APPROVED **[2024] IEHC 467**

THE HIGH COURT

Record No: 2015/83 SP

Between:

PERMANENT TSB PLC FORMERLY IRISH LIFE AND PERMANENT PLC and START MORTGAGES DESIGNATED ACTIVITY COMPANY

Plaintiffs

-AND-

BRIAN DONOHOE

Defendant

JUDGMENT of Mr Justice Rory Mulcahy delivered on 29 July 2024

Introduction

1. This judgment concerns the second plaintiff's application for possession of two properties, one in Clondalkin, the other in Galway ("**the Properties**"), pursuant to section 62(7) of the Registration of Title Act 1964, as amended.

2. It is not disputed that, on foot of a loan approval dated 30 April 2007, the first plaintiff advanced the defendant a loan in the sum of €543,450. The loan was secured by way of a mortgage dated 8 May 2007 in favour of the first plaintiff. The mortgage was registered as a charge against the Properties on 5 June 2008.

3. It is also accepted that the defendant has not made any payments on the secured loan since July 2010.

4. Notwithstanding that the defendant does not dispute that he had the benefit of the loan from the first plaintiff, that he granted security over the Properties, and that he has not made any payments on the loan for some fourteen years as at the date of this judgment, the defendant contends variously that the claim should be dismissed, that certain questions should be referred to the Supreme Court and/or the Court of Justice of the European Union (CJEU), or that the proceedings should be adjourned to plenary hearing. He has identified a multiplicity of issues in defence of these proceedings.

5. It should be noted that the issues he now relies on differ from those he advanced in the very many extensive affidavits he has filed in response to the plaintiffs' claim. As acknowledged by him in his opening oral submissions, he had presented his defence on the basis of "*at times misinformed opinions*". His tenth, and subsequent, affidavits address the matters which are now the subject of his defence of the plaintiffs' claim. This judgment, therefore, as the defendant invited the court to do, focuses on the issues raised in those and subsequent affidavits and in his extensive written and oral submissions. The defendant continues to rely on certain factual averments and exhibits from his earlier affidavits.

6. The first plaintiff issued these proceedings by way of special summons in April 2015. The proceedings have been the subject of two prior judgments of the High Court, one of McDermott J ([2017] IEHC 143), the other of MacDonald J ([2018] IEHC 355).

7. The defendant appealed against the judgment and order of MacDonald J dated 22 June 2018. While that appeal was pending, on 1 February 2019, the first plaintiff sold its interest in the defendant's loan facility and mortgage to the second plaintiff. The Court of Appeal made an order adding the second plaintiff as co-plaintiff in the proceedings on 1 November 2019. The appeal was dismissed on 23 November 2020. An application for leave to appeal to the Supreme Court was subsequently withdrawn by the defendant.

8. The second plaintiff was registered as owner of the charge over the Properties on 27 March 2019. The second plaintiff is, therefore, the only party with a material interest in the

proceedings, but, for convenience, I will simply refer to the plaintiffs in this judgment save where it is necessary to distinguish between the first and second plaintiffs.

9. In addition to the plaintiffs' application for an order for possession, the defendant has two motions before the court, one dated 3 May 2018, the other 8 March 2024, in which he seeks to have the proceedings struck out on grounds which broadly mirror those he advances by way of defence and which, therefore, do not require to be separately addressed.

The plaintiffs' case

10. The plaintiffs' case is straightforward and is advanced in reliance on section 62(7) of the Registration of Title Act 1964 ("**the 1964 Act**"). Section 62(7) has been repealed. However, it remains applicable to mortgages created before 1 December 2009 by virtue of section 1 of the Land and Conveyancing Law Reform Act 2013. Section 62(7) of the 1964 Act provides:

> *(7) When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession.*

11. In *Bank of Ireland v Cody* [2021] IESC 26, the Supreme Court (Baker J) explained the limited proofs required to obtain an order for possession pursuant to section 62(7):

> "*49. The owner of a charge who seeks to obtain possession pursuant to s. 62(7) has to prove two facts:*
>
> *(a) That the plaintiff is the owner of the charge;*
>
> *(b) That the right to seek possession has arisen and is exercisable on the facts."*

50. The summary process is facilitated by the conclusiveness of the Register as proof that the plaintiff is the registered owner of the charge is a matter of the production of the folio, and, as the Register is by reason of s. 31 of the Act of 1964 conclusive of ownership, sufficient evidence is shown by that means: see the discussion in the Court of Appeal in Tanager DAC v. Kane *[2018] IECA 352. The judgment of the Court of Appeal inter alia held that the correctness of the Register cannot be challenged by way of defence in summary possession proceedings, and that a court hearing an application for possession pursuant to s. 62(7) of the Act of 1964 is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and the right to possession has arisen and become exercisable."*

12. The plaintiffs assert that they have established the proofs necessary in order to obtain the order for possession. It is not disputed that the second plaintiff is the registered owner of the charge over the Properties, as established by production of the folio, the conclusiveness of which the court is required to accept. And it asserts that the right to possession has arisen and is exercisable on the facts.

13. The terms of the loan to the defendant are set out in a letter of approval dated 30 April 2007. As appears therefrom, the term of the loan was 25 years with an interest rate of 4.75%. The defendant, however, was only required to repay interest on the loan, at least for the first five years of the loan period. Clause 4 of the Special Conditions provides:

Permanent tsb *will accept monthly repayments, as set out in the letter of approval, representing repayment of interest only (as may be varied from time to time and including insurance premiums where applicable) for the first five years from the date of cheque issue or such other period as* ***permanent tsb*** *may decide.*

14. The first plaintiff reserved the right to demand repayment of principal and interest at any time during the period of the loan, but if no such demand was made, the principal would become repayable upon the expiry of the term of the loan. The plaintiffs do not purport to have ever terminated the interest only period of loan repayment.

15. The mortgage deed expressly incorporates the first plaintiff's 'Mortgage Conditions 2002' which provide for the circumstances in which the mortgagee would be entitled to possession. Clause 6.4 of those conditions provides that the mortgagee may enter into possession after the Total Debt has immediately become payable. Condition 7.1 provides that the Total Debt will become immediately payable, *inter alia*, if the mortgagor defaults in making two monthly repayments. There is no reference to a requirement for a prior demand for repayment. The 'Total Debt' is defined as the whole of the moneys outstanding on the security of the mortgage.

16. The conditions also provide, at Clause 2.5, that the mortgagor will "*and hereby any covenants to pay to* ***permanent tsb*** *and discharge on demand (or on such other terms as may be agreed in writing) the general indebtedness and liability.*" The 'general indebtedness and liability' is defined to include all indebtedness and liability incurred by the mortgagor to the bank in the ordinary course of banking business.

17. On 7 January 2014, the first plaintiff's then solicitors wrote to the defendant setting out the full amount then owing on the defendant's loan, being €614,806.97, and demanded payment in full within seven days. A letter from the solicitors of 15 January 2014 noted that there had been no response to this letter and called on the defendant to provide vacant possession of the properties.

18. The plaintiffs assert that the right to seek possession had arisen pursuant to Clause 7.1 of the Mortgage because, in circumstances where it is not disputed that no repayments had been made since July 2010, necessarily the defendant had missed more than two monthly repayments and the first plaintiff was therefore entitled to possession without a prior demand. However, it relies on the fact that it *has* made a prior demand, by demanding repayment of the entire sum outstanding in its demand of 7 January 2014. Therefore, it argues, the Total Debt had become repayable, thus triggering an entitlement to possession.

19. The defendant contends that there is a conflict between the provisions requiring repayment of the Total Debt, where there is no reference to a prior demand and the repayment of the 'general indebtedness and liability' which does necessitate a prior demand. He contends that the plaintiffs' entitlement to possession does not arise without a prior valid

demand. The defendant says that there is no sufficient evidence that the demand letter was sent, and he avers that he did not receive it.

Special Summons procedure

20. In addition to his assertion regarding the requirement for a demand, the defendant advances a variety of defences to the claim such that the claim should be dismissed or adjourned to plenary hearing. Order 38 of the Rules of the Superior Courts regulates hearings of proceedings commenced by special summons. Order 38, rule 9 provides as follows:

> *9. On the hearing of any special summons, the Master, in a case within his jurisdiction, or the Court, as the case may be, may give judgment for the relief to which the plaintiff may appear to be entitled or may dismiss the action or matter or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action or matter as may seem just.*

21. Thus, if a special summons is adjourned to plenary hearing, the court has broad discretion to give directions as to the hearing of the matter. This is explained in Delaney and McGrath on *Civil Procedure*, 5th ed. (Round Hall, 2023) at 28.21 – 28.22:

> *On the hearing of the special summons, the court is given a broad discretion and may make such order for determination of the questions in issue as may be just. In that regard, the court has three options open to it: (i) it may give the plaintiff judgment for such relief as he may appear to be entitled; (ii) it may dismiss the action; or (iii) it may adjourn the proceedings for plenary hearing with such directions as to pleadings, discovery etc. as may be appropriate.*
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> *Order 38, rule 9 provides that the court may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate. In*

deciding whether to adjourn the proceedings to plenary trial, the test is whether issues of fact arise, the resolution of which are necessary for the determination of the proceedings, and which can only or best be resolved by plenary hearing. In addition, adjournment to plenary hearing may be ordered where the complexity of the issues raised is such that the action cannot be disposed of in a summary manner and plenary trial preceded by an exchange of pleadings is the more appropriate mode of trial.

22. In *Cody*, the court (Baker J) considered the options available to the court when asked to grant possession in summary proceedings and explained the circumstances in which it might be appropriate to adjourn to plenary hearing:

"*69. Before analysing the factual matters in contention in the present appeal it is useful to examine the range of responses available to a court in an action for summary judgment with a view to positioning the facts and arguments in the present case within that range.*

70. On one end of the range are cases where a plaintiff establishes its claim on the affidavit evidence, as the defendant is not able to persuade the judge either that the evidence is incomplete or that there is a basis on which a credible defence exists. That approach to both the law and the facts is established in the authorities and a court hearing a claim for summary judgment, whether that be for summary judgment for debt or for summary possession, must be satisfied that the plaintiff has established its claim and that the defendant has not put forward a basis for a credible defence either on the facts or on the law."

She then referred to examples of cases where it was possible to grant an order for possession on a summary basis, and those where it was appropriate to dismiss the action. She continued:

"*76. Many applications for summary judgment would fall between these two extremes and will involve the proffering of evidence or argument by a defendant by way of defence which is not sufficient to rebut the evidence of the plaintiff to enable the judge to make a positive finding against the plaintiff, but which offers enough doubt as to the truth or completeness of the plaintiff's evidence, or credibly presents reasonable arguments or evidence that a defendant has a basis of defence which merits further*

scrutiny, evidence or argument. In that instance the trial judge is constrained by the inability to decide between contested affidavit evidence of fact, or resolve complex questions of law, the action cannot therefore be disposed of summarily and will be adjourned to plenary hearing."

23. The question, therefore, is whether the defendant has identified any defence to the plaintiffs' claim such that it is clear that the claim will fail, and therefore should be dismissed, or has established that the interests of justice demand that it be dismissed, or whether he has identified an issue the resolution of which requires a plenary hearing. I have concluded that the defendant has identified a limited number of factual disputes which, if resolved in his favour, are at least capable of giving rise to a defence to the plaintiffs' claim and that, therefore, the proceedings should be adjourned to plenary hearing for a resolution of those issues. In addition, there are some matters which are of sufficient complexity that, having regard to the fact that I have, in any event, concluded that a plenary hearing is appropriate, would best be addressed in the context of a plenary hearing.

24. As will appear from the discussion below, the issues on which I believe there are grounds to defend the proceedings touch on a broad range of matters. However, there are also substantial arguments advanced by the defendant which it has been possible to resolve on the basis of the affidavit evidence, concerning as they do, undisputed facts, or legal issues. In giving directions as to the hearing of the matter, it will be appropriate to reflect the fact that those issues have been finally resolved.

25. Given the multiplicity of issues raised, I propose explaining and then addressing each purported defence in turn, which might assist the understanding of the issues raised and the court's response to them. I will order the defences in the order which, in my view, best aids that understanding, rather than in the order in which they were presented. Before doing so, I will briefly address some of the preliminary issues raised by the defendant.

Preliminary issues

26. The first preliminary issue that is raised by the defendant is an argument that the plaintiffs have not properly invoked the jurisdiction of the court having regard to the manner in which the special indorsement of claim is framed. There is no substance to this objection. The form of the indorsement of claim is almost identical to that at issue in *Permanent TSB plc v Keane* [2018] IEHC 263. In that case, the High Court (Costello J) found that the claim was compliant with the requirements of the rules:

> "*26. In the circumstances, I am satisfied that both defendants knew fully the particulars of the claim they were required to meet, from both the special indorsement of claim and the affidavit of Ms. O'Brien. On this separate ground I hold that the plaintiff has complied with the requirements of O.4 r.4.*"

27. I am similarly satisfied in this case. Given the detailed exchanges of affidavits to date, it is frankly absurd for the defendant to seek to rely on any purported deficiency in pleading to suggest that he did not or does not know the case which he has to meet. In this regard, it is worth observing that the judgment of McDermott J referred to above involved an application by the defendant to compel replies to particulars. That application was refused on the basis that it was clear what case the defendant had to meet, a view echoed in the judgment of MacDonald J (at para 3):

> "*McDermott J. expressed the view in his written judgment that he was not satisfied that a response to the notice for particulars was necessary for Mr. Donohoe to understand the plaintiff's claim which, as McDermott J. observed, is absolutely clear from the affidavit submitted in support of the special summons.*"

28. Separately, the defendant seeks security for costs, without having brought a motion seeking same, and prior rulings on a number of matters, such as the admissibility of evidence, which are relevant to his defence of the proceedings. The necessity for a prior ruling was not explained. In the context of a summary hearing, it seemed to me that the issues he raises can be assessed in the context of determining whether they give rise to a potential defence without the necessity for any prior rulings or determinations and did not

require to be determined in advance of dealing with the plaintiff's application for summary relief.

No demand letter sent

29. The most straightforward defence put forward by the defendant is that the first plaintiff never made a prior demand for repayment of the loan, which he argues was a necessary prerequisite to the plaintiffs' entitlement to possession pursuant to the mortgage. In this regard, he avers that he never received the demand letter of 7 January 2014. Moreover, he argues that the plaintiffs have not proved that the letter was sent.

30. The only evidence regarding the demand of 7 January 2014 is that of Ms O'Brien who avers that solicitors for the first plaintiff sent the letter, but gives no express means of knowledge for this averment. There is no affidavit from the firm who purportedly sent the demand. In *McDonald v Hill* [2014] IEHC 629 Binchy J, albeit in the context of an application for interlocutory relief to restrain the appointment of a receiver, concluded that there was a triable issue on the question of whether a demand had been sent:

> "*26. It is clear from the terms of the deeds of mortgage completed by the defendant in favour of Danske Bank that it is a prerequisite that a letter of demand is issued by the Bank to the defendant before it may exercise its appointment of receiver. It is not necessary for the Bank to send it by registered post, or even to be able to prove that the demand has been received by the defendant; all the Bank must do is send it by post or leave it at the defendant's usual, or last known, abode or place of business. None of that is in dispute.*
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> *27. What is in dispute, however, is the standard of proof required of the Bank or the receiver to demonstrate that the letter of demand was sent. Having regard to the very serious consequences for the defendant of the appointment of a receiver over his farm and licensed premises, and having regard to the fact that it was open to the Bank to keep a record that would prove definitively that the letter of demand was sent, I believe that there is a serious issue to be tried between the parties at a full hearing of the*

proceedings and that accordingly, the first of the three criteria laid down by the Supreme Court in Campus Oil v. Minister for Industry and Energy (No.2) [1983] I.R. 88 has been satisfied."

31. Similarly, I think that the question of whether the demand letter of 7 January 2014 was sent has not been adequately established at this stage. It is clear that the evidence in this case falls well short of that presented in *McDonald v Hill*. Since the letter was purportedly sent by a solicitor, once it was put in issue by the defendant, further evidence could have been adduced. In light of the defendant's averment that it was not received, the issue of whether a prior written demand was made can only be satisfactorily resolved in a plenary hearing.

32. Of course, the plaintiffs maintain that no prior demand was necessary. They have, however, at all times relied on the demand of 7 January 2014. It seems to me that the defendant has raised a defence regarding the necessity for the existence of a prior letter of demand which merits, in the words of Baker J, "*further scrutiny, evidence or argument*." In the circumstances, the question of whether a demand was required and, if so, whether the plaintiff can prove to the necessary standard that the demand was made, are matters which in my view would be best be resolved at a plenary hearing.

Breach of Unfair Contract Terms Directive

33. The defendant claims that the interest provisions under the loan approval are in breach of Directive 93/13/EEC on unfair terms in consumer contracts ("**the Unfair Contracts Terms Directive**" or "**the Directive**") or the implementing regulations, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 27/1995 and claims that the provisions of the loan providing for the payment of interest are therefore void. The defendant accepts that this does not mean that he is relieved of his obligation to repay the principal sum due, but argues that, since the loan was an interest only loan, with the principal repayable upon the expiry of the loan period, then if the interest provisions fall away – one possible implication of a conclusion that the interest provisions are unfair contract terms – the first plaintiff was not entitled to demand repayment or seek possession when it did in 2014. He contends, therefore, that the second condition in *Cody,* that the entitlement to seek possession had arisen and was exercisable, is not met.

34. The properties the subject matter of these proceedings were both investment properties. The loan was described on the letter of approval as a "2 year fixed residential investment loan (interest only)". In the circumstances, I sought further submissions from the parties on whether the Directive applied to the loan agreement and mortgage the subject of these proceedings in light of the decision of the Court of Appeal in *Bank of Ireland Mortgage UC v Hade* [2023] IECA 292. The plaintiffs contended that the defendant was not a consumer as the loan was for the purpose of acquiring investment properties. Counsel for the plaintiffs made submissions to this effect by reference to the content of documents already exhibited in the proceedings. The defendant claimed that he was a consumer, and provided a further affidavit, his thirteenth, together with written submissions on this issue for the purpose of showing that he was acting as a consumer at the time he took out the loan. He also argues that the plaintiff is estopped from denying that he acted as a consumer having at all times treated him as such prior to the issue being raised by the court.

35. In light of the contested evidence in relation to whether the defendant acted as a consumer, it will be necessary for the proceedings to be adjourned to plenary hearing to resolve this dispute if the issue does need to be resolved. It will only need to be resolved, however, if the defendant is able to make out an arguable case that, if he is a consumer, the terms of the Directive are engaged, and furthermore, that the engagement of the Directive has a bearing on the plaintiffs' entitlement to seek possession.

36. The terms of the loan were set out in a letter of approval dated 30 April 2007. It was an interest only loan with a two-year fixed rate period of 4.75%, with an APR of 4.9% The cost of credit was given as €657,845.28. Special Condition 6 provided:

> *.... On expiry of the fixed rate period, and where the applicant chooses the option of a tracker mortgage interest rate, the interest rate applicable to the loan will be the tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate for the loan will be the tracker mortgage rate applicable to the balance outstanding on the loan, at the date of expiry of the fixed rate period and as may be varied in accordance with variations to the European Central Bank refinancing rate.*

37. The loan offer was accompanied by a European Standardised Information Sheet (ESIS) which expressly stated that it did not constitute a binding offer and that the figures therein were provided "*in good faith and are an accurate representation of the offer that the lender would make under current market conditions based on the information that has been provided. It should be noted, however, that the figures could fluctuate with market conditions.*"

38. The ESIS provided details based on a "*nominal*" interest rate of 4.75%. The ESIS contained similar wording to Special Condition 6 and included the following in capital letters: "*THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME (applies if a Standard Variable Rate or Tracker Rate is chosen).*" The ESIS then contained an illustrative amortisation table which showed the cost of credit on the loan as €657,845.28, *i.e.* the same as set out in the loan approval letter. Under the table, it was stated that the table illustrated "*the amortisation of the loan assuming the loan runs full term and interest rates that currently prevail are available for the full term of the loan.*"

39. It then stated:

> "*The rate is fixed for 2 year(s). The above table assumes that the loan will roll over into the Tracker Mortgage Rate appropriate for the balance outstanding on the loan at the end of this period and as may be varied from time to time.*
> *The loan is an interest only loan for the duration of the term and the capital will be paid in full at the end of the term.*"

40. In addition to the written documents, the defendant avers, in his tenth affidavit, that the mortgage broker, who he says acted as the first plaintiff's agent, represented to him that the margin over ECB would not exceed 1.1%.

41. The fixed rate period of the defendant's loan expired in or about April 2009. It appears that the loan was then switched to a tracker rate at an equivalent of ECB + 2.35%. Other than a letter dated 8 April 2010, from the defendant to the first plaintiff, in which he noted that he assumed that he was on a tracker rate and queried whether he was on the correct rate

since the payment amounts seemed high, the defendant doesn't appear to have made any complaint that Special Condition 6 was an unfair contract term until he delivered the affidavit of Mr Pierre Griejmans sworn on 9 February 2024. He did previously query the manner in which the total interest due was calculated.

42. The defendant relies on evidence of Mr Griejmans to the effect that Special Condition 6 is an unfair term. Since the question of whether the term is unfair is a question of law, Mr Griejmans' opinion of whether the term is unfair is, of course, inadmissible, but the court can have regard to certain of the factual matters upon which Mr Griejmans relies in forming his opinion.

43. Mr Griejmans points out that Special Condition 6 does not specify the margin that the first plaintiff would charge over the ECB rate if the loan was moved to a tracker. He avers that at the time of the loan, the relevant ECB rate was 3.75%. He calculates that the amortisation table contained within the ESIS had an "embedded" margin of 1.1%. However, from his review of the defendant's account, he calculates that the first plaintiff applied a margin of 2.35%. He further avers that the first plaintiff was inconsistent about applying changes to the applicable rate in response to changes in the ECB rate, to the disadvantage of the defendant. His evidence is that 2.35% is the margin that the first plaintiff typically applied to residential investment loans moving on to a tracker rate in 2009. He notes that at that time, the first plaintiff no longer provided a tracker mortgage product. He avers that the defendant's loan should have been part of the tracker mortgage examination framework.

44. Ms McCarthy addressed Mr Griejmans' affidavit in her replying affidavit of 29 February 2024 and one of the defendant's preliminary applications was that he should be afforded an opportunity to respond thereto. However, no such necessity arises. Although there is a factual dispute between the parties regarding whether ECB rate changes were applied in a consistent and timely manner, and whether or not the defendant's loan should have been included within the tracker mortgage examination framework, neither of those issues could give rise to an arguable defence in these proceedings. Even if both those factual issues were resolved in the defendant's favour, they could only affect the amount of interest which was properly due and owing on the loan. In circumstances where the defendant has not made any repayments on the loan since 2010, neither issue could give rise to the defendant being in a position to contend that the entitlement to possession hadn't arisen on

the facts: the defendant was clearly in default on his loan, it was only a question of degree. Ms McCarthy denies that the interest provisions constitute an unfair contract term, but does not dispute Mr Griejmans calculation of the margin applied by the first plaintiff from the time the fixed rate period ended.

45. However, having regard to the type of loan at issue, it is arguable that if the interest provisions of the loan are void as being contrary to the Directive then no issue of default has arisen. If the interest rate provisions of the loan simply fall away, then the loan could never have fallen into default, since no requirement to make any repayment of principal will arise until the end of the term of the loan in 2027.

46. In *Start Mortgages v McNair* [2020] IEHC 140, the High Court (Simons J) considered the case law on the implications of the Directive to mortgages:

> "*83. The implications of the Directive for mortgages has been considered in detail by the High Court (McDermott J.) in* Permanent TSB plc v. Davis *[2019] IEHC 184. The judgment emphasises that neither (i) the definition of the main subject matter of the contract, nor (ii) the adequacy of the price and remuneration, are to be considered when assessing the fairness of a term, provided same are in plain intelligible language. This follows from Article 4(2) of the Directive.*
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> > *2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.*
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> *84. McDermott J. identified the main subject matter of a loan agreement as follows (at paragraph 30 of the judgment).*
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> > *"[…] However, it is clear that the main subject matter of the agreement was that all monies advanced under the loan would be repaid by monthly instalments and at a variable interest rate over a period of thirty-five years. The loan would be secured on the family home: it was so secured. If the borrowers defaulted on*

their repayments the plaintiff became entitled to seek an order for possession having made the appropriate demand for repayment and make good their security. These terms were in clear and intelligible form and were fully understood by each of the parties to involve the offering of the defendants' family home and principal place of residence as security for the loan and that in default of making the agreed repayments the security might be realised by the lender (see AIB Mortgage Bank v Cosgrove *[2017] IEHC 803 per Faherty J., at para 60 and* Allied Irish Banks plc v O'Donoghue *[2018] IEHC 599 per Meenan J., at paragraphs 7-21)."*

85. This approach has very recently been approved of by the High Court (MacGrath J.) in KBC Bank Ireland plc v. Brennan*, unreported, 25 February 2020, [27] to [34].*

86. Having carefully considered the general and special conditions of the loan agreement in the present case, I am satisfied that the "main subject matter of the contract" is similar to that considered in Permanent TSB plc v. Davis *and* KBC Bank Ireland plc v. Brennan*. In particular, the loan offer of 5 February 2007 sets out, in plain and intelligible language, (i) the terms of the loan; (ii) the period of the loan agreement; (iii) the number and amount of the repayment instalments; (iv) the total amount payable, and (v) the cost of the credit. The applicable interest rate is also set out. The requirement to enter into a mortgage is clearly stated, and there is an express warning that the borrowers' home is at risk if they do not keep up payments on a mortgage secured on it.*

87. There is nothing in the papers before me to suggest that the loan agreement and/or mortgage contained any "unfair terms"."

47. It is clear, therefore, that the interest rate applicable under the loan agreement does not fall to be assessed under the Directive as long as the terms regarding the interest rate are set out in "*plain intelligible language*". In Case C-26/13, *Kasler v Jelsalogbank Zrt*, the CJEU set out what the requirement for plain intelligible language involves:

"*71 The requirement of transparency of contractual terms laid down by Directive 93/13 cannot therefore be reduced merely to their being formally and grammatically intelligible.*

72 On the contrary, as has already been recalled out in paragraph 39 of this judgment, the system of protection introduced by Directive 93/13 being based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his level of knowledge, the requirement of transparency must be understood in a broad sense."

48. The Court concluded (at para. 75) that the terms of the loan at issue in that case should be set out with sufficient transparency that the "*consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.*"

49. Special Condition 6 clearly falls within the definition of "*the main subject matter of the contract*" or "*the adequacy of the price and remuneration*" within the meaning of Article 4(2) of the Directive. Is it expressed in plain intelligible language, which would therefore bring it outside the scope of the Directive?

50. Mr Griejmans' affidavit contends that the defendant was entitled to understand from the loan approval and ESIS that a margin of 1.1% over ECB would be applied to his loan throughout the period of his loan. If that is so, then the defendant's complaint is that he has been overcharged interest, not that this was an unfair contract term. Such a complaint would not, however, mean that he was not in default of his loan at the time that the first plaintiff demanded repayment or commenced the proceedings. Even if the demand made in January 2014 was for a sum in excess of the sum then due and owing, it is clear it remained a valid demand (see, for instance, *Flynn v National Asset Loan Management Ltd* [2014] IEHC 408).

51. However, I do not think that the defendant could have understood from the loan offer alone that he was being offered a product which would, after a fixed rate period, switch to a tracker rate with a guaranteed margin over the relevant ECB rate. As Mr Griejmans points out, there is no reference to a margin in Special Condition 6. What the contract provides is that the tracker rate, if the borrower chooses that option, will be "*the rate applicable to the*

balance outstanding on the loan at the date of expiry of the fixed rate period." The first plaintiff interpreted this clause as permitting it to apply a tracker rate of 2.35% above ECB. It appears that this was the rate applicable to all residential investment loans. Was it plain that the bank would be free to do so? Although I might have been inclined to conclude that it was if required to determine the issue on the basis of the evidence and submissions to date, in light of the defendant's evidence about the representation from the mortgage broker, I think that the defendant has, just about, raised an issue here which merits further scrutiny in the context of a plenary hearing.

52. The defendant contends that the phraseology "*the rate applicable to the balance outstanding on the loan*" used in Special Condition 6 is not clear. In this regard, it must be borne in mind that there was little uncertainty about the balance that would be outstanding on the loan at the expiry of the fixed rate period. If the defendant had repaid in accordance with the terms of the loan, then the amount which would be outstanding at that stage was known at the date of the loan. What was not known, however, is what the rate applicable would be to that loan amount. As it happens, the bank did not have a tracker mortgage product at the date of expiry of the fixed loan period. It appears to have been decided that the "rate applicable" to *all* residential investment loans was ECB + 2.35%. Is that what was contemplated by Special Condition 6? Or, more accurately, it is clear that is what Special Condition allowed for? In light, in particular, of the apparently contradictory representation by the mortgage broker, it appears to me that the resolution of the factual and complex legal issues necessary to finally determine this question would be best achieved in a plenary hearing.

53. For completeness, I should say that even if the clause does come within the terms of the Directive, it is far from clear that it should be regarded as unfair.

54. It is apparent that the Directive allows for agreements which allow variations in the interest rate payable by a consumer (see Annex 2(b) of the Directive). Directive 90/88/EEC (the Consumer Credit Directive) provides at Article 6 provides:

> *6. In the case of credit contracts containing clauses allowing variations in the rate of interest and the amount or level of other charges contained in the annual percentage rate of charge but unquantifiable at the time when it is calculated, the annual*

percentage rate of charge shall be calculated on the assumption that interest and other charges remain fixed and will apply until the end of the credit contract.

55. Mr Griejmans disputes that the rate of interest was "unquantifiable" at the time that the loan was given, all that was required was the margin (and the time within which changes would be applied following changes in the ECB rate). However, that is to misunderstand what was being offered. The loan approval wasn't for a tracker rate at an agreed margin. It was for a tracker rate at a rate (or margin) to be fixed at the relevant time.

56. But more importantly, the defendant was not obliged to take the tracker rate on offer, even if he wanted the contract to continue. It is clear that the loan would default to a tracker, but only if the defendant did not choose a different option, a fixed or variable rate. The fact that the defendant did not opt for one of those options does not serve to render the tracker rate applied unfair. Indeed, there is no evidence that the tracker rate applied was higher than any fixed or variable rate on offer from the first plaintiff at the relevant time.

57. The question of whether the term was unfair can also be addressed, if it arises, in the context of a plenary hearing.

Securitisation and loan sales

58. As appeared from affidavits filed by the parties, the loans and charge the subject of these proceedings were securitised in or about 2009, which securitisation was reversed in or about 2014. As further appears, the loans and charge were subsequently sold by the first plaintiff in 2019. The defendant contends that he has a defence to these proceedings arising out of each of those processes. The defendant accepts that the second plaintiff is registered as owner of the charge the subject of these proceedings. However, he argues that the process of securitisation and loan sales in these proceedings has led to significant gaps in the plaintiffs' proofs. He argues, furthermore, that there are errors, omissions, contradictions and untruths in the affidavits sworn on behalf of the plaintiffs such that their affidavit evidence cannot be relied on, at least not for the purpose of granting summary judgment

and/or that the plaintiffs' claim should be dismissed, in effect, as a mark of the court's disapproval of the manner in which they have presented their case.

i. Securitisation

59. The special summons was verified by an affidavit of Ms Jacqueline O'Brien, a manager with the first plaintiff. In reply thereto, the defendant challenged the first plaintiff's entitlement to seek possession on the basis that the first plaintiff had securitised and/or sold the loan. In Ms O'Brien's subsequent affidavit, she referred to a letter from the first plaintiff in which it was denied that the loan had been sold, assigned, hypothecated or otherwise transferred. She referred to the statement in the letter that "*any securitisation which permanent tsb enter into are an internal matter for the bank and do not affect the terms and conditions of your loan.*" She averred that the loan had been securitised in 2008, but then "*de-securitised"* in August 2014 and was, therefore, of no relevance to the proceedings. In a subsequent affidavit, she repeated that there had been no assignment or transfer of the loan, but that it had been securitised by virtue of an equitable assignment of the mortgage, which did not involve a transfer of the legal or beneficial interest. The defendant describes these averments as "*positive deceptions*".

60. The application the subject matter of MacDonald J's judgment, referred to above, concerned, *inter alia*, an application by the defendant to compel replies to particulars. The defendant had taken issue with the content of Ms O'Brien's affidavit and exhibited documentation regarding mortgage sales from the first plaintiff to an entity known as Fastnet Securities 7 Limited ("**Fastnet**") which, if it included his mortgage and loan, he contended meant that the plaintiff had divested itself of any entitlement it had to seek relief from him.

61. In response to this application, MacDonald J directed the plaintiff to file a further affidavit setting out the securitisation process and exhibiting the securitisation documents. He specified what the affidavit should address (at para. 56):

> "*The affidavit to be filed by the plaintiff should address why it is that, notwithstanding the securitisation process put in place in 2008, the plaintiff continued to have the rights to pursue Mr. Donohoe in respect of the enforcement of the mortgage granted by him.*

The plaintiff should also explain on affidavit (again exhibiting the relevant documents) how the securitisation was subsequently reversed."

62. In purported compliance with this requirement, the plaintiff delivered an affidavit from Mr Donal Davis. I refer to purported compliance because the defendant disputes the reliability of the documentation put before the court. He also notes that Mr Davis deals with the securitisation of loans in 2009, notwithstanding that the judgment and order of MacDonald J referred to 2008 in circumstances where Ms O'Brien had, in apparent error, referred to 2008 in her affidavits.

63. In his affidavit, Mr Davis explains that the defendant's loan and related mortgage were transferred to Fastnet on 23 March 2009, but that only the beneficial interest, and not the legal interest was transferred. He avers that the first plaintiff continued to administer the mortgage book and maintained the right to pursue the mortgagor in respect of enforcement of the mortgage granted by it. Mr Davis exhibits a 'Master Definitions Schedule', a 'Mortgage Sale Agreement' between the first plaintiff, Fastnet and BNP Paribas Trust Corporation UK Limited in which the first plaintiff is described as the "mortgage manager" (the "**MSA**"), a printout of a record from the first plaintiff's electronic systems showing that the defendant's mortgage loan account was part of the transfer, and a 'Mortgage Management Agreement' (the "**MMA**").

64. Mr Davis avers that the documents illustrate that the first plaintiff retained legal title to the defendant's loan and mortgage, but that Fastnet could compel the transfer of the legal title in the event of a 'trigger event'. He confirmed that no such trigger event had occurred. Under clause 2.1 of the MMA, Fastnet appointed the first plaintiff to manage and administer the loans and mortgages the subject of the MSA and, under clause 2.2 the first plaintiff was given all powers necessary to do or cause to be done all things necessary to manage the loans, including *per* Clause 5 of the MMA, the right to set interest rates in accordance with the terms of the loans, and *per* Clause 11, to collect all payments due and enforce all covenants of each borrower.

65. Mr Davis further explains that on 18 August 2014, the securitisation process was reversed and the beneficial interests in the loans and mortgages the subject of the 23 March

2009 agreement were reversed. Therefore at the time the proceedings were instituted, the first plaintiff was the legal and beneficial owner of the defendant's loan and mortgage.

66. The defendant makes various complaints about the reliability of the documents exhibited, about whether the plaintiffs have made available for inspection originals of the exhibited documents and about compliance with the Bankers Book Evidence Act and/or the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. However, his substantive complaints are that, contrary to Ms O'Brien's averment, the first plaintiff *did* transfer the beneficial interest in his loan and mortgage to Fastnet, as established by Mr Davis's evidence, and, moreover, contrary to the averment of Mr Davis, the first plaintiff had assigned the authority to fix interest rates on the defendant's loan.

67. Moreover, he argues that the mortgage sale agreement to Fastnet provided that the first plaintiff transferred to Fastnet "*the right to demand, sue for, recover, receive, give receipts for all principal moneys payable to become payable under the mortgage…*". Accordingly, argues the defendant, at the time of the demand by the first plaintiff, on 7 January 2014, the first plaintiff had divested itself of the entitlement to make such a demand.

68. In circumstances where at the time of the commencement of the proceedings, the securitisation had been reversed and the first plaintiff was the legal and beneficial owner of the defendant's loan and related mortgage, it is important to be clear on the relevance of the defendant's complaints about that process to his defence of these proceedings. In essence, the defendant claims that even if the documents exhibited can be relied on, they establish that the first plaintiff was not entitled to make the demand it made on 7 January 2014. As a consequence, that demand cannot be relied on to establish that the entitlement to possession has arisen and is enforceable. As noted above, I have concluded that the question of whether there was any necessity for such a demand should be resolved as part of a plenary hearing.

69. Separately, he argues that the first plaintiff had assigned the entitlement to set interest rates, contrary to an express provision of the loan agreement. This, he argues, has a variety of consequences, including that the first plaintiff breached his contract. He also argues that insofar as the assignment clause in the loan contract permitted the first plaintiff to assign the entitlement to set interest rates other than in accordance with the loan documents, it was an unfair contract term and thus void.

70. The defendant has misinterpreted the securitisation documents exhibited. On a proper reading of those documents, it is clear that the first plaintiff retained the entitlement to fix interest rates on the defendant's loan in accordance with the terms of that loan, and also retained the right to make demands on the loan and seek to enforce the defendant's obligations under the loan and mortgage.

71. In respect of the setting of interest rates, the defendant refers to the provisions of the Home Loan application form for his loan which describes securitisation. It includes the following statement: "*In practice, you should not be aware of any effect from securitisation because the lender will continue to deal in all matters relating to your mortgage, including the setting of interest rates and the handling of arrears*." He characterises this as a term of his contract or a representation which induced him to enter the contract.

72. He then refers to terms of the MSA which, he contends, illustrate that the first plaintiff did, in breach of contract or its representation, assign the entitlement to set interest rates to Fastnet. He refers to the fact that the MMA (at Clause 15.1) required that the first plaintiff use reasonable endeavours "*to recover from Borrowers all costs and expenses properly recoverable under the relevant Mortgage Conditions*." He argues that it could only have recovered *additional* costs and expenses incurred through the securitisation process by setting interest rates at a level to recover those costs.

73. The defendant relies on the provisions of Schedule 10 of the MSA to argue that the entitlement to fix interest rates has been assigned. This is a Power of Attorney pursuant to which the first plaintiff appointed Fastnet and BNP Paribas to be its attorney and its agent and in its name do the following acts, "*to exercise its rights, powers and discretions under the Loans, the Mortgages and the Charges including the right to fix the rate or rates of interest payable under the Mortgages in accordance with the terms thereof.*" However, it appears from the main body of the MSA, Clause 9.2, that the requirement to execute the power of attorney was "*by way of security for the performance of [the first plaintiff's] obligations under*" the MSA.

74. Moreover, the parties, at the same time entered the MMA. Pursuant to that agreement, pursuant to Clause 5, Fastnet granted to the first plaintiff "*full right, liberty and authority*

on its behalf to determine and set the rate or rates of interest applicable to the Loans… in accordance with the terms of such Loans."

75. Accordingly, it appears to me that the first plaintiff retained, at all material times, the entitlement to set the interest rates applicable to the defendant's loan and it was required to set the rate in accordance with the terms of the defendant's loan. Even if the power of attorney did operate to transfer that entitlement to Fastnet, Fastnet would have been required, by the terms of that power of attorney, to set the interest rate in accordance with the terms of the loan. Even if such a transfer did amount to a breach of contract or misrepresentation, I cannot see how it could give rise to a defence to, what is now, the second plaintiff's claim for possession.

76. Nor do I think that the plaintiff is correct in contending that the first plaintiff had assigned the entitlement to demand repayment of the loan, or that he has identified an arguable defence on this ground. The defendant relies on the provisions of Schedule 2 of the MSA, a draft Land Registry Transfer, the terms of which provide that the first plaintiff transferred to Fastnet the mortgages the subject of the MSA, which included the defendant's mortgage, together with "*the right to demand, sue for, recover, receive and give receipts for all principal moneys payable or to become payable under the Mortgages…*"

77. However, it is clear from Clause 5 of the MSA that it was only intended to execute this transfer if and when the sale of the *legal* interest in the mortgages was completed. The transfer of the legal interest was never completed and therefore, there was no transfer of the right to demand payment of monies due. Accordingly, the provisions of the MSA, including Schedule 2, do not provide the defendant with an arguable basis for contending that the first plaintiff was not entitled to demand repayment of the defendant's loan at the relevant time. Other arguments about the demand have been considered above.

78. The above conclusions are based on the documentation exhibited, in particular by Mr Davis, and the defendant contends that those documents are unreliable and that the plaintiffs have failed to comply with the requirements of the Bankers Book Evidence Acts or the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 ("the 2020 Act"). He points to various anomalies in the numbering of the documents and the unreliability of the first plaintiff's witnesses, in particular Ms O'Brien, who positively averred that the defendant's

loan had not been assigned and that there had been no transfer of the legal or beneficial interest in his loan or related mortgage. As appears from the affidavit, this was incorrect. She also made an error in recording the year that the securitisation took place and has made averments that receivers appointed by the first plaintiff never took possession of the properties which the defendant disputes.

79. In addition to arguing that the evidence is inadmissible, the defendant argues that, owing to the "positive deceptions" in the plaintiffs' evidence, the plaintiffs' claim should be dismissed.

80. The plaintiffs rely on the 2020 Act for the admissibility of the documents on which they relies. They also rely on the decision of the Supreme Court in *Ulster Bank v O'Brien* [2015] IESC 96. In circumstances where, as I have indicated, I propose adjourning these proceedings to plenary hearing, the admissibility of evidence is a question which necessarily have to be addressed at the trial of the action. However, had I been required to resolve the matter for the purpose of this judgment, I would have tended to the view that the documentation relied on was admissible.

81. Section 13 of the 2020 Act provides that business records prepared in the ordinary course of business are presumed to be admissible in evidence as truth of the fact or facts set out therein. Section 14 describes the criteria which a record must contain to be presumed admissible under section 13. I am satisfied that the documents relied on, exhibited by the first plaintiff, meet the criteria in section 14.

82. Section 15 provides that the documents are not admissible unless either (i) a copy of the documents has been served on the other side, or (ii) a notice, together with a copy of the document, has been served at least 21 days prior to trial. I am satisfied that copies of the documents have been served on the defendant, as exhibits to the various affidavits sworn.

83. A person on whom documents are served is not entitled to object to their admissibility unless they serve notice of their intention so to do. This the defendant clearly did. Critically, however, an objection does not serve to render the documents inadmissible, it merely entitles the defendant to object to their admissibility. Whether they are admitted is determined in accordance with section 16 of the 2020 Act. The overriding concern is whether the

admission of the documents is in the interests of justice. In determining the interests of justice, regard can be had, *inter alia*, to the contents and source of the information and the circumstances in which it was compiled, whether it is a reasonable inference that the information is reliable and that the documents are authentic, and also to the question of whether any unfairness would be done to the defendant by admitting the document.

84. There is no reason, in my view, to doubt the reliability of the information or authenticity of the information exhibited by Mr Davis. The minor anomalies in the documents do not lead to an inference that they are unreliable or not authentic. Similarly, the documents exhibited by Ms O'Brien appear reliable and authentic. Her incorrect averments regarding the date of securitisation of the defendant's loan- she refers to 2008 rather than 2009, and incorrect statement that that securitisation did not involve an assignment of the beneficial interest are unfortunate but are, perhaps, explained by the fact that at the time she swore her affidavits, the loan and related mortgage were not then securitised. Crucially, in my view, no injustice is done to the defendant by permitting the plaintiffs to rely on business records, many of which the defendant insisted they produce.

85. Needless to say, I do not think that the defendant has come close to establishing that there has been any misconduct by the deponents of the affidavits on behalf of the first plaintiff which would warrant the plaintiffs' case being dismissed.

86. Accordingly, in my view, the defendant has not identified any arguable defence by reference to the securitisation of his loan between 2009 and 2014.

ii. Loan Sale

87. In addition to his complaints about the manner in which the first plaintiff described and disclosed its interest in the defendant's loan and mortgage, the defendant contends that the second plaintiff has not been forthcoming in relation to its interest.

88. The circumstances in which the second plaintiff applied to be joined to the proceedings are set out in an affidavit of Ms Eve McCarthy, litigation manager for the second plaintiff, sworn on 15 July 2019. The application was made to the Court of Appeal since, at that time,

there was a pending appeal against the order of MacDonald J referred to above. Ms McCarthy explains that by deed of transfer dated 1 February 2019, the first plaintiff transferred its "*right, title, interest, estate, benefit and entitlement (past and present)*" in, *inter alia*, the defendant's loan and mortgage to the second plaintiff. She exhibits a redacted copy of the transfer deed. She avers that a Form 56 was lodged with the Property Registration Authority (PRA) and that the second plaintiff became registered owner of the charges on the lands the subject of these proceedings on 27 March 2019.

89. The defendant filed an affidavit in reply to the application in the Court of Appeal, largely objecting to the form of the application. Notwithstanding those objections, the Court of Appeal (Costello J) made an order joining the second plaintiff as a co-respondent to the appeal and co-plaintiff to the proceedings.

90. In his eleventh affidavit, the defendant raises a number of issues about this transaction and describes the application to the Court of Appeal as another "positive deception". By reference to a C1 form filed in the Companies Registration Office, a form used to register a charge, and the second plaintiff's annual accounts, the defendant contends that the second plaintiff was not the purchaser of his loan and mortgage at all and is, at most, a bare trustee. The C1 form, he says, shows that it was, in fact, an entity known as LSF X1 Glas Investments Designated Activity Company (LSF) which is the beneficial owner of the mortgage assets the subject of the sale agreement between the first and second plaintiff, and that the second plaintiff is a bare trustee. He notes that the annual accounts of the second plaintiff for the years ending 2019 to 2022 do not record the second plaintiff having assets in the form of loans and receivables to customers.

91. In a replying affidavit, Ms McCarthy does not address the substance of the defendant's claims that the second plaintiff is not, in fact, the owner of the defendant's loan and mortgage, rather she relies on the conclusiveness of the register as proof of the second plaintiff's ownership of the charge.

92. The register, however, does not conclusively determine that the second plaintiff has succeeded to the first plaintiff's debt in the instant case. As noted in *Mars Capital Finance Ireland DAC v Temple* [2023] IEHC 94, when adjourning that case to plenary hearing, "*one of the central issues which will have to be determined in these proceedings is whether Mars*

Capital has succeeded to the debt." That was not conclusively established by the register in *Temple*, albeit for reasons particular to the manner in which the registration of the charge had been recorded.

93. The circumstances arising bear some similarity to those which the Court of Appeal had to address in *Pepper Finance Corporation (Ireland) Limited v Macken* [2021] IECA 15. That judgment involved an appeal against an order allowing the substitution of Pepper for Danske Bank A/S as the plaintiff in the proceedings. The substitution application, it would appear, was based on similar documentation to that relied on in these proceedings in the application to join the second plaintiff, that is, publicly available documents which suggested that it might be an undisclosed third party which was actually the beneficiary of the loan and charge at issue. In the appeal, the defendant established that the transaction by which the loans had been transferred between Danske and Pepper was more complicated than had been set out to the High Court. Pepper's failure to set out the full details of the transaction was deprecated by the Court of Appeal. The court did not allow the appeal, having regard to the applicable threshold for substitution applications, and rejected an argument that the fact that Pepper may have been merely a "bare trustee" undermined its claim that it was *prima facie* entitled to be joined to the proceedings and seek the reliefs claimed. However, the Court of Appeal made clear that the defendant had raised an issue which would require cross-examination in order to be fairly determined:

> "*30. In this case, having regard to the unusual manner in which information relating to the transaction was disclosed and to the contentions which Mr. Macken has signalled he proposes to make in relation to Pepper's interest in those assets, it follows that he must have a full opportunity to make that case at trial. For my part I find it difficult to see how he could do so on these facts without having the entitlement to cross-examine both Mr. Ryan and Mr. Dowling, the latter of whom, as he now accepts in his latest affidavit, not merely failed to make a complete disclosure to the High Court of the details of the transaction in his affidavit grounding the application for substantive relief, but actually incorrectly identified the beneficial owner of the assets in that affidavit. Presumably Mr. Dowling will now have to swear a corrective affidavit addressing this error before the trial of the matter. The High Court will have to adjudicate in these changed circumstances on any application Mr. Macken makes to respond on affidavit.*

31. That Pepper persisted before the High Court in objecting to Mr. Macken cross examining these deponents is one of a number of surprising features of its approach to the case. It was my understanding from counsel's comments at the second day of this appeal (on January 21) that Pepper now accepts that Mr. Macken is entitled to cross-examine as to issues of fact in dispute between the parties. The question of whether Pepper has an interest in the assets in question sufficient to allow it claim the relief sought is, it follows from what I have said, properly in dispute. It should also be recalled in this context that, these proceedings being brought by special summons, Mr Macken is presumptively entitled to cross-examine Pepper's deponents. Any departure from that position has to be justified by Pepper. In the circumstances set out above, and having regard to the concessions made by Pepper, it is difficult to see any basis on which the High Court could be invited to depart from the general rule in Order 38, Rule 3."

94. One potentially important distinction between *Temple* and the instant case is that it appears that in *Macken*, at the time of the substitution application, certain elements of the overall transaction had already occurred, but were not referenced in the substitution application. It is far from clear that the same position applies here, and it may well be, as the second plaintiff contends, that the transactions relied on by the defendant are, in any event, of no relevance to its entitlement to an order for possession. However, it seems to me that here, as in *Macken*, the defendant has raised an issue regarding ownership of the underlying debt, and the entitlement of the second plaintiff to have been joined to these proceedings, which can most fairly be adjudicated by way of cross-examination. Although the Court of Appeal in *Macken* contemplated cross-examination in the context of the special summons procedure, a plenary hearing of this action will afford the parties the same opportunity and enable all the other issues in the case to be resolved in accordance with the requirements of justice.

Breaches of contract and prescribed contraventions

95. The defendant contends that there have been various breaches of contract by the plaintiffs, other than those referred to above. In particular, it contends that there was a failure

to provide written notice of rate changes, as required by Clause 2.7, 4.12 and 4.14 of the Mortgage and a failure to notify him of his options when coming off the fixed rate period of his mortgage. The first plaintiff's evidence is that such letters were sent by it in the ordinary course, but copies were not retained on the first plaintiff's systems.

96. It does appear that the plaintiffs were required to notify the defendant in writing of rate changes and the evidence does not definitively establish that this was done in the case of the defendant. However, as with a number of the defendant's other complaints, it is difficult to see how this could give rise to a defence to these proceedings. It is not obvious how any such breach could have the effect of absolving the defendant from liability under the loan agreement and mortgage. At most, it might have some effect on the calculation of interest due on the loan facility. But since there have been no payments in respect of that facility since 2010, this could not, by itself, create a result whereby the defendant was not in default of the loan facility and the plaintiffs were entitled to demand repayment and/or seek possession.

97. Nor has the defendant identified any basis for contending that the first plaintiff was contractually obliged to notify him of his options when the fixed rate period of his loan ended. As is clear from the terms of Special Condition 6, it was for the defendant to choose an option at this point, in default of which his loan would switch to a tracker rate, not for the first plaintiff to present him with his options.

98. The defendant argues that the second plaintiff has committed prescribed contraventions contrary to section 28 of the Central Bank Act 1997, as amended. He relies in this regard, on the decision of the High Court (Simons J) in *Start Mortgages DAC v Kavanagh* [2023] IEHC 452. There is some ambiguity in the affidavits of Ms McCarthy in response to these allegations, but I am far from convinced that the issues which the defendant raises would afford him a defence to these proceedings. The decision in *Kavanagh* relied on by the defendant tends to undermine rather than support his argument.

99. However, given the multiplicity of alleged breaches identified by the defendant, and having regard to the fact that, for other reasons, I have concluded that it is appropriate to adjourn this case to plenary hearing, these are matters which can be further explored in that plenary hearing.

Conclusion

100. Having regard to the foregoing, I will make an order adjourning these proceedings to plenary hearing in accordance with Order 38, rule 9 of the Rules of the Superior Courts. I will list the proceedings on 9 October 2024 at 10.30 am for the purpose of giving directions for the further hearing of this matter. I would invite the parties to liaise in advance of that date for the purpose of agreeing, insofar as possible, such directions.