties at the relevant time of sale. The first defendant did not call any independent expert evidence in relation to the sale prices that had actually been achieved by the receiver.

166. In *Ruby Property Company Limited v. Kilty* (Unreported, High Court, McKechnie J., 31st January 2003), it was held that the duty on a receiver is to exercise reasonable care to obtain, at the time of sale, the best price reasonably obtainable for the property in question. Having reviewed the relevant case law, McKechnie J. set out the relevant principles to be derived from the authorities at para. 13 of his judgment. The relevant principles for the purposes of this case are principles (b), (c) and (d):

> "*(b) This duty of a receiver is both to be determined and evaluated at "the time of sale". See Casey, supra. In this context he is not required to postpone, defer or cancel a sale in the hope of the market improving. This position was, I think, also accepted by Carroll J. in McGowan and Ors v. Gannon [1983] I.L.R.M. 516,though as the following point was not argued she expressly left open the issue "whether a receiver who has tested the market and found that the market is very bad, is entitled to sell at a giveaway or knock down price because he cannot get better. Should he be obliged to wait for any given period in the hope that there would be an upswing in the market?"*

(c) A similar view was taken by the Court in Bank of Cyprus (London) Ltd. v. Gill [1980] Lloyds Reports 51, but at the same time it was stated that the receiver was of course obliged to take proper steps to secure the best price available at the time of sale.

(d) If there is no duty to wait, logically, it would appear to follow that there is no duty to sell immediately so as to avoid a possible decrease in the value of the charged asset. See China and South Sea Bank Ltd. v. Tan Soon Gin [1990] 1 AC 536."

167. In *Farrelly & Anor. v. Kavanagh* [2015] IEHC 114, the mortgagor brought an action against the receiver for his alleged negligence in failing to repair, or renovate the properties prior to placing them for sale. It was held that the receiver was not under any duty to expend money on the property prior to putting that property on the market for sale. The court also noted that the receiver had acted on the advice of experienced estate agents when placing the property for sale and there had been no contradictory expert evidence put before the court on behalf of the borrower. In these circumstances, the court refused to find that the properties had been sold at an undervalue (see paras. 37 and 38).

168. In *Feniton Property Finance DAC v. McCool* [2022] IECA 217, the court had to consider whether the receiver had acted negligently in selling the property at what the borrower alleged was a gross undervalue and was effectively a "fire sale" of the property. In the High Court judgment, reported at [2019] IEHC 473, it was noted that while the defendant complained about alleged negligence on the part of the receiver in selling at an undervalue, there was no independent evidence that the property had in fact been sold at an undervalue. It was held that all the borrower had put before the court was a mere assertion, which was unsupported by any independent evidence of a kind that one would expect to see in such a case from a valuer (see paras. 24-26).

169. In the decision of the Court of Appeal, the court, in affirming the judgment of the High Court, held that it was settled law that where the contracts so provided, the receiver was to be an agent of the mortgagor, not of the mortgagee, which had appointed him. It was held that if the borrower wanted to allege that the receiver acted negligently, his cause of action was against the receiver not the bank (see paras. 134-135).

170. In the present case, in the absence of any independent expert evidence to the effect that the receiver acted negligently in effecting any of the sales in respect of which complaint is made, the court cannot find that the properties were sold at an undervalue, as alleged by the first defendant. Accordingly, this ground of defence and counterclaim also fails.

(x) Did the Receiver act negligently in his management of the properties?

171. The first defendant submitted that the receiver had acted negligently in his conduct of the receivership, by failing to manage the properties under his control. In particular, it was alleged that if the receiver was not going to sell the properties, he was under a duty to rent them to tenants, so as to obtain an income from the properties, which could be applied in reduction of the debt.

172. The first defendant complained that virtually all of the properties, which had been retained by the receiver, had been left vacant for many years. Furthermore, he made particular complaint in relation to the management of the four units at St. Maelruns Park, which properties had been left derelict for approximately seven/eight years. In addition, they had become dilapidated to such an extent, that the local authority had served a notice that they intended to compulsorily acquire the properties as they had become dilapidated. The first defendant argued that to allow the properties, which he alleged had been in perfectly habitable condition at the time that the receiver first took possession of them, to become dilapidated to that extent, could not possibly be consistent with the proper management of the properties under his control.

173. In order to give a judgment on this issue, it is necessary to set out some of the evidence that was given on behalf of the receiver in relation to the management of the properties. Before doing so, it is also necessary to mention two aspects that are pertinent to this inquiry. Firstly, due to the actions of the first defendant, his servants or agents, it was necessary for the receiver to go to the High Court to get an injunction restraining him from interfering with the conduct of the receivership. By order of the High Court dated 10th September, 2014, an order was made restraining the defendants and each of them, their servants or agents, from doing the following: -

> *"1. From attempting to carry on manage or otherwise interfere with the exercise by the plaintiff of his function as receiver over each of the properties the subject*

matter of the within proceedings described in the schedule hereto or any portion thereof.

2. from taking position of getting in and collecting the rents and the licence fees associated with each property and marketing each property for sale.

3. From registering a lis pendens against any of the properties."

174. The second aspect which must be borne in mind is that the first defendant purported to transfer title to some of the properties into a trust in an effort to defeat or interfere with the ongoing receivership. In his evidence, the first defendant admitted that at one time he had been contacted by a man, who claimed that he had a "magic formula" for defeating receiverships. This involved placing the properties into a trust and for the trustees to purport to let the properties to tenants. The first defendant admitted that a trust had been set up under the title the Rodolphus Allen Family Trust, or in similar terms, and that it had purported to enter into a lease with tenants in respect of some of the properties. The first defendant accepted that that had not been a good idea.

175. The evidence in relation to the day to day management of the properties was given by Ms. Lisa McCarthy. The court found Ms. McCarthy to be an honest and reliable witness. She answered all questions in a frank and forthright manner. The court accepts her evidence.

176. To begin with the properties in respect of which the first defendant had a particular complaint, being the four units at St. Maelruns Park, Ms. McCarthy stated that when the receiver was appointed over these properties in 2011, there had been tenants in each property. The receiver had engaged an agent to collect the rents on his behalf. However, there were issues in collecting the rent from some of the tenants. The Rodolphus Allen Family Trust also became involved. It was necessary for the receiver to bring an application before the PRTB to remove the tenants from the property. A decision was made to bring the properties to the market with vacant possession. To that end, the receiver proceeded to bring number 24B to the market on a trial basis, with a guide price of €150,000. However, it transpired that there were planning issues with some of the units in relation to unauthorised attic conversions. The estate agent, who had been retained by the receiver, advised that the best option was to attempt to sell all four units as one lot to an investor.

177. The receiver accepted that advice and put the four units on the market, with a guide price of €595,000. He managed to secure an offer of €695,000 for the four units. The bank approved that offer. Ms. McCarthy stated that contracts were issued in December 2015. However, there was a break-in to the properties over the Christmas period and copper was taken from the roof. The receiver made an insurance claim in respect of the damage to the property. Ms. McCarthy stated that the purchaser obtained a repair estimate, based on which, he made a reduced offer of €591,000. The receiver was waiting at that time for the insurance claim to be settled, which was eventually settled in the sum of approximately €84,000, which resulted, net of expenses, in a payment of €64,000 approximately.

178. Ms. McCarthy further stated that the purchaser also wanted an assurance that any ongoing litigation between the defendants and the bank and/or the receiver, would not affect the property. When the receiver was unable to give such an assurance, the sale fell through. Following that, the receiver obtained quotations in respect of the cost of completing remedial works to bring the properties back to a habitable standard. Quotations were obtained in the region of €130,000. The receiver did not have any funds on account, so he submitted a proposal to the bank. The proposal was that the remedial works would be carried out and then the properties would either be sold or rented. The receiver also obtained a further valuation on the four properties of approximately €750,000. A decision was made to sell the properties in the condition that they were in, at that price. The properties were put up for sale again, by auction in March 2017.

179. Ms. McCarthy stated that the four units did not sell at auction, but subsequently a third party made an offer of €750,000. However, he wanted a special condition guaranteeing that all litigation would be concluded within six months of the sale. Again, the receiver was not in a position to comply with that special condition, so the sale fell through.

180. Ms. McCarthy stated that after that, the receiver received an instruction from the bank to place the properties "on hold", meaning that he was neither to sell them, nor rent them to tenants. The reasons for that were as follows: first, at the hearing of the Circuit Court application, which had been brought seeking an order for sale in respect of 29 Kingswood Heights, the first defendant had urged on the court that none of the properties should be sold pending the determination of his plenary proceedings against the bank and

the receiver. Secondly, given the difficulty that had been encountered by the receiver in getting tenants out of properties and the necessity to bring proceedings before the PRTB, it was felt unwise to put in new tenants, if there was a likelihood that the matter would be resolved, or determined within a reasonable period of time.

181. Thirdly, the proceedings herein were due to be heard in the High Court in October 2018. They were adjourned until April 2019 and were further adjourned on that date. After that, the restrictions imposed due to the Covid-19 Pandemic began, so the action was not heard during 2020, or 2021, and ultimately came on for hearing before the court in October 2022. Ms. McCarthy stated that, at the relevant time, being 2018, it was anticipated by all concerned that all disputes in relation to the underlying debt, the appointment of the receiver and the management of the properties, would be concluded within a short period of time. It was for that reason that the decision was made to put the properties "on hold".

182. Ms. McCarthy accepted that it had been necessary to place steel shutters on the properties at St. Maelruns Park, due to the fact that there had been a break-in and extensive damage done to the property over Christmas 2015. She accepted that a dilapidations notice had issued from the local authority indicating their intention to compulsorily acquire the property on account of the fact that it had become dilapidated. She accepted that due to a change in staff on the receiver's team and in particular, the fact that one member thereof, was on extended maternity leave, an opportunity to make submissions against the making of the CPO had been missed by the receiver; however, the CPO could not become effective unless there was consent to its making by An Bord Pleanála (hereinafter "ABP"). Both the first defendant and the receiver had the opportunity to make further submissions to ABP, the closing date for which was on 1st November, 2022. Ms. McCarthy stated that the receiver would make the necessary submissions in time for that deadline.

183. In relation to No. 29 Kingswood Heights, the receiver had been appointed over that property in February 2013. That was the property in respect of which an application had been made to the Circuit Court for an order for sale. The first defendant had objected to that order being made. The learned Circuit Court judge had declined to make an order for sale, on the grounds that all issues in relation to the validity of the appointment of the receiver and his right to take possession of the property and to sell it, would be

determined in the course of the plenary proceedings brought by the first defendant against the bank and the receiver. In the circumstances, the receiver decided to put that property "on hold" pending the outcome of the present proceedings.

184. In relation to No. 4 Taobh na Coille, Ms. McCarthy stated that the receiver had to proceed with caution, as the first defendant had made the case that that property constituted his principle dwelling. In addition, there had been tenants in the property when the receiver was appointed. The receiver had taken steps to obtain vacant possession of the property. However, that had involved bringing an application to the PRTB. In addition, an email had been sent to the bank's solicitor from the Rodolphus Allen Family Trust, alleging that there had been a trespass on the property by the receiver, as the trust was the lawful owner of the property. It was in light of that correspondence and other actions on the part of the first defendant, that the receiver had sought the injunction from the High Court restraining the first defendant, his servants or agents, from interfering with the conduct of the receivership.

185. Ms. McCarthy stated that they eventually secured possession of the property, but had managed to obtain very little rent from the tenant during the period that the claim was proceeding through the PRTB. Following the departure of the tenant, the receiver had obtained up-to-date valuations in respect of the property, but the property was not brought to the market, as the decision was made to put it "on hold" pending the outcome of the present litigation.

186. No. 752 Virginia Heights was sold by the receiver for €100,000 in 2013. In relation to No. 752A Virginia Heights, Ms. McCarthy stated that the receiver served a notice of termination of tenancy on the tenant, but he did not leave. The receiver was again required to bring a case to the PRTB. The tenant did not pay rent while that case was proceeding. The PRTB ultimately gave a determination in favour of the receiver. It was necessary for the receiver to obtain an execution order from the Circuit Court in respect of that determination. When they eventually obtained vacant possession of the property, a security company was engaged to survey the property. It was found to have been left in bad condition by the tenant.

187. Ms. McCarthy stated that since 2018, the receiver had obtained valuations on the property and reports from the security agents. However, the receiver had received an instruction from the bank, that due to the present litigation, the receivership property was

to be put "on hold". It had remained in suspension since the time when the case was first due to be heard in October 2018.

188. The remaining two properties in the portfolio, being 107 Jervis Place and 92 Moy House, had both been sold by the receiver.

189. The court has only given a brief outline of the evidence that was given by Ms. McCarthy in relation to the management of the properties that had been retained by the receiver to date. In reaching its conclusions on this aspect, the court has had regard to the extensive documentation that was put before it in respect of the management of each of these properties. The court is satisfied that, having regard to the oral and documentary evidence tendered in relation to the management of the properties by the receiver, he did not act negligently in his management of the receivership properties.

190. A number of things emerge very clearly from the evidence. First, the first defendant, as the borrower and mortgagor of the properties, was adamant that they should not be sold pending the determination of his plenary proceedings against the bank and the receiver. He had stated that quite clearly in the documentation that he put before the Circuit Court and also in correspondence that he had sent to the bank and its solicitors. The court was informed that he had applied unsuccessfully to the High Court for an injunction preventing the receiver from selling the properties. He tried to appeal that refusal to the Court of Appeal, but was out of time to do so.

191. Secondly, the court accepts the evidence of Ms. McCarthy that it was in fact very difficult to effect sales of the properties. The court accepts her evidence in relation to the efforts that were made to sell the four units in St. Maelruns Park and of the difficulties that were encountered, when two purchasers each insisted on the insertion of clauses guaranteeing that the litigation between the first defendant and the bank and the receiver, would be concluded within a specified period of time. The court accepts that the receiver was not in a position to give any such assurance or agree to any such special condition, and for that reason the sales fell through.

192. Thirdly, the court is satisfied that the receiver encountered substantial difficulties with tenants in the properties and had to bring applications before the PRTB to have them evicted from the properties. In addition, he faced difficulties posed by the activities of the so called Rodulphus Allen Family Trust in connection with the properties. Fourthly, the court accepts that the proceedings herein were originally scheduled to be heard in October

2018 and again in April 2019. They were adjourned on both occasions. The court accepts that it was a reasonable decision to make to place the properties "on hold" in the months and years leading up to the first hearing date in 2018, on the basis that the conclusion of these proceedings would determine all questions that would arise in relation to the underlying debt, the appointment of the receiver and his management of the receivership.

193. Taking all of these matters into consideration, the court finds that while the receiver acted unlawfully in taking possession of the properties and in selling some of them without first obtaining authorisation from the Circuit Court, he did not act negligently in his management of the properties, once he had taken them into his possession.

(xi) Other Defences and/or Claims raised by the Defendants.

194. The remaining grounds of defence and/or counterclaim, can be dealt with succinctly. The first defendant submitted that the bank and the receiver had acted unlawfully and negligently, by placing a notice on one of the properties stating that he had been indebted to the bank in a given sum of money and that a receiver had been appointed. The first defendant submitted that while that was a method of serving documentation provided for under the Act, it was not appropriate, or lawful for the bank or the receiver to have adopted that method of service, when they had elected to serve the document directly upon him at his place of residence. The first defendant stated that his reputation in the locality was greatly injured as a result of the action on the part of the bank or receiver in placing the notice on the property.

195. There is no substance in this ground of defence or counterclaim, due to the fact that it is a method of service that was expressly authorised. Secondly, insofar as the first defendant alleges that his reputation was adversely affected by the placing of the notice on the property due to the incorrect amount of his indebtedness being stated in the notice; if he has any cause of action arising out of that, it is an action in defamation. He is long out of time to bring such a claim. It is not appropriate to attempt to raise such a claim in the present proceedings.

196. The first defendant also complained that the bank had not obtained the consent of his spouse to some of the mortgages that were created on 17th December, 2009. There is no substance in this assertion, due to the fact that it was not necessary for the bank to get the consent of the second defendant to the creation of the mortgages for two reasons: first, the properties complained of were in the sole name of the first defendant; and

secondly, none of the properties in the mortgages created on 17th December, 2009, were the family home of the defendants.

197. Finally, the defendants raised the point that the property at 29 Kingswood Heights, was misdescribed as 24 Kingswood Heights in some of the documentation. There is no substance in this point. The defendants knew at all times that the mortgage was to be created over No. 29 Kingswood Heights, which was owned by the first defendant. The solicitor who acted for the first defendant at the time, confirmed in correspondence that his undertaking to hold the title deeds related to No. 29 Kingswood Heights.

198. That concludes the analysis of the various defences and claims raised by the defendants.

Amount currently outstanding on the Loans.

199. The court accepts the evidence given by Mr. Downes in relation to the current amounts outstanding on both of the loans. The court accepts the accuracy of the statements of account that were produced in evidence in relation to each of the accounts. The defendants did not seriously challenge the figures given by Mr. Downes.

200. The court is satisfied that the sum of €2,026,640.09 is due by both defendants on foot of the 254 account, together with continuing interest thereon, from 28th September, 2022 until date of judgment herein. The court grants the bank a joint and several judgment against the defendants in that sum.

201. The court is satisfied from the evidence of Mr. Downes and from the documentation proved in evidence by him, that the sum of €1,412,210.09 is due and owing by the first defendant on foot of the 877 account, together with continuing interest thereon from 28th September, 2022 until date of judgment herein. The court grants the bank judgment against the first defendant in that sum.

Proposed Orders.

202. Having regard to the findings made by the court in its judgment herein, the court proposes to make orders in the terms set out below. It should be noted for the purpose of the orders in each action, the parties will be identified by their title in the respective proceedings. The parties will have liberty to make submissions on the terms of the final orders that will be made by the court in each case.

(a) The Summary Summons Proceedings (Record No. 2014/1416S).

203. The court proposes to make the following orders in this action:

(1) Judgment in favour of the plaintiff against the defendants jointly and severally in the sum of €2,026,640.09, together with continuing interest thereon from 28th September, 2022 to date of judgment herein;

(2) Judgment in favour of the plaintiff against the first defendant in the sum of €1,412,210.09, together with the continuing interest thereon from 28th September, 2022 to date of judgment herein;

(3) Dismiss the defendants' counterclaim against the plaintiff.

The Plenary Proceedings (Record No. 2014/4328P).

204. The court proposes to make the following order in these proceedings:

(1) Judgment in favour of the plaintiff against the second defendant in the sum of €550,000;

(2) A declaration that the second defendant is not entitled to possession of 29 Kingswood Heights, Dublin 24 or 4 Taobh Na Coille, Dublin 24, without an order of the Circuit Court; there will be a stay on this declaration for six months to enable the second defendant to bring the necessary applications before the Circuit Court;

(3) Dismiss the plaintiff's action against the first defendant.

Costs.

205. As these two sets of proceedings were effectively heard together, although they were not consolidated into a single action, and as both parties have been substantially successful on various aspects of their claim, but equally have been unsuccessful in other aspects of the case, the court proposes to make no order as to costs in either action.

Stay on Judgment and Order.

206. The court would propose to place a stay on its judgment and order in each case for a period of twenty-eight days. If any of the parties appeal any aspect of either judgment, then the stay is to continue on both judgments and orders, pending the final determination of the matter before the Court of Appeal.

Further Directions.

207. The parties will have two weeks within which to furnish brief written submissions in relation to the content of the final order and on costs and on any other matters that may arise, such submissions should be sent by email to the registrar.

208. Both actions will be listed for mention at 10.30 hours on 21st December, 2022, for a physical hearing, for the purpose of making final orders in each case. To that end, the bank may file a further affidavit setting out the total amount of the debt on each account, as of that date. Alternatively, the bank can elect to waive any claim to interest from 28th September, 2022 to date of judgment.

209. It should be noted that the making of submissions in relation to the content of the final orders herein, will not prejudice any party's right to lodge a notice of appeal against some or all of the judgments herein, within twenty-eight days of perfection of the orders in each case.