

**APPROVED**



**AN ARD-CHÚIRT  
THE HIGH COURT**

**[2025] IEHC 82**

**Record No. 2020/7570P**

**BETWEEN/**

**AIDAN KELLY**

**PLAINTIFF**

**-AND-**

**KEN FENNELL**

**FIRST NAMED DEFENDANT**

**-AND-**

**LINK ASSET SERVICES**

**SECOND NAMED DEFENDANT**

**-AND-**

**HAVBELL DAC**

**THIRD NAMED DEFENDANT**

**JUDGMENT of Mr. Justice Conleth Bradley delivered on the 28<sup>th</sup> day of January 2025**

## INTRODUCTION

### *Preliminary*

1. The plaintiff is a litigant in person whose substantive action relates to the appointment of a receiver over a property located at Unit No. 20, Beechwood Close Industrial Estate, Boghall Road, Bray, County Wicklow and in relation to which he had fallen into arrears in the repayment of a mortgage.
2. By Notice of Motion dated 16<sup>th</sup> April 2024, the plaintiff sought leave to amend an initial Statement of Claim which was delivered on 5<sup>th</sup> July 2021 with pleas set out in a proposed amended Statement of Claim dated 8<sup>th</sup> April 2024.
3. Aside from those amendments which were agreed, Keith Rooney BL, on behalf of the defendants, objected to the substance of the plaintiff's application and submissions, stating, for example, that they were not grounded on any evidence set out in this particular application.
4. The parties agree that the title of the second named defendant, initially pleaded as LINK ASI Limited can be amended to read "BCM Global ASI Limited" and I make that amendment.
5. Whilst some amendments have been agreed, there remains a dispute regarding the majority of the plaintiff's proposed amendments which necessitates this judgment and a determination on those matters.

6. An Amended Statement of Claim<sup>1</sup> is scheduled to this judgment, which reflects the amendments which have been agreed between the parties.

### **CHRONOLOGY**

7. The applicable chronology in this application is as follows:

<b>DATE</b>	<b>EVENT</b>
9 <sup>th</sup> November 2020	Plenary Summons Issued
26 <sup>th</sup> February 2021	Motion to Dismiss issued for failure to deliver a Statement of Claim
14 <sup>th</sup> June 2021	High Court extended the time for delivery of a Statement of Claim by three weeks
5 <sup>th</sup> July 2021	Statement of Claim delivered
29 <sup>th</sup> July 2021	Notice for Particulars raised by the Defendants
7 <sup>th</sup> August 2021	Warning letter requesting delivery of particulars
29 <sup>th</sup> September 2021	Plaintiff confirming in writing that he will deliver particulars
26 <sup>th</sup> October 2021	Defendants agree to extend time for particulars by 14 days
26 <sup>th</sup> October 2021	Defence delivered
11 <sup>th</sup> January 2022	Further letter demanding that particulars be furnished
27 <sup>th</sup> January 2022	Motion to compel replies to particulars issued
4 <sup>th</sup> April 2022	Order to reply to particulars made by High Court
5 <sup>th</sup> July 2022	Defendants seek voluntary discovery

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<sup>1</sup> A tracked and clean copy is scheduled to this judgment. The ‘pleading’ in the Amended Statement of Claim is that set out by the plaintiff who is a litigant in person.

27 <sup>th</sup> July 2022	Defendants agree to extend time to reply to request for discovery by 21 days
15 <sup>th</sup> August 2022	Plaintiff agrees to make discovery as requested within 60 days
22 <sup>nd</sup> August 2022	Defendants agree that discovery can be furnished within 8 weeks
13 <sup>th</sup> October 2022	Letter from Defendants requesting delivery of an affidavit of discovery as agreed and warning that a motion may issue
20 <sup>th</sup> October 2022	Plaintiff agrees to make discovery by 31 October 2022
31 <sup>st</sup> October 2022	Plaintiff writes to indicate he cannot make discovery on his previous timeline and requests a further unspecified period of time to make discovery
1 <sup>st</sup> November 2022	Defendants write agreeing to extend time for discovery to 14 November 2022
1 <sup>st</sup> December 2022	Motion for discovery issues against the Plaintiff
20 <sup>th</sup> Dec 2022	Discovery Motion adjourned on Plaintiff's application
14 <sup>th</sup> February 2023	Discovery Motion adjourned on Plaintiff's application
21 <sup>st</sup> February 2023	Discovery Motion adjourned on Plaintiff's application
28 <sup>th</sup> February 2023	Affidavit of Discovery delivered, and motion struck out with costs to the Defendants
8 <sup>th</sup> April 2024	Proposed amended Statement of Claim delivered by e-mail from the plaintiff
10 <sup>th</sup> April 2023	Response sent by Sherwin O'Riordan Solicitors on behalf of the Defendants
16 <sup>th</sup> April 2024	Notice of Motion seeking leave to amend the Statement of

	Claim
16 <sup>th</sup> April 2024	Affidavit of Aidan Kelly
10 <sup>th</sup> May 2024	Affidavit of Ruth Quinn
13 <sup>th</sup> June 2024	Replying Affidavit of Aidan Kelly
21 <sup>st</sup> October 2024	Submission of Aidan Kelly

## DISCUSSION & DECISION

### *Proposed amendments which are agreed*

8. In correspondence dated 10<sup>th</sup> April 2024 to the plaintiff, in response to the delivery of the proposed amended Statement of Claim on 8<sup>th</sup> April 2024, the defendants’ solicitors indicated *inter alia* that the proposed amendments from paragraph 9 onwards were not accepted as they did not “*put the true matters in controversy before the court*” and were “*a transparent attempt to waste more time without bringing the case to hearing*”.

9. The correspondence called upon the plaintiff to issue and serve this motion.

10. At the hearing of this application before me, subject to the terms of the further objections set out below, counsel on behalf of the defendants indicated that they had no objection to the following proposed amended pleas in the following paragraphs of the proposed amended Statement of Claim:

- paragraphs 3, 4, 6, 7, 8 and the first part of paragraph 9;
- paragraphs 10, 10(a), 10(b) and 10(c);

- paragraph 11 (except the sentence which pleads “*totally disregarding the plaintiff’s claims of zero sums due by the surviving mortgagor*”), (under the sub-heading ‘Power of Attorney to Register a Charge not Transferable’);
- paragraphs 12, 13 and 13(a);
- under the sub-heading ‘Legal and Beneficial Ownership of Mortgage Loans’ at paragraphs 14, 14(a) (except the sentence which pleads “*as security for funds obtained from Deutsche Trustee Company Limited to fund purchase of loan bundles (held in pooled form as collateral) from Irish Life & Permanent Plc*”, 14(b), 14(c), 14(d), 14(e) (except the sentence which pleads “*and is currently investigating whether a criminal offence has been committed in this regard*”, 14(f), 15(d), aspects of paragraph 16, paragraph 18;
- under the sub-heading ‘Permanent PTSB plc Title Rights Extinguished Prior to Loan Sale to Havbell DAC’, paragraphs 19(g), 19(j) and 19(k);
- aspects of paragraph 20, paragraph 21, 21(a), paragraph 22(a), paragraphs 23, 24, 24(a) (except the sentence which pleads “*which the plaintiff would hold Mr. Ken Fennell, Link ASI Limited and Havbell DAC countable for such an event. I repeat that the defendants’ insurers should be appraised and kept on notification*”); and
- paragraphs 25, 27, 29(5), 29(6), 29(7).

11. Accordingly, I make the aforesaid amendments, which are reflected in the Amended Statement of Claim which is scheduled to this judgment.

### *Submission of the Plaintiff*

12. In paraphrasing and summarising the plaintiff's written submission (dated 21<sup>st</sup> October 2024) (which were also reflected in his oral submissions), the plaintiff alleged the following matters (and in doing so, made reference to the judgment of the High Court (Birmingham J., as he then was) in *Rossmore Properties Ltd v ESB* [2014] IEHC 159) in seeking to challenge the defendants' claims:

- first, the decision in *Rossmore Properties Ltd* emphasised that amendments to pleadings should generally be made unless they caused real prejudice. The plaintiff's proposed amendments were essential, there was no causal connection between the alleged delay or content in his proposed Amended Statement of Claim and the prejudice asserted by the defendants in respect of any alleged missing documentation and, rather, it was the Defendants failure to comply with their obligation to keep in safe custody all documents required for litigation prior to initiating any legal actions and until conclusion of such actions;
- second, as per the decision in *Rossmore Properties Ltd*, delays in relation to discovery and other delays alleged by the defendants should be seen in the context of what the plaintiff submitted were similar complexities in these proceedings together with the fact that he was a litigant-in-person;
- third, in response to the affidavit of Ms. Ruth Quinn, Director of Havbell DAC, sworn on 10<sup>th</sup> May 2024, the plaintiff's written submission referred again to the judgment in *Rossmore Properties Ltd* and addressed these matters under the following sub-headings: 'prejudicial assessment', 'document preservation', his alleged motivation in instigating this action,

references to what is stated to be his evidence from a Circuit action, references to affidavits of company directors, the assertion that the subject mortgages in relation to (a) the industrial premises and (b) the residence/family home were in default in excess of 12 years prior to the alleged transfer date by Permanent TSB to the third named defendant, the making of further allegations and a references to section 33 of the Statute of Limitations 1957;

- fourth, addresses matters under a sub-heading ‘fairness and justice’;
- fifth, refers to paragraph 12 of the affidavit of Ms. Quinn, sworn on 10<sup>th</sup> May 2024;
- and sets out a ‘Conclusion’.

13. The plaintiff’s full written submission was as follows:

*“By way of effective challenge to the defendants’ claims contained in Havbell’s Director Ruth Quinn’s sworn replying affidavit of 10.05.24, I wish to draw the attention of the court to case entitled “Rossmore Properties Limited v Electricity Supply Board [2014] IEHC 159”. A copy of which judgement of Mr Justice Birmingham I sent by email to the Defendants Solicitors early this morning for their perusal prior to today’s hearing with further copy attached herein to this submission.*

*This case provides significant insights into the court’s approach to principles of amendments to statements of claim and the handling of discovery delays, which can be pivotal in supporting my arguments as Plaintiff.*



### *Key Points for Challenging Defendants' Claims*

*1. Precedent Supporting Amendments...In Rossmore Properties, the court underscored that amendments to pleadings should generally be allowed unless they cause real prejudice to the other party. I state that my proposed amendments are essential for a fair adjudication of the case and the amendments do not prejudice the defendants as inter alia there is no causal connection between the alleged delay or content in my amended statement of claim and the prejudice asserted by the defendants in respect of any alleged missing documentation. The Defendants failure in their duty to keep in safe custody all documents required for litigation prior to initiating any legal actions and until conclusion of such actions is their responsibility entirely and not the Plaintiff's. It is clear that the defendants failure in this regard had already occurred before any alleged delay on the part of the Plaintiff in submitting an amended statement of claim. This aligns with the court's emphasis on ensuring that all relevant issues are explored in pursuit of justice.*

*2. Addressing Discovery Delays.... The Rossmore Properties case highlights that delays should be contextualized within the complexities of the case: The court recognized that delays could arise from various factors, including the nature of the claim and the need for thorough investigation. It is my view that similar complexities exist in this case in tandem with the fact that I am a lay litigant, justifying any perceived delays as promoted in detail*

*by the Director of third named defendant Company. If issues have arisen due to actions or inactions by both parties, this should mitigate claims of prejudice from the defendants.*

*3. Countering Points from Deponents Affidavit.....some several specific points from Rossmore Properties can be utilized to counter Ms Quinn's assertions:*

*Prejudice Assessment: The court in Rossmore Properties indicated that potential prejudice must be weighed against the plaintiff's right to amend. It is my view that any inconvenience to the defendants is outweighed by my right as Plaintiff to fair justice and that I am not prejudiced.*

*Document Preservation: Ms Quinn claims that they as defendants have been prejudiced because documents they failed to keep in safe custody have been allegedly purged due to time elapsed, this does not automatically equate to irreparable harm, as other forms of evidence are still available as the court is aware the three defendants in tandem with their current legal advisors are keen to link the third defendant's (Havbell DAC) Circuit Court appeal record number 2024/0000106 with this current plenary action, I wish to place on record some of the activities engaged in by the defendants and their agents which have caused myself and my family possibly unquantifiable loss and harm over the past 9 years.*

*Accordingly, I wish to make an observation to the court concerning Ms Quinn's Affidavit as same presents in minute detail the history of the defendants actions post commencement*

*of this plenary action. However, she fails to detail their devious actions and the extreme reason for my motivation to instigate this plenary case as a lay person. I wish to place on record an excerpt from my sworn evidence on affidavit (unrebutted) presented to the then plaintiff Havbell DAC and sitting judge in the Circuit Court case and relay same adjusted to this case participants (Plaintiff & Defendants) as follows .....*

*The third named defendant' company directors Mr. Shane Coman and Mr. Karl Smith in their sworn affidavits submissions to the circuit court case (CC case No.243/2018) gives evidence that on 19th June 2015 that a transfer from Permanent TSB Plc to the Havbell DAC occurred, which in effect confirms that the subject mortgages (A).Industrial Premises and (B)Residence/family home were in default in excess of twelve years prior to the alleged transfer date by Permanent TSB pic to the third names defendant with the consequence that the plaintiff purchased compromised and unenforceable mortgages because they were at least one year beyond the applicable statute of limitations "cut off" period of 12 years.*

*The third named Defendants set about in a devious and nefarious plot in what appears to be collusion with their solicitors issued demand notices on both mortgages (A & B) on 15th May 2018 and 12th July 2018 both reciting "you have now defaulted in the making of two or more of such repayments" whereupon they set about enforcing the mortgages by staging the above, a contrived false default event to sanitise the defective unenforceable*

*mortgages by concealing that the mortgages at that time were some nineteen years by the Plaintiff's Havbell DAC own sworn testimony, since the default which started the Statute of Limitations time line.*

*It is my observation the third named defendant grossly misrepresenting their legal capacity to enforce the subject mortgages when in fact the Statute of Limitations requires that legal action for the recovery of possession of land following default trigger must be commenced within 12 years of the identified cause of action.*

*The period runs from the time when the claimant is first entitled to take legal action which by their own sworn evidence presented to the Circuit Court in evidence on the then Plaintiff (Havbell DAC) happened some nineteen years prior.*

*As this court is fully aware Section 33 of the 1957 Statute of limitations states "at the expiration of the period fixed by this Act (12 years) for a mortgagee to bring an action claiming sale of the mortgaged land, the title of the mortgagee to the land shall be extinguished".*

*4. Fairness and Justice: The overarching theme from Rossmore Properties is that fairness and justice must prevail: The plaintiff's barrister should emphasize that denying amendments could result in an incomplete adjudication of Mr Kelly's rights, undermining his ability to seek redress.*

*5. In point number 12 in Ms Quinn's replying affidavit of May 10 2024 she asserts inter alia that allowing the Plaintiff's amended*

*statement of claim “would allow the Plaintiff to profit from his delay*

*Ms Quinn does not explain how I could possibly profit given that*

*(a) There were nil mortgage sums due by the Plaintiff to Permanent PTSB at time of alleged loan sale agreement in 2015 independent of the Statute of Limitations.*

*(b) I have detailed in my affidavits and exhibits very significant sums I am claiming from the Defendants (which total thus far in the region of €4 million are well in excess of even the highest unsubstantiated sums the third defendant Havbell DAC alleged but failed in the Circuit Court to provide necessary proofs I owed.*

*(c) The provisions and requirements of the Consumer Protection Act 2015 and the Statute of Limitations Act 1957 exist independently of my amended statement of claim and in my view are an inescapable factual reality.*

*I submit in the circumstances that to assert that I would somehow profit in the event my amended statement of claim is allowed is simply untrue and utterly incomprehensible and contemptible to me.*

*The court should I believe exercise its discretion in favour of allowing amendments, as doing so aligns with principles of equity and justice.*

*Conclusion: By strategically employing insights from Rossmore Properties, the plaintiff’s barrister can effectively counter Ms Ruth Quinn’s affidavit. Highlighting precedents regarding*

*amendments, contextualizing discovery delays, addressing specific claims made by Quinn, and invoking consumer protection laws will strengthen Mr Kelly’s position and advocate for a fair and justice resolution in this matter.*

*In conclusion, I ask this honourable court to enter this submission into the record and in consideration of the above facts and for balance of justice I respectfully request that this court grant my motion with no order as to costs.*

*Thanking you for your attention,*

[SIGNATURE]

*Aidan Kelly”.*

***O. 28, r. 1 of the Rules of the Superior Courts 1986***

14. Order 28, rule 1 of the Rules of the Superior Courts 1986, as amended (“RSC 1986”) provides for the amendment of a Statement of Claim, as follows:

*“The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”*

***Applicable principles***

15. The applicable principles which govern applications to amend a Statement of Claim have been set out in a number of cases, including by the Court of Appeal

in *Stafford v Rice* [2022] IECA 47 (applied, for example, by the High Court in *McDonald v Conroy* [2024] IEHC 69).

16. In *McDonald*, Ferriter J., at paragraph 42 of his judgment, summarised the principles adumbrated by the Court of Appeal, in the judgment of Collins J.,<sup>2</sup> in *Stafford* as follows:

*“(42) In summary, the relevant principles are as follows. (This summary is drawn from para 23 of the judgment of Collins J. in Stafford v Rice unless otherwise indicated). The power of amendment is a broad one. Order 28 rule 1 is intended to be a liberal rule. An amendment should be allowed where it can be made without prejudice to the other party or where any prejudice can be addressed by the imposition of appropriate terms such as terms as to costs. Any prejudice being relied upon by a party seeking to resist an amendment must be prejudice resulting from the fact of the belated alteration in the pleadings rather than the presence, if allowed, of the amendment itself. Prejudice can be substantive (such as the death of a material witness or loss of potentially relevant evidence) or logistical (such as significantly disrupting the management and determination of the proceedings).*

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<sup>2</sup> Mr. Justice Maurice Collins.

*(43) The addition of a new claim by way of amendment could cause serious prejudice to a defendant if that defendant would have a basis for a limitation defence to the new claim if the new claim was advanced by way of separate proceedings issued at the date of the amendment application. Accordingly, as a general rule an amendment setting up a new claim will not be permitted where that claim would or might be statute-barred if made in proceedings issued at the time of the amendment. However, that rule is not an absolute one and should not be applied overly rigidly.*

*(44) Accordingly an amendment to existing pleadings to add a new cause of action arising out of “the same facts or substantially the same facts as have already been pleaded” may be permitted (Krops v Irish Forestry Board [1995] 2 IR 113) (“Krops”). Facts may be added by amendment if they serve only to clarify the original claim but not if they are new facts. As Collins J notes in Stafford v Rice (at para 23(11)) such circumstances permitting a new claim to be made by way of amendment causes no material prejudice to the defendant because they are already on notice of a claim arising from the same facts which they will have had an opportunity to investigate. The court is not generally concerned with the merits of any proposed amendment or its prospects of success at trial once the proposed amended claim is not clearly*



*doomed to fail. The applicant's conduct in the proceedings including any question of delay in bringing the amendment application are factors which the court can take into account in exercise of its discretion to amend (see Moorehouse v Governor of Wheatfield Prison[2015] IESC 21 and Quinn v IBRC at para 52)".*

17. The central objection by the defendants to what are in fact the majority of the plaintiff's proposed amendments relates to the consequent prejudice which it is said is visited upon the defendants and which is described by Ms. Ruth Quinn, Director of Havbell DAC, beginning at paragraph 8 of her Affidavit sworn on 10<sup>th</sup> May 2024, as the *"inordinate delay by the [p]laintiff in seeking these amendments has left the [d]efendants without the means to appropriately address the claim made against them"* and she categorised this in the following three groups: (i) 'Consumer amendments' (ii) 'Statute of Limitation amendments' and (iii) 'Argumentation amendments'.

18. In oral submissions, in addition to the objection on behalf of the defendants to the fact that the plaintiff had not grounded his application on any evidence, counsel for the defendants further objected to the substance of the plaintiff's application and submissions, the following grounds:

(a) delay;

(b) the amendments sought by the plaintiff were not an expansion on the facts which were already pleaded in the initial Statement of Claim but

constituted in fact a *reversal* of those facts previously pleaded. Further in this regard, it was submitted on behalf of the defendants, that the plaintiff in the initial Statement of Claim had pleaded facts which contained either an acceptance or acknowledgement of the factual situation whereas in the proposed amended Statement of Claim, the plaintiff has sought to effectively to ‘*reset the clock*’ and reverse his previous acknowledgments by, for example, referring to alleged documentation which he claims had been sent on a “*without prejudice*” basis when in fact they had not been sent on that basis;

- (c) it was further submitted that the plaintiff’s previous acknowledgements and acceptance of certain facts created an estoppel as he had already admitted and acknowledged a debt which could not now be resiled upon.

(Counsel for the defendants also reserved the defendants’ position in relation to a general reference by the plaintiff to an unspecified EU regulation in the context of what the plaintiff said was the Statute of Limitations).

***Proposed amendments which are contested***

- 19. Having regard to the principles set out in *Stafford* and applied in *McDonald*, the defendants’ objections to the plaintiff’s proposed amendments can be conveniently grouped under the following sub-headings:

**(a) Context & time-line**

20. By way of general preliminary objection, an examination of the following time-line and correspondence exhibited in this application sets out the manner in which the plaintiff has sought to introduce these amendments ‘late in the day’ and at a time when the matter was reasonably expected to be set down for trial.

21. It also supports, in my view, the defendants’ contention that they had experienced numerous frustrations in seeking to get the plaintiff to agree to set the action down for trial and comes within the matters described as the “*applicant’s conduct in the proceedings including any question of delay in bringing the amendment*” and which can be considered in the exercise of my discretion on this application. That time-line is as follows:

- (i) The solicitors for the defendants (Sherwin O’Riordan Solicitors), for example, wrote to plaintiff by letters dated 4<sup>th</sup> April 2023, 21<sup>st</sup> April 2023 and 18<sup>th</sup> July 2023 stating, *inter alia*, that if the plaintiff was not willing to progress the case to hearing, it was the defendants’ intention to issue a certificate of readiness and set the matter down for trial;
- (ii) By letter dated 29<sup>th</sup> January 2024, the defendants’ solicitors wrote to the plaintiff stating that it was their intention to set the matter down for hearing within a period of 21 days from that date;
- (iii) On 30<sup>th</sup> January 2024, the plaintiff replied to the letter dated 29<sup>th</sup> January 2024 from the defendants and, *inter alia*, stated that he “*might be willing*

*to consent to a date for hearing depending on what month/date you intend applying for”;*

- (iv) By response dated 31<sup>st</sup> January 2024, the defendants’ solicitor replied to the plaintiff noting his willingness to consent to a hearing date and requested clarification on any dates which were unsuitable to the plaintiff;
- (v) At the end of the 21-day period, on 20<sup>th</sup> February 2024, the defendants’ solicitor e-mailed the plaintiff to inform him that an application would be made to the High Court shortly for a hearing date. The plaintiff responded to that e-mail on the same date – 20<sup>th</sup> February 2024 – stating that the defendants’ solicitors were on notice that he was (i) seeking to amend the Statement of Claim, (ii) raise interrogatories, and (iii) would also be seeking discovery, as follows:

*“I acknowledge receipt of your email above from 10:00 this morning but which has only just come to my attention this afternoon. I am just in home from a hospital procedure so I can only reply very briefly just now.*

*You may recall that you were on notice that my statement of claim is in the process of being amended and that I am also actively working on the completion of the discovery process and my interrogatories.*

*As you are fully aware that I am actively preparing for next Circuit hearing in case your client Havbell DAC is pursuing against me Record Number 243/2018.*

*I am sure you will understand therefore that while I am actively working on all the foregoing, this case with High Court Record Number 2020/7570P Aidan Kelly -v- Ken Fennell, Link Asset Services and Havbell DAC is categorically not as yet ready for trial and it is in my view inappropriate to press for a trial date before due processes are completed and matters are ready.*

*If you/your clients insist on pressing for a trial date which is before all of the above matters are completed then you will leave me with no option but to strongly oppose such action”.*

(vi) The immediate background to this motion is set out in a letter dated 10<sup>th</sup> April 2024 from Sherwin O’Riordan solicitors (for the defendants) addressed to the plaintiff, where they refer to a proposed amended Statement of Claim from the plaintiff which had been delivered by e-mail on 8<sup>th</sup> April 2024;

(vii) This letter stated that the defendants did not accept any of the proposed amendments, which had been suggested by the plaintiff, from and

including paragraph 9 onwards, as he had not put the true matters in controversy between the parties before the court and that the plaintiff was attempting to waste more time without bringing the case to hearing. The letter called upon the plaintiff to issue this motion within the time-line set down by the High Court on the 6<sup>th</sup> March 2024.

22. The aforesaid matters represents logistical prejudice in delaying the management and determination of the proceedings.

**(b) Statute of Limitations & prejudice**

23. On behalf of the defendants, Ms. Ruth Quinn, Director of Havbell DAC, in an affidavit sworn on 10<sup>th</sup> May 2024 avers that the greatest concern to the defendants in respect of the plaintiff's claims in the proposed amended Statement of Claim relate to the Statute of Limitations and she states that the inclusion of these proposed claims at this late stage is manifestly prejudicial to the defendants.

24. Further in this regard, Ms. Quinn avers to the following matters at paragraphs 11 and 12 of her affidavit sworn on 10<sup>th</sup> May 2024:

*“(11) Following delivery of the amended statement of claim I engaged with Havbell DAC’s predecessor-in-title, Permanent TSB Plc (PTSB). I sought documentation from PTSB surrounding the defendant’s alleged discussions circa 2005, and any other negotiations, payment arrangements et al which*

*would be relevant to a claim under the Statute of Limitations. I have been informed by PTSB that they have “purged” the plaintiff’s documents from their systems given the extensive period of time since the loan migrated to Havbell DAC in 2015.*

*(12) PTSB have informed me that they will make their best efforts to locate any documentation they may still have to hand, but, in the absence of such documentation I say that the defendants are severely prejudiced in defending the claims made against them. Had the plaintiff appealed this claim in 2020 then the documents would likely have been available to make this claim. However, given some of the actions of which he complains took place in 2002 and 2005 it is now simply not possible for the defendants to marshal the documents and witnesses necessary to meet the claim made by the plaintiff. Allowing such an amendment would therefore be disproportionately prejudicial to the defendants and will allow the plaintiff to profit from his delay”.*

25. Whilst the power of amendment is a broad one and is to be interpreted liberally, in my view, *the fact of delay* (rather than the amendment itself) in relation to the following proposed amendments creates substantive prejudice to the defendants insofar as the availability of witnesses and documents are concerned which cannot be addressed by the imposition of appropriate terms, including, for example, in relation to costs and is relevant to the application of the Statute of

Limitations. In so finding, I have not had regard to the merits of the proposed amendments or their prospects of success at trial.

26. Further, in contrast to the position in *Rossmore Properties Limited v Electricity Supply Board* [2014] IEHC 159, which was relied upon by the plaintiff, the fact that documentation from PTSB in relation to the defendants' alleged discussions/negotiations including payment arrangements from in around 2005 with the plaintiff have been purged since Havbell DAC took over the loan in 2015 is both relevant to a claim under the Statute of Limitations and the loss of potentially relevant documentation and raises the issue of substantive prejudice. Insofar as the plaintiff seeks, therefore, to introduce matters which he alleges occurred in 2002 and 2005 the defendants do not have access to the documents and witnesses necessary to meet such alleged claims.

27. Immediately after paragraph 9 of the proposed amended Statement of Claim, for example, *notwithstanding* the acceptance by the plaintiff in paragraphs 1-8 thereof that he fell into arrears with the subject mortgage but was engaged with Permanent TSB plc (formerly Irish Life & Permanent plc) in seeking a solution, the plaintiff, under a sub-heading 'Statute of Limitations 1957 Act' seeks to plead number of general and unparticularised matters at paragraphs (a), (b), (c), (d) and (e) (under paragraph 9) which would have the effect of the rendering the defendants' claims as against him statute-barred.

28. The defendants refer, for example, to the "consumer amendments" and the "argumentation amendments" as referring primarily to amendments sought in



the context of the Consumer Protection Act 2015 and laterally hearsay evidence amendments. It is submitted that “argumentation amendments” include alterations to the pleadings and introducing phraseology, such as in paragraph 19(m) of the proposed Statement of Claim and the words “*overall pragmatic without admission of liability*” which, it is said, both alters the clear plea of the plaintiff and seeks to place a contrary characterisation on the previous plea contained in the initial Statement of Claim.

29. Accordingly, the following amendments sought to be pleaded by the plaintiff— at paragraphs 10(d) to (i) relate to the Consumer Protection Act 2015; and similarly the reference, under the sub-heading ‘Legal and Beneficial Ownership of Mortgage Loans’ in paragraph 14(a) of the proposed Statement of Claim to “*as security for funds obtained from Deutsche Trustee Company Limited to fund purchase of loan bundles (held in pooled form as collateral) from Irish Life & Permanent Plc*”; the pleas under the sub-heading ‘Hearsay Evidence is not admissible’ at paragraphs 15, 15(a), (b) and (c); the allegations under the sub-heading of ‘Unjust Enrichment’ in paragraphs 17, 17(a), (b) and (c) *inter alia* to the effect that when initially screening the loans the third named defendant “*would be reasonably expected to have taken into account in the purchase price, the likelihood of issues with the Statute of Limitations Act 1957 (due to the inordinate, inexcusable and prejudicial number of years passed) which states that at the expiration of the period of twelve years the right to titles shall be extinguished*”, the reference in the reliefs claimed to “(d) Unjust enrichment by Havbell at the expense of the Plaintiff”; the reference in the second paragraph in paragraph 18 in the context of the third named defendant to “*and*

or their as assignee Deutsche Trustee Company Limited (UK Company registration number (00338230)”; the pleas under the sub-heading “Permanent PTSB P.L.C. title rights extinguished prior to loan sale to Havbell DAC”; paragraphs 19(a), (b), (c), (d), (e), (f) and (h), (i) (l), (m) which seek, again, to raise the Statute of Limitations and which included a reference in paragraph 19(h) and that part of paragraph 20 to the plaintiff initiating “*pragmatic negotiations*” “conducted ... *without admission nor acceptance, nor acknowledgement of any debt or liability to Permanent PTSB P.L.C. nor HAVEBELL DAC*” and similar references in paragraph 24(a) and paragraph 29(3); the reference in paragraph 22(a) to “*as per instructions from Mr. Fergus Barry who presented himself as Senior Manager in Link ASI Limited (now known as BCMGlobal ASI Limited) and who stated to the plaintiff in no uncertain terms that “...the receiver will do what we tell him to do...”*”; the reference in paragraph 26 to “*the plaintiff claims it is reasonable to expect they had the benefit of legal and accounting advice and were*” and “*the implications of the 1957 Statute of Limitations Act. The plaintiff notes that the 2015 audited accounts for Havbell DAC show expenditure of €1.114 million on Legal & Professional Fees*”; and, the reference to “(d) Unjust enrichment by Havbell at the expense of the Plaintiff”, which also raises the Statute of Limitations, and the reference to “*Unfair Terms*” in the ‘Reliefs Claimed’ section of the Statement of Claim – constitute new claims based on new facts which do not arise out of the same facts or substantially the same facts pleaded in the initial Statement of Claim. In relation to this last issue and the ‘Reliefs Claimed’ section of the Statement of Claim, in *Croke v Waterford Crystal* [2004] 2 I.R. 383, Geoghegan J. observed that it was “*trite law that a cause of action merely*

*mentioned by name in the prayer does not and cannot in any sense constitute the pleading of such cause of action. It is, therefore, necessary to look at the main body of the statement of claim.”*

30. These new claims based on new facts cannot not be described as bringing clarity to the original claim. In addition, and while not determining the issue or placing reliance upon it, it may be observed there is a possibility that such claims could be statute-barred if made in proceedings issued at the time of the amendment.

31. The proposed amendments are contradictory and include those which comprise a reversal of the plaintiff’s position where his initial pleas in the first Statement of Claim constituted an acceptance or acknowledgement of the factual situation which is sought to be reversed in the new amended plea: see observations of the Court of Appeal (Ryan P., Peart and Irvine JJ., judgment given by Irvine J. (as she then was) in *Quinn & Ors v IBRC & Ors* [2016] IECA 21 at paragraphs 51 and 52 and referred to by the Court of Appeal (Baker, Costello and Donnelly JJ.) in *Persona Digital Telephony Ltd. & Anor v Minister for Public Enterprise & Ors* [2019] IECA 360 at paragraph 36 in the judgment of Donnelly J. By way of example, in paragraph 11 of the proposed Statement of Claim, the proposed addition of the words “*totally disregarding the plaintiff’s claims of zero sums dues by the surviving mortgagor*” is contrary to the plaintiff’s acceptance, as pleaded, that he fell into arrears with the subject mortgage but was engaged with Permanent TSB plc (formerly Irish Life & Permanent plc) in seeking a solutions.

32. Similarly, in paragraph 16 of the initial Statement of Claim dated 5<sup>th</sup> July 2021, the plaintiff had pleaded, as follows:

*“The plaintiff claims that Havbell DAC or their principal have knowingly purchased the subject mortgage in full knowledge that there was potential legal consequences as a result of the PTSB failure to provide agreed finance to enable performance by the plaintiff on agreed expenditure to enable the division and partial sale of Unit 20 in 2006/2007 in performance of already signed sale contract committing the plaintiff”.*

33. The underlined portion of the plea in paragraph 16 (above) is referred to on behalf of the defendants as an example of the plaintiff acknowledging the debt owed. However, in contrasting the same paragraph – paragraph 16 – of the proposed amended Statement of Claim dated 8<sup>th</sup> April 2024 and the proposed deletion of the word “was” and its substitution with the words “would be”, has the effect of changing the entire meaning of the plea at paragraph 16, as follows:

*“The plaintiff claims that Havbell DAC or your principal had knowingly purchased the subject mortgage in full knowledge that there ~~was~~ would be potential legal consequences as a result of the PTSB failure to provide agreed finance to enable performance by the plaintiff on agreed expenditure to enable the division and partial sale of Unit 20 in 2006/2007 in performance of already signed sale contract committing the plaintiff”.*

34. Similarly, at paragraph 19 of the initial Statement of Claim delivered on 5<sup>th</sup> July 2021, the plaintiff refers *inter alia* to having entered negotiations in good faith culminating in the subsequent reduction of an alleged and disputed amount in the sum of €1 million as follows:

*“(19) Notwithstanding the above claim the plaintiff further claims that in or around March 2019 both Havbell’s agent Keith Masterson (LinkASI) and the plaintiff had in good faith entered serious negotiations culminating in the subsequent reduction of an alleged and disputed amount owed, to an agreed sum of €1m settlement with Fergus Barry, Senior Manager at Havbell’s Building, 2 Grand Canal Square, with an agreed programme of action by the plaintiff and his team of professionals to be monitored and reported at various intervals by both parties”.*

35. In contrast, the proposed amended paragraph 19 has a main paragraph and then a number of sub-paragraphs from (a) to (m). For example, in relevant part, paragraph 19 now *inter alia* seeks to plead:

*“PERMANENT PTSB PLC TITLE RIGHTS EXTINGUISHED  
PRIOR TO LOAN SALE TO HAVBELL DAC  
(19) As established in the foregoing under the provisions of the Statute of Limitations Act, 1957 the original lender and mortgagee Permanent TSB Plc (formerly Irish Life and*

*Permanent P.L.C.) for whatever reason/s factually did not issue any legal proceedings against the Mortgagor/s Mr. Aidan Kelly and Co-mortgagor Ms. Helen Kelly (deceased in 2003) which they were entitled to do (within an outer limited of twelve years from qualifying event of default)...*

*...(h) It is very important to note and understand it is for these reasons that the plaintiff initiated pragmatic negotiations (absolutely conducted at all times without admission nor acceptance nor acknowledgment of any debt or liability to Permanent TSB PL.C. nor Havbell DAC. And that any and all amounts claimed were most strongly disputed) to try get some quality of live back and avoid yet more years of extreme financial and legal stress hanging over our family with all the negative impacts that come along with such constant extreme stress and sleep deprivation. ~~Culminating~~...*

*...(i) This culminated in the subsequent reduction of an alleged and strongly disputed amount claimed ~~owed~~ to an agreed sum of €1m pragmatic settlement without admitting any liability with HAVBELL DAC (to be a full and final redemption of ALL and any sums claimed on all mortgages I had on both my family dwelling home and my pension property investment) ~~with a senior Manager at Havbell's Building, 2 Grand Canal Square,~~ with an agreed programme of action by the plaintiff and his team of Professionals to be monitored and reported at various intervals by both parties...*

*...(m) The plaintiff had identified to two separate parties that were willing to invest in the industrial unit for a sum in the region of €1m which combined with availing of certain CGT allowances associated, would satisfy the negotiated figure to settle the agreed overall pragmatic without admission of any liability, settlement amount between both parties despite being statute barred even before alleged purchase and all mortgages and provide closure to the entire saga for all parties... ”*

## **CONCLUSION**

36. In the circumstances, and for the reasons set out in this judgment, I shall permit only those proposed amendments to which the defendants have indicated their agreement during the hearing before me and I shall disallow those amendments which were opposed.

37. In consequence, therefore, the draft of a tracked Amended Statement of Claim – which remains that as drafted by the plaintiff (with amendments agreed to on behalf of the defendants) – is scheduled to this judgment (together with an untracked copy of same).

38. I shall list the matter for Tuesday 4<sup>th</sup> February 2025 at 10:30 to deal with any ancillary or consequential matters which arise including the question of costs.

**Schedule 1: the Plaintiff's Amended Statement of Claim as permitted by order of the High Court dated [TO BE INSERTED]**

THE HIGH COURT

Record Number: 2020 /7570P

Between/

AIDAN KELLY

**Plaintiff**

and

KEN FENNELL

And

BCMGLOBAL ASI LIMITED

~~LINK ASI LIMITED~~

and

HAVBELL DAC

**Defendants**

**AMENDED STATEMENT OF CLAIM**  
**PURSUANT TO ORDER OF THE HIGH COURT DATED [TO BE INSERTED]**

Delivered the [INSERT DATE ] to the Defendants by the Plaintiff and the Plaintiff resides at Brooklands, Kendalstown Hill, Delgany, Co. Wicklow A63 N252

1. The Plaintiff is Aidan Kelly a Businessman with an address at Brooklands, Kendalstown Hill, Delgany, Co. Wicklow A63 N252
2. The first named Defendant is Ken Fennell of Deloitte 29 Earlsfort Terrace, Dublin 2
3. The second named Defendant is Link ASI Limited (Company registration number 315348) known since April 2021 as BCMGlobal ASI Limited, Block C, Maynooth, Business Campus, Maynooth, W23 F854
4. The third Defendant is Havbell DAC (Company registration number 558429) No. 2 Grand Canal Square, Grand Canal Harbour, Dublin 2, Ireland.
5. The Plaintiff claims he/was is the lawful titled owner of a property Unit No. 20 Beechwood Close Industrial Estate, Boghall Road, Bray, Co. Wicklow
6. The Plaintiff claims the appointment and Instrument of Appointment of the receiver was not founded on non-valid security documents and that Havbell DAC did not have capacity to appoint the receiver therefore the appointment is incorrect, inaccurate, incomplete and therefore invalid and had no authority over the property.
7. The plaintiff claims the alleged receiver unlawfully misrepresented his standing by stating inter alia in a letter to the plaintiff on Deloitte letterhead



*“Please note that your interest in the property ceased as at the date of my appointment”* and he the receiver and his agents proceeded to commit criminal acts of breaking and entry and dispossession of equipment tools and property by deceit under false pretences denying this plaintiff his lawful constitutionally protected rights.

8. The Plaintiff states for the record that due to personal and business circumstances beyond his control that he fell into arrears with the subject mortgage/s circa 2002 before the untimely death in 2003 of his beloved wife and co-mortgagor Helen Kelly after a tortuous battle of some 13 years fighting cancer. However, the plaintiff fully ~~at all times~~ engaged, was open and forthcoming with Permanent TSB P.L.C. (formerly Irish Life and Permanent P.L.C.) the original lender and mortgagee ~~the institutions involved~~ to the extent that the plaintiff was proactive in creating a solution/s to satisfy the requirements of all parties concerned.
9. The Plaintiff states It was the ~~Institutions~~ subsequent negligent behaviour of Irish Life & Permanent Plc the mortgagee having agreed to the plaintiff's proposed solutions that they failed to communicate over a prolonged time and then inexplicably and then inexplicable did a reversal and reneged on their stated position with dire consequences (loss of rental and business income which directly impacted on the plaintiff's ability as a widower to provide for his family and make mortgage payments)for the plaintiff and his family and substantial financial loss to the plaintiff leading to a situation where any correct balances that had been due by the plaintiff at the time of the default event circa 2002 the subject of this matter were exceeded by the sums that consequentially and subsequently became due to the plaintiff by the mortgagee namely Permanent PTSB P.L.C. formerly Irish Life & Permanent Plc.

#### STATUTE OF LIMITATIONS 1957 ACT

- (a) ~~Furthermore, notwithstanding the foregoing, I say that at least a year prior to the alleged mortgage sale by Permanent PTSB P.L.C. (formerly Irish Life & Permanent P.L.C in 2015 (including all obligations, past present and future) to the third defendant Havbell DAC, the plaintiff was in a serious recorded dispute with Irish Life & Permanent Plc and the plaintiff claims there were no sums due by the plaintiff to the mortgagee at that time or at any time subsequently. Hence, in any event there could not be any sums subsequently due to Havbell DAC.~~
- (b) ~~Notwithstanding the above, the plaintiff claims that due to the inordinate and inexcusable delay by Irish Life & Permanent Plc, IF any sums were found to be due any right to enforce same would be statute barred well before the alleged loan sale in mid 2015 due to the the well established 1957 Statute of Limitations Act, which provides for a six year limit on interest and a twelve-year limit on principal, whereupon the title of the mortgagee to the land shall be extinguished. Hence the plaintiff claims that all title to the lands/ property which the original mortgagee Irish Life & Permanent Plc once legitimately held as security was lost BEFORE the alleged loan sale to Havbell DAC in 2015.~~

- ~~(e) The twelve year period runs from the time the claimant is first entitled to take legal action which in the case of these particular Irish Life & Permanent Plc mortgages terms and conditions a specific letter of demand is not required, it is from the event of default which by the third defendant's own evidence is some sixteen years prior to the alleged loan sale to Havbell DAC and some nineteen years prior to Havbell DAC appointing the first defendant as receiver over the plaintiff's pension property investment namely Unit 20, Beechwood Close Industrial Estate, Boghall Road, Bray, Co. Wicklow.~~
- ~~(d) Notwithstanding all the foregoing I say it is deceptively and grossly misrepresenting their legal capacity for the third defendant Havbell DAC to enforce the subject mortgages when in fact the Statute of Limitations requires that legal action for recovery of possession of land must be commenced within 12 years from event of default as determined in the terms and conditions of the specific mortgage agreement/s of concern here.~~
- ~~(e) Furthermore, notwithstanding the foregoing, I say therefore the third name defendant Havbell DAC by appointing a receiver on June 8 2018 was acting without capacity and contrary to the 1957 Statute of Limitations act, as the title to all the plaintiff's loans with Permanent PTSB were extinguished well prior to 2015 as they were well outside the twelve year limit for enforcement under the said act.~~

#### ~~CONSUMER PROTECTION ACT 2015~~

#### ~~A CREDIT SERVICER CANNOT ENFORCE A MORTGAGE~~

10. The Plaintiff states for the record that Havbell DAC are a stranger to his private personal business he has no contractual relationship with them other than that imposed upon him by Irish Life & Permanent Plc/PTSB allegedly selling his mortgage/s to them without his agreement or consent in fact the plaintiff strongly opposed the loan sale agreement.
- (a) I say that I the Plaintiff am a Consumer.
- (b) The second named Defendant formerly known as Link ASI Limited (company number, 315348) now trading as BCMGlobal ASI Limited is authorised by the Central Bank(C29016) as a Credit Servicer.
- (c) The third named Defendant formerly known as Havbell Limited (company number 558429) now trading as Havbell DAC is authorised by the Central Bank (C141765) as a Credit Servicer.
- ~~(d) However, under the Consumer Protection Act 2015 Seclf (2) neither Credit Servicer BCMGlobal ASI Limited nor Havbell DAC second and third named defendants respectively can control or determine overall strategy or make key decisions in management and admin of credit agreements./portfolios.~~

- (e) ~~Furthermore, neither entity can undertake credit servicing by another person or enforce a credit agreement as such an action would be a prescribed contravention contrary to the Central Bank and consumer protections Acts.~~
- (f) ~~Taking into account section 1 of the Consumer Protection Act 2015 therefore neither BCM Global ASI Limited nor Havbell DAC have the capacity to enforce the subject mortgage/s nor determine, manage make key decisions or enforce credit agreements.~~
- (g) ~~Furthermore, Havbell DAC cannot appoint another Consumer Servicer to carry out their function as a Credit Servicer all such activity is contrary to statute and prescribed contravention of said Acts~~
- (h) ~~Notwithstanding all other matters raised in this amended statement of claim the above makes it clear that both Credit Servicers Havbell DAC and BCMGlobal ASI Limited management practices and enforcement actions against the plaintiff consumer are prescribed contraventions of the Consumer Protection Act 2015.~~
- (i) ~~It follows from the above that under the rules of the 2015 Consumer Protection Act the appointment of and management of the first named defendant Ken Fennell as receiver over the plaintiff's personally owned pension investment property was/is contrary to statute and a prescribed contravention, contrary to the Central Bank and consumer protections Acts.~~

11. The plaintiff expressly strongly opposed the alleged sale of his mortgage loans was not consulted by Permanent TSB PLC, allegedly selling his Mortgage documents on 10<sup>th</sup> March 2015 to Havbell DAC without his, ~~consent~~ **assent** or authority **in the circumstances where there was a sale contract already in place and High Court proceedings relating to the specific performance of that contract on-going** and totally disregarding the plaintiff's claims of zero sums due by the surviving mortgagor. In fact, when the Plaintiff objected to the sale in light of the **foregoing, together with** the mismanagement, negligence and losses suffered by the Plaintiff, the permanent TSB PLC (**formerly Irish Life & Permanent P.L.C.**) confirmed in writing that they were proceeding with the sale regardless, but that they had advised Havbell of the Plaintiff's claim **prior to the mortgage loan sale allegedly being executed.**

#### POWER OF ATTORNEY TO REGISTRER A CHARGE NOT TRANSFERRABLE

- 12. The Plaintiff states for the record that the security instrument created between Aidan & Helen Kelly and Irish Life & Permanent PLC on 7<sup>th</sup> April 1999 is the sole property of both himself and his late wife and is not the property of Permanent TSB P.L.C. to do with as they with without ~~consulting~~ **obtaining assent in writing and specific attested power of attorney** from the plaintiff **for an unenvisaged purpose/s.**
- 13. The plaintiff further states that any Power of Attorney donated to Irish Life and Permanent PLC was specific only to that entity and was non-transferable to any third party (*Delegatus non potest delegare, a delegate cannot delegate*

and a done of a power of attorney cannot delegate his/her power to a third party).

- (a) For this reason, inter alia, the third named defendant did not have the capacity to appoint a receiver on the strength of the mortgage instrument or the 1999 Irish Permanent Mortgage conditions nor to register a charge on the plaintiff's property in the Registry of Deeds.

## LEGAL AND BENEFICIAL OWNERSHIP OF MORTGAGE LOANS

14. Notwithstanding the foregoing the plaintiff claims that the third named defendant Havbell DAC in 2016 were ~~not~~ neither the beneficial nor legal owners of the plaintiff's mortgage/s, but merely created an appearance of being so.

- (a) It is the view of the plaintiff that in reality it is the entity that controls the collateral is the legal and beneficial owner of the security documents as inter alia Havbell DAC created a C1 charge in the CRO on 18<sup>th</sup> June 2015 and in the process assigned absolutely all rights it allegedly acquired from Permanent PTSB P.L.C. (formerly Irish Life & Permanent P.L.C.) to Deutsche Trustee Company Limited Winchester House, London EC2N 2DB, UK Company registration number 00338230. ~~, as security for funds obtained from Deutsche Trustee Company Limited to fund purchase of loan bundles (held in pooled form as collateral) from Irish Life & Permanent Ple.~~
- (b) In 2015 the issued and paid up share capital of Havbell DAC as shown in their audited accounts and company returns was a mere €100 and the number of employees was stated to be none.
- (c) They are at best agents of the true principal and despite ~~their legal registration~~ all the foregoing, somehow questionably managed registration to register a charge on the plaintiff's property on Registry of Deeds in January 2016- (some six months after they assigned absolutely whatever interest they allegedly acquired from Permanent PTSB) they are not the beneficial owners of the equity in the loans or related security as is borne out in their audited accounts and reports.

(d) I say there is a note in the audited accounts for 2015 of Havbell Limited (now known as Havbell DAC) Directors report that "the shareholding of Havbell DAC is owned 100% by Castlewood CS Holdings (the share trustee) under the terms of a declaration of trust " ("The Declaration of Trust") under which the share trustee holds the benefit of the shares on trust for charitable purposes. There are no other rights that pertain to the shares and shareholders."

(e) The plaintiff believes that Havbell DAC were not entitled to register a charge/burden on his property in the Registry of Deeds in January 2016 and is currently investigating whether a criminal offence has been committed in this regard.

(f) The plaintiff claims that no assent/ or specific attested power of attorney was sought or given by him and that any power of attorney given to the original lender/mortgagee namely Irish Life & Permanent Plc was not transferrable to an unenvisaged third party.

(g) The C1 Charge Instrument proves that by Irish law debenture on 18<sup>th</sup> June 2015 Havbell DAC assigned and agreed to assign absolutely all rights title benefit and interest to Deutsche Trustee Company limited (as security agent for the secured parties) in and to loan assets and they charged by way of first fixed charge all of their rights under each loan asset and the proceeds thereof plus all of its books and other debts and monies owing to it as per the laws of Ireland.

#### HEARSAY EVIDENCE IS NOT ADMISSIBLE

15. ~~Notwithstanding all the foregoing~~ It is the Plaintiff's view ~~I say that the~~ overall amounts claimed by Havbell DAC ~~in 2018~~ amounting to circa €1.6m in total overall is an unsubstantiated a fabricated amount, not owed nor owing by the plaintiff to neither PTSB or Havbell. The plaintiff will in the process of this matter commission an audit of the PTSB statements to present to the court in due course. ~~I say all sums claimed by Havbell DAC are known to the defendants' legal advisors to be classic hearsay which is inadmissible evidence before the honourable court.~~

~~(a) I say further that that the relief exception to the hearsay rule afforded by the provision of the banker's books evidence Acts 1879—1959 is not available to Havbell DAC.~~

~~(b) and subsequent legislation signed into law on 6 August 2020 some two years after the appointment of the first defendant as receiver, is not retrospectively available to the defendant.~~

~~(c) The plaintiff says that notwithstanding the fact that there were no nett sums due by the plaintiff to Permanent PTSB P.L.C. in the period prior to the alleged loan sale agreement and that even IF some amount/s were found to be due. any such amounts became statute barred due to the extraordinarily inordinate and inexcusable delay well prior to the alleged loan sale agreement in 2015 to the third named defendant.~~

(d) It should be noted and drawn to this honourable court's attention that inter alia the receiver and or his agents destroyed the contents of a fire proof cabinet comprising of all of one's personal documents to include company records for three separate Companies.

16. The Plaintiff claims that Havbell DAC or their principal have knowingly purchased the subject mortgage in full knowledge that there was ~~would be~~ potential legal consequences as a result of the PTSB failure to provide agreed finance to enable performance by the plaintiff on agreed expenditure to enable the division and partial sale of Unit 20 in 2006/7 in performance of already signed sale contract committing the Plaintiff.

## UNJUST ENRICHMENT

~~17. I say that prior to the alleged loan sale agreement between Permanent PTSB P.L.C. formerly Irish Life & Permanent Plc/ the seller and Havbell DAC the alleged purchaser. the third named defendant when initially screening the loans would be reasonable expected to have taken into account in the purchase price, the likelihood of issues with the Statute of Limitations Act 1957 (due to the inordinate, inexcusable and prejudicial number of years passed) which states that at the expiration of the period of twelve years the right to title shall be extinguished.~~

- (a) The plaintiff therefore has ~~good~~ reason to believe that the third named defendant Havbell DAC ~~for all the foregoing reasons~~ they have purchased the said mortgage/s at a very low price to allow for the possible adjustment of ~~zero~~ sums due and potential litigation with the plaintiff.
- (b) Havbell DAC or their principal have failed to pass this reduction on to the plaintiff thereby inducing unjust enrichment at the expense of the plaintiff.
- (c) The Plaintiff will be seeking the assistance of the court for Havbell DAC to produce full unredacted ~~original~~ chain of title documents ~~including the mortgage sale agreement and Global deed/s of assignment to include the deed of assignment with Deutsche Trustee Company Limited~~ and details of monies paid for the subject mortgages from the beginning of their involvement.

18. It is the plaintiff's view and claim that Havbell DAC were fully aware of potential pending litigation between the Plaintiff & PTSB due to breach of contract as plaintiff was sued for specific performance by purchaser of an approximate half division of Unit 20 Beechwood Close (contract signed for €935k) and was at a substantial loss over all due to the failure of Permanent PTSB P.L.C. (~~formerly Irish Life & Permanent P.L.C.~~) to provide agreed funding by inserting onerous and unreasonable T&Cs on agreed funding which PTSB agreed to remove but failed to do so, directly leading to the buyers seeking to amend their claim in the High Court from demanding specific performance of the sale contract to seeking return of their deposit and rescission of the contract and damages. All possibilities to seek to retain the contract buyers were lost when the first named defendant Ken Fennell questionable appointment as receiver by Havbell DAC, took legal action in the High Court to have the Lis Pendens on the plaintiff's Unit 20 property removed which led to the collapse of the sale contract causing yet further significant issues and costs for the plaintiff.

As Havbell claim to have purchased all rights title, benefit, and interest and obligations of Permanent TSB PLC in the security document so this leads one to the understanding that by their own admission Havbell ~~DA~~ and or their assignee Deutsche

~~Trustee Company Limited (UK Company registration number (00338230) now stand as the party liable for the wrongdoing of their predecessors in title and this plaintiff is seeking a declaration that if Havbell DAC are able to avail of the benefits they and their assignee Deutsche Trustee Company Limited are also liable for the consequences of negligence and breach of contract by their predecessors PTSB.~~

~~PERMANENT PTSB P.L.C. TITLE RIGHTS EXTINGUISHED PRIOR TO  
LOAN SALE to HAVBELL DAC~~

- ~~19. As established in the foregoing under the provisions of the Statute of Limitations Act 1957 the original lender and mortgagee Permanent TSB P.L.C. (formerly Irish Life and Permanent P.L.C.) for whatever reason/s factually did not issue any legal proceedings against the Mortgagor/s Mr Aidan Kelly and or Co Mortgagor Mrs Helen Kelly (deceased in 2003) which they were entitled to do (within an outer limit of twelve years from qualifying event of default).~~
- ~~(a) — under the terms of the Mortgage Loan agreement and it's specific Terms & Conditions which provide that after an event of default as defined in said conditions and which took place circa 2002 and therefore well in excess of the prescribed outer statutory time limit of twelve years.~~
- ~~(b) — at which time their (Permanent TSB P.L.C.) title under the mortgage/s (including any sums found to be owing and security enforcement/re-possession) as prescribed under the relevant provisions of the act "shall be extinguished" due to inordinate and inexcusable delay combined with such an extraordinary passage of time being both generally and personally prejudicial during which time period the co-mortgagor Mrs Helen Kelly sadly suffered an untimely death in October 2023.~~
- ~~(c) — Consequentially the plaintiff claims that any title/enforcement rights against the plaintiff under the mortgage/s agreement/s were already lost to the original lender/mortgagee Irish Life & Permanent P.L.C. well prior to the execution of the alleged Mortgage Sale Agreement in 2015 and any purchase by Havbell DAC by reason inter alia of being statute barred under the statute of limitations act 1957.~~
- ~~(d) — Notwithstanding other reasons stated I say that Havbell DAC therefore had no right in law under the security document allegedly purchased from Permanent PTSB P.L.C. to appoint the first named defendant Mr Ken Fennell as Receiver on 8 June 2018 a further three years after the alleged loan sale agreement and at least sixteen years after the default event with the original lender stated by the third defendants own sworn testimony to be nineteen years.~~
- ~~(e) — Furthermore, the defendants had absolutely no right or title to interfere with a sale contract already in place on the plaintiff's Unit 20 property (causing same contract to collapse) nor to sell let alone firesale the plaintiff's property known as Unit 20 Beechwood Close, Industrial Estate, Bray, Co. Wicklow.~~



(f) Notwithstanding ~~all the above claim foregoing~~ the Plaintiff further claims that in or around March 2019 ~~both Havbell's agent two employees of credit servicer Link ASI Limited Mr Keith Masterson (Link ASI) and Mr Fergus Barry and the plaintiff agreed to a meeting with the plaintiff at which they represented Havbell DAC at their offices at 2 Grand Canal Square, had in good faith entered serious negotiations. It is noteworthy at that meeting when the plaintiff explained how Permanent PTSB's negligence had caused the plaintiff very significant financial harm Mr Fergus Barry introduced as a senior manager said he didn't doubt that.~~

(g) By that time in 2019 the plaintiff and his family had already had circa 17 years of extreme financial and legal stress hanging over them and to be honest were losing the will to live. I say it felt and still feels (now another 5 years later and circa 22 years on from the unfortunate default event on the PTSB mortgages which was due to circumstances outside the control of the mortgagors) like a life sentence and was/is causing serious stress and both physical and mental health concerns within the family. Too much family time has been lost that can never be recovered.

(h) ~~It is very important to note and understand it is for these reasons that the plaintiff initiated pragmatic negotiations (absolutely conducted at all times without admission nor acceptance nor acknowledgement of any debt or liability to Permanent PTSB P.L.C. nor HAVBELL DAC. And that any and all amounts claimed were most strongly disputed) to try get some quality of life back and avoid yet more years of extreme financial and legal stress hanging over our family with all the negative impacts that come along with such constant extreme stress and sleep deprivation. Culminating~~

(i) ~~This culminated in the subsequent reduction of an alleged and strongly disputed amount claimed owed, to an agreed sum of €1m pragmatic settlement without admitting any liability with HAVBELL DAC (to be a full and final redemption of ALL and any sums claimed on All mortgages I had on both my family dwelling home and my pension property investment) with a senior Manage at Havbell's building 2 Grand Canal Square, with an agreed programme of action by the plaintiff and his team of Professionals to be monitored and reported at various intervals by both parties.~~

(j) The plaintiff by acting on the agreement and in full knowledge of Havbell DAC, employed a team of professionals (Auctioneers, Accountant, Builder, Solicitor & Tax Consultant etc) to set about selling/raising finance for the industrial unit No. 20 Beechwood Close in a pension tax efficient optimum manner and in a manner which would help to minimise stress on my youngest son living in the Family home all his life but with a significant mental health disability (life threatening at all times) requiring my full 24 hour caring both then and now. The plaintiff's representative Chris van der Lee, Solicitor



regularly updated Link/Havbell at their request with full report and updates supplied as and when requested.

- (k) Meanwhile the third named defendant Havbell DAC through the first and second defendants nevertheless continued to aggressively pursue repossession summary proceedings against my family dwelling in the Circuit Court and almost weekly threats to activate the first named defendant the receiver Ken Fennell to put the plaintiff's pension property up for sale by mortgagee in possession. Maintaining /holding this constant harassment and pressure over the plaintiff and his family was contrary to the spirit of the pragmatic nature and purpose of the agreement. was extremely unhelpful and delaying to the fund raising and was in reality actually life threatening.
- (l) ~~This pattern of aggressive behaviour which my daughter described as financial terrorism is all the more remarkable when the plaintiff never ever borrowed nor owed any sum whatsoever to any of the defendants who allegedly purchased securities from Permanent TSB P.L.C. the enforcement rights of which had already been lost prior to alleged purchase.~~
- (m) ~~The plaintiff had identified two separate parties that were willing to invest in the industrial unit for a sum in the region of €1m which combined with availing of certain CGT allowances associated, would satisfy the negotiated figure to settle the agreed overall pragmatic without admission of any liability settlement amount between both parties despite being statute barred even before alleged purchase on all mortgages and provide closure to the entire saga for all parties.~~
20. However suddenly without notice or warning to the plaintiff's legal representative (in regard to concluding a ~~pragmatic settlement with no admission of any liability~~) in the middle of the agreed programme Havbell reactivated the appointment of the receiver 23 Sept 2020 (having put him on hold for a period of circa 16 months since his appointment 8 June 2018) with the result that the plaintiff's extensive time intensive work of the plaintiff and all his professional team was all in vain with significant costs arising. Not only did the receiver act in an unprofessional manner he served notice on the plaintiff to remove all the customised equipment requiring specialised handling and transport in two days in the middle of Covid pandemic lockdown restrictions. The Receiver's agents then yet again illegally broke into the plaintiff's premises and removed all the specialised and customised equipment, paperwork to include personal and company documents held there for secure safe keeping in a Chubb fireproof cabinet including data records on circa 4,000 customers.
21. The receiver then despite requests to postpone to facilitate talks, put the property up for sale on BIDX-1 without proper presentation effectively an inappropriate rushed fire sale at a disclosed price and sold Unit 20 for €451k exclusive of applicable Vat.

(a) As stated, the plaintiff had identified two separate investor/buyers for an amount in the region of €1M with a deal under discussion which would have facilitated availing of the once off CGT retirement relief scheme. And while in the process of underselling the property the receiver in a senseless, unnecessary, mindless act also disposed of specialised and customised machinery and contents and left the plaintiff with substantial losses including loss of significant CGT reliefs, instead of the entire matter being resolved as negotiated and agreed. As the particular combination of specialised and customised machinery and equipment is not available second-hand the plaintiff holds the defendants responsible for the full replacement cost to include all associated consulting sourcing, travel and commissioning.

22. It is the Plaintiff's claim that Havbell if they had the capacity to appoint a receiver, they could only appoint a rent receiver as he is bound by the Land and Conveyancing Act 1881 and 1911 specifically Sec 19 & 21. The receiver failed to meet with the plaintiff and inform him of any fees due, KYC, terms of employment, strategy to be employed and in the involvement of Deloitte in the receivership.

(a) It is clear from ~~correspondence~~ communications received that not alone was Ken Fennell appointed, Deloitte were managing progress in this matter as per instructions from Mr. Fergus Barry who represented himself as Senior Manager in Link ASI Limited (now known as BCMGlobal ASI Limited) and who stated to the plaintiff in no uncertain terms that "the receiver will do what we tell him to do"

(b) Furthermore Mr Fennell in his letter from Deloitte to the Plaintiff announcing his appointment stated that *"your interest in the property ceased as at the date of my appointment"* this is a gross misrepresentation of his authority as I Aidan Kelly the Plaintiff was the registered owner of the property at the time, I did not consent to his appointment which was adversarial and he in my view was not validly appointed for a number of reasons.

23. The Plaintiff claims that ~~Ktech~~ K-Tech Security Unlimited a security agent employed by the receiver wrongfully forced entry into the business premises of the Plaintiff, without lawful authority to do so. As a result of the receiver's agents' actions, the Plaintiff suffered and continues to suffer defamation, loss, damage and inconvenience The Receiver's agent by his action committed a criminal Act by breaching provisions of Statutory Instrument No 195/2015 Private Security Regulations 2015 and the Private Security Services Act 2004 by forcing entry to a private premises without lawful authority and license to do so.

24. The plaintiff claims that apart from the damage/destruction of the specialised and customised proto type machinery ~~and~~ equipment and contents of Unit 20 built up over a number of years and the panic strongly opposed and unauthorised sale of the premises by Havbell DAC with an overall loss to be calculated, ~~he~~ the plaintiff met the qualifying criteria and was entitled

to a range of Tax reliefs in a once off business retirement relief scheme/s with the Revenue Commissioners whereby an individual ~~exiting~~ selling his business and associated personally owned premises and equipment simultaneously, could benefit from a once off relief threshold of up to three million euro ~~in the region of 500K~~ on the sale of the Unit 20 pension investment property associated with the continuity of his business trading there up to/at the time of retiring from and selling his business and associated assets including the Unit 20 property.

(a) Havbell were fully apprised of the importance of this All in writing by Chris van der Lee & Associates ~~on several occasions both verbally and in writing~~ with supporting documentation from fully qualified Chartered Tax Consultants Dermot Byrne & Associates and of the importance of this as part of and to enable the overall ~~pragmatic~~ settlement of €1 million as agreed with Havbell (~~without admission of any liability to Permanent PTSB P.L.C. and especially not to Havbell DAC~~) to be achieved. Indeed, it was pointed out strongly that to proceed to re-activate the Receiver and sell ~~the Unit 20~~ property without agreement would cause very significant losses, damages and consequences ~~which the plaintiff would hold Mr Ken Fennell, Link ASI Limited and Havbell DAC accountable for in such an event. I repeat that the defendants' insurers should be appraised and kept on notification.~~

25. The Plaintiff had performed on all negotiated agreement with both Permanent TSB and Havbell DAC however it is these parties that reneged on their agreements and in the process caused considerable personal anxiety, trauma and unnecessary financial loss and health damage to the plaintiff and his family.

26. Havbell are seeking unjust enrichment as they ~~the plaintiff claims it is reasonable to expect they had the benefit of legal and accounting advice and were~~, prior to the alleged purchase of the Plaintiff's loans from Permanent PTSB P.L.C. (formerly Irish Life & Permanent P.L.C.) fully briefed and aware of the probable adjustments to account balances due to negligence, overcharging, miscalculation of interest charged and inappropriate penalty charges and possible pending legal consequences arising from breach of contract by the actions of Permanent TSB P.L.C ~~and the implications of the 1957 Statute of Limitations Act. The plaintiff notes that the 2015 audited accounts for Havbell DAC show expenditure of €1.114 million on Legal & Professional Fees.~~

27. It is the Plaintiff's claim that Havbell DAC purchased the mortgage/s at a significantly reduced/discounted price due to all the foregoing and potential adverse legal outcome following the PTSB's unwarranted and destructive actions contrary to prior agreements.

28. The Plaintiff because all his documents pertaining to PTSB and Havbell were destroyed by the receiver, reserves the right to bring further evidence to the court in support of his damages and negligence claim.

29. Appointment of alleged Receiver

1. It is the Plaintiff's claim that Havbell DAC did not have the capacity to appoint the receiver by power of attorney as it is the plaintiff's belief no power of attorney specific to the subject mortgage/s is or was in existence. Furthermore, Havbell could not rely on the mortgage indenture (7 April 1999) which incorporates 1999 Irish Permanent terms & Conditions as neither document contains a stand-alone power to appoint a receiver. Furthermore the "attorney" appointing a receiver a Mr. Karl Smith (Havbell Company Director) even if acting as company director under 2014 Companies act would not have had the capacity as he was/is not a sole director.
2. Notwithstanding, if Havbell had the power to appoint the receiver there is no power of possession explicitly contained in any security document presented by the defendants and the former charge holders and for clarity instead of breaking into the property the alleged receiver should have had his standing clarified by the court before breaking and entering in private constitutionally protected property by a security company K-Tech who have no statutory authority.
3. The alleged receiver when re appointed/re-activated without notice to the plaintiff dishonouring and contrary to ~~well negotiated pragmatic no admission of liability~~ agreement between Havbell and the plaintiff the terms of which were carried out by the plaintiff by action and deed. As stated above and in all the foregoing it is the plaintiff's view that Havbell did not have the capacity to appoint the receiver and even if they did, they could only appoint him within the confines of the Conveyancing Act 1881 & 1911 limiting him to being a rent receiver.
4. When re-activated the Receiver issued the plaintiff with a notice to empty the contents of the 4200sq.ft. factory premises. The premises contained specialised equipment tools machinery, office equipment stocks and company records. The Notice to empty the building amounted effectively to a two-day time span over a weekend in the middle of a Covid 19 lockdown when the Government were insisting people limit their contacts and 5 km restrictions were in place, an impossible feat without an undue risk to Health and Wellbeing especially given the Plaintiff's age/vulnerability group and an example of the arrogance and bullyboy behaviour and disregard for Public Health displayed by the Receiver, Link Asset Services and Havbell.
5. The receiver then proceeded to empty the entire contents of the premises to include all equipment tools and personal documents (PTSB docs etc) of the plaintiff stored in a large 3 drawer Chubb fireproof cabinet with the records for three companies only some of which were retrieved in very poor condition. In addition, the Customer Data records on circa 4,000 customers are missing.
6. The receiver/Havbell then placed the property for sale on a auction web site BIDX-1 without proper presentation 12 Nov 2020 and sold same for €451k.

7. It is the Plaintiff's claim that as stated inter alia Havbell did not have the capacity to appoint the receiver, Havbell entered into serious well-grounded negotiations with which the plaintiff entered into in good faith and by agreement between both parties the plaintiff employed a professional team to fulfil agreed targets at all times reporting to Havbell as scheduled. The Plaintiff has incurred & accrued significant costs and Professional Fees which will be sought as part of this claim.
  
8. It is the plaintiff's claim that he is also at the loss for replacement value of All specialised machinery and contents removed and for loss of value on the fire sale of the industrial premises plus the value of the once off Tax allowances and reliefs.

**The Plaintiff claims the following reliefs:**

**(a) Breach of Contract by Irish Permanent TSB PLC**

The Plaintiff claims substantial damages for the breach of contract by the predecessor of Havbell PTSB leading plaintiff to loss of property entitlement, Property rental income, personal distress, financial loss, loss of the purchaser for half his premises and the substantial clearance of his mortgage as agreed with PTSB. The Plaintiff also claims Unfair Terms in Mortgages on Unit 20 Beechwood Close.

**(b) Breach of agreement by Havbell**

The plaintiff claims substantial damages in the amount of loss of revenue tax reliefs of circa €500k and loss on the panic sale by the receiver of the industrial premises to a very significant amount and other damages to be advised.

**(c) Wilful destruction of equipment and rushed sale of property by receiver**

The plaintiff claims compensatory damages for breaking and entry, wilful destruction of his specialised machinery, stocks, equipment & tools, and if the receiver is found to be invalidly appointed aggravated damages for trespass negligence.

**(d) Unjust enrichment by Havbell at the expense of the Plaintiff**

~~Havbell were fully aware of the consequences of purchasing a legacy litigation asset where it is reasonable to expect during due diligence screening the likely impact of the 1957 Statute of Implications Act became apparent to them and their legal advisors with specialised knowledge in such matters. Evidence also shows that they were made aware by Permanent PTSB P.L.C. of the plaintiffs claim that strongly contest there being any sums due to the original lender. They would also have been aware that there was a sale contract in place for half of the Unit 20 property the subject of the High Court litigation for specific performance and a Lis pendens on that property.~~

**UNFAIR TERMS**

~~It is also reasonable to expect that Havbell DAC were aware that for the original lender in my case Permanent PTSB P.L.C. to offer to sell to Havbell DAC my loans for a price judged to be at or below the recoverable value in the market place at that time, while not offering the plaintiff the same opportunity could be judged to be an unfair term and have the capacity to void the mortgage contract/s and associated security, bearing in mind that it was the Irish State through NAMA that set the precedent for establishing recoverable value versus any loan balance figure.~~

~~For all the foregoing reasons inter alia it is the opinion the the plaintiff is of the view that they there is good reason to believe that prior to loan purchase Havbell following pre-purchase screening would have likely sought to substantially reduce the negotiated price of the mortgage bundle downwards and that they paid a low price for same the plaintiff's mortgage/s. Yet Havbell were/are seeking full payment of a fabricated large amount based on hearsay. claimed to be owed by PTSB. Compensation can only be assessed after interrogatories and discovery and with the assistance of the court~~

**(e) Aggravated damages.**

**(f) Costs.**

**(g) Liberty to Apply**

**Schedule 2: [clean version] the Plaintiff's Amended Statement of Claim as permitted by order of the High Court dated [TO BE INSERTED]**

THE HIGH COURT

Record Number: 2020 /7570P

Between/

AIDAN KELLY

**Plaintiff**

and

KEN FENNELL

And

**BCMGLOBAL ASI LIMITED**

and

HAVBELL DAC

**Defendants**

**AMENDED STATEMENT OF CLAIM  
PURSUANT TO ORDER OF THE HIGH COURT DATED [TO BE INSERTED]**

Delivered the [INSERT DATE] to the Defendants by the Plaintiff and the Plaintiff resides at Brooklands, Kendalstown Hill, Delgany, Co. Wicklow A63 N252

1. The Plaintiff is Aidan Kelly a Businessman with an address at Brooklands, Kendalstown Hill, Delgany, Co. Wicklow A63 N252
2. The first named Defendant is Ken Fennell of Deloitte 29 Earlsfort Terrace, Dublin 2
3. The second named Defendant is Link ASI Limited (Company registration number 315348) known since April 2021 as BCMGlobal ASI Limited, Block C, Maynooth, Business Campus, Maynooth, W23 F854
4. The third Defendant is Havbell DAC (Company registration number 558429) No. 2 Grand Canal Square, Grand Canal Harbour, Dublin 2, Ireland.
5. The Plaintiff claims he/was is the lawful titled owner of a property Unit No. 20 Beechwood Close Industrial Estate, Boghall Road, Bray, Co. Wicklow
6. The Plaintiff claims the appointment and Instrument of Appointment of the receiver was ~~not~~ founded on non-valid security documents and that Havbell DAC did not have capacity to appoint the receiver therefore the appointment is incorrect, inaccurate, incomplete and therefore invalid and had no authority over the property.
7. The plaintiff claims the alleged receiver unlawfully misrepresented his standing by stating inter alia in a letter to the plaintiff on Deloitte letterhead



*“Please note that your interest in the property ceased as at the date of my appointment”* and he the receiver and his agents proceeded to commit criminal acts of breaking and entry and dispossession of equipment tools and property by deceit under false pretences denying this plaintiff his lawful constitutionally protected rights.

8. The Plaintiff states for the record that due to personal and business circumstances beyond his control that he fell into arrears with the subject mortgage/s circa 2002 before the untimely death in 2003 of his beloved wife and co-mortgagor Helen Kelly after a tortuous battle of some 13 years fighting cancer. However, the plaintiff fully ~~at all times~~ engaged, was open and forthcoming with Permanent TSB P.L.C. (formerly Irish Life and Permanent P.L.C.) the original lender and mortgagee to the extent that the plaintiff was proactive in creating a solution/s to satisfy the requirements of all parties concerned.
9. The Plaintiff states It was the subsequent negligent behaviour of Irish Life & Permanent Plc the mortgagee having agreed to the plaintiff’s proposed solutions that they failed to communicate over a prolonged time and then inexplicably and then inexplicable did a reversal and reneged on their stated position with dire consequences (loss of rental and business income which directly impacted on the plaintiff’s ability as a widower to provide for his family and make mortgage payments)for the plaintiff and his family and substantial financial loss to the plaintiff leading to a situation where any correct balances that had been due by the plaintiff at the time of the default event circa 2002 were exceeded by the sums that consequentially and subsequently became due to the plaintiff by the mortgagee namely Permanent PTSB P.L.C. formerly Irish Life & Permanent Plc.
10. The Plaintiff states for the record that Havbell DAC are a stranger to his private personal business he has no contractual relationship with them other than that imposed upon him by Irish Life & Permanent Plc/PTSB allegedly selling his mortgage/s to them without his agreement or consent in fact the plaintiff strongly opposed the loan sale agreement.
  - (a) I say that I the Plaintiff am a Consumer.
  - (b) The second named Defendant formerly known as Link ASI Limited (company number, 315348) now trading as BCMGlobal ASI Limited is authorised by the Central Bank(C29016) as a Credit Servicer.
  - (c) The third named Defendant formerly known as Havbell Limited (company number 558429) now trading as Havbell DAC is authorised by the Central Bank (C141765) as a Credit Servicer.
11. The plaintiff expressly strongly opposed the alleged sale of his mortgage loans by Permanent TSB PLC, allegedly selling his Mortgage documents on 10<sup>th</sup> March 2015 to Havbell DAC without his, assent or authority in the circumstances where there was a sale contract already in place and High Court proceedings relating to the specific performance of that contract on-going. In



fact, when the Plaintiff objected to the sale in light of the foregoing, together with the mismanagement, negligence and losses suffered by the Plaintiff, the permanent TSB PLC (formerly Irish Life & Permanent P.L.C.) confirmed in writing that they were proceeding with the sale regardless, but that they had advised Havbell of the Plaintiff's claim prior to the mortgage loan sale allegedly being executed.

#### POWER OF ATTORNEY TO REGISTRER A CHARGE NOT TRANSFERRABLE

12. The Plaintiff states for the record that the security instrument created between Aidan & Helen Kelly and Irish Life & Permanent PLC on 7<sup>th</sup> April 1999 is the sole property of both himself and his late wife and is not the property of Permanent TSB P.L.C. to do with as they with without ~~consulting~~ obtaining assent in writing and specific attested power of attorney from the plaintiff for an unenvisaged purpose/s.
13. The plaintiff further states that any Power of Attorney donated to Irish Life and Permanent PLC was specific only to that entity and was non-transferable to any third party (*Delegatus non potest delegare, a delegate cannot delegate and a done of a power of attorney cannot delegate his/her power to a third party*).
  - (a) For this reason, inter alia, the third named defendant did not have the capacity to appoint a receiver on the strength of the mortgage instrument or the 1999 Irish Permanent Mortgage conditions nor to register a charge on the plaintiff's property in the Registry of Deeds.

#### LEGAL AND BENEFICIAL OWNERSHIP OF MORTGAGE LOANS

14. Notwithstanding the foregoing the plaintiff claims that the third named defendant Havbell DAC in 2016 were ~~not~~ neither the beneficial nor legal owners of the plaintiff's mortgage/s, but merely created an appearance of being so.
  - (a) It is the view of the plaintiff that in reality it is the entity that controls the collateral is the legal and beneficial owner of the security documents as inter alia Havbell DAC created a C1 charge in the CRO on 18<sup>th</sup> June 2015 and in the process assigned absolutely all rights it allegedly acquired from Permanent PTSB P.L.C. (formerly Irish Life & Permanent P.L.C.) to Deutsche Trustee Company Limited Winchester House, London EC2N 2DB, UK Company registration number 00338230.
  - (b) In 2015 the issued and paid up share capital of Havbell DAC as shown in their audited accounts and company returns was a mere €100 and the number of employees was stated to be none.
  - (c) They are at best agents of the true principal and despite ~~their legal registration~~ all the foregoing, somehow questionably managed registration to register a charge on the plaintiff's property on Registry

of Deeds in January 2016- (some six months after they assigned absolutely whatever interest they allegedly acquired from Permanent PTSB) they are not the beneficial owners of the equity in the loans or related security as is borne out in their audited accounts and reports.

(d)I say there is a note in the audited accounts for 2015 of Havbell Limited (now known as Havbell DAC) Directors report that “the shareholding of Havbell DAC is owned 100% by Castlewood CS Holdings (the share trustee) under the terms of a declaration of trust “ (“The Declaration of Trust”) under which the share trustee holds the benefit of the shares on trust for charitable purposes. There are no other rights that pertain to the shares and shareholders.”

(e)The plaintiff believes that Havbell DAC were not entitled to register a charge/burden on his property in the Registry of Deeds in January 2016

(f) The plaintiff claims that no assent/ or specific attested power of attorney was sought or given by him and that any power of attorney given to the original lender/mortgagee namely Irish Life & Permanent Plc was not transferrable to an unenvisioned third party.

(g)The C1 Charge Instrument proves that by Irish law debenture on 18<sup>th</sup> June 2015 Havbell DAC assigned and agreed to assign absolutely all rights title benefit and interest to Deutsche Trustee Company limited (as security agent for the secured parties) in and to loan assets and they charged by way of first fixed charge all of their rights under each loan asset and the proceeds thereof plus all of its books and other debts and monies owing to it as per the laws of Ireland.

15. It is the Plaintiff’s view [the] overall amounts claimed by Havbell DAC amounting to circa €1.6m in total overall is an unsubstantiated a fabricated amount, not owed nor owing by the plaintiff to neither PTSB or Havbell. The plaintiff will in the process of this matter commission an audit of the PTSB statements to present to the court in due course.

(d) It should be noted and drawn to this honourable court’s attention ~~the~~ that inter alia the receiver and or his agents destroyed the contents of a fire proof cabinet comprising of all of one’s personal documents to include company records for three separate Companies.

16. The Plaintiff claims that Havbell DAC or their principal have knowingly purchased the subject mortgage in full knowledge that there was potential legal consequences as a result of the PTSB failure to provide agreed finance to enable performance by the plaintiff on agreed expenditure to enable the division and partial sale of Unit 20 in 2006/7 in performance of already signed sale contract committing the Plaintiff.

(a) The plaintiff therefore has ~~good~~ reason to believe that the third named defendant Havbell DAC they have purchased the said mortgage/s at a very low price to allow for the possible adjustment of ~~zero~~ sums due and potential litigation with the plaintiff.

- (b) Havbell DAC or their principal have failed to pass this reduction on to the plaintiff thereby inducing unjust enrichment at the expense of the plaintiff.
  - (c) The Plaintiff will be seeking the assistance of the court for Havbell DAC to produce full unredacted chain of title and details of monies paid for the subject mortgages from the beginning of their involvement.
17. It is the plaintiff's view and claim that Havbell DAC were fully aware of potential pending litigation between the Plaintiff & PTSB due to breach of contract as plaintiff was sued for specific performance by purchaser of an approximate half division of Unit 20 Beechwood Close (contract signed for €935k) and was at a substantial loss over all due to the failure of Permanent PTSB P.L.C. (formerly Irish Life & Permanent P.L.C.) to provide agreed funding by inserting onerous and unreasonable T&Cs on agreed funding which PTSB agreed to remove but failed to do so, directly leading to the buyers seeking to amend their claim in the High Court from demanding specific performance of the sale contract to seeking return of their deposit and rescission of the contract and damages. All possibilities to seek to retain the contract buyers were lost when the first named defendant Ken Fennell questionable appointment as receiver by Havbell DAC, took legal action in the High Court to have the Lis Pendens on the plaintiff's Unit 20 property removed which led to the collapse of the sale contract causing yet further significant issues and costs for the plaintiff.

As Havbell claim to have purchased all rights title, benefit, and interest and obligations of Permanent TSB PLC in the security document so this leads one to the understanding that by their own admission Havbell now stand as the party liable for the wrongdoing of their predecessors in title and this plaintiff is seeking a declaration that if Havbell DAC are able to avail of the benefits they are also liable for the consequences of negligence and breach of contract by their predecessors PTSB.

- (a) Notwithstanding the above claim the Plaintiff further claims that in or around March 2019 and the plaintiff had in good faith entered serious negotiations. It is noteworthy at that meeting when the plaintiff explained how Permanent PTSB's negligence had caused the plaintiff very significant financial harm Mr Fergus Barry introduced as a senior manager said he didn't doubt that.
- (b) By that time in 2019 the plaintiff and his family had already had circa 17 years of extreme financial and legal stress hanging over them and to be honest were losing the will to live. I say it felt and still feels (now another 5 years later and circa 22 years on from the unfortunate default event on the PTSB mortgages which was due to circumstances outside the control of the mortgagors) like a life sentence and was/is causing serious stress and both physical and mental health concerns within the family. Too much family time has been lost that can never be recovered.

- (c) [I]n the subsequent reduction of an alleged and strongly disputed amount claimed owed, to an agreed sum of €1m settlement with a senior Manager at Havbell's building 2 Grand Canal Square, with an agreed programme of action by the plaintiff and his team of Professionals to be monitored and reported at various intervals by both parties.
- (d) The plaintiff by acting on the agreement and in full knowledge of Havbell DAC, employed a team of professionals (Auctioneers, Accountant, Builder, Solicitor & Tax Consultant etc) to set about selling/raising finance for the industrial unit No. 20 Beechwood Close in a pension tax efficient optimum manner and in a manner which would help to minimise stress on my youngest son living in the Family home all his life but with a significant mental health disability (life threatening at all times) requiring my full 24 hour caring both then and now. The plaintiff's representative Chris van der Lee, Solicitor regularly updated Link/Havbell at their request with full report and updates supplied as and when requested.
- (e) Meanwhile the third named defendant Havbell DAC through the first and second defendants nevertheless continued to aggressively pursue repossession summary proceedings against my family dwelling in the Circuit Court and almost weekly threats to activate the first named defendant the receiver Ken Fennell to put the plaintiff's pension property up for sale by mortgagee in possession. Maintaining /holding this constant harassment and pressure over the plaintiff and his family was contrary to the spirit of the pragmatic nature and purpose of the agreement. was extremely unhelpful and delaying to the fund raising and was in reality actually life threatening.
- (g)The plaintiff had identified two separate parties that were willing to invest in the industrial unit for a sum in the region of €1m which combined with availing of certain CGT allowances associated, would satisfy the negotiated figure to settle the agreed amount between both parties on all mortgages and provide closure to the entire saga for all parties.

18. However suddenly without notice or warning to the plaintiff's legal representative (in regard to concluding a settlement in the middle of the agreed programme Havbell reactivated the appointment of the receiver 23 Sept 2020 (having put him on hold for a period of circa 16 months since his appointment 8 June 2018) with the result that the plaintiff's extensive time intensive work of the plaintiff and all his professional team was all in vain with significant costs arising. Not only did the receiver act in an unprofessional manner he served notice on the plaintiff to remove all the customised equipment requiring specialised handling and transport in two days in the middle of Covid pandemic lockdown restrictions. The Receiver's agents then yet again illegally broke into the plaintiff's premises and removed all the specialised and

customised equipment, paperwork to include personal and company documents held there for secure safe keeping in a Chubb fireproof cabinet including data records on circa 4,000 customers.

19. The receiver then despite requests to postpone to facilitate talks, put the property up for sale on BIDX-1 without proper presentation effectively an inappropriate rushed fire sale at a disclosed price and sold Unit 20 for €451k exclusive of applicable Vat.
- (a) As stated, the plaintiff had identified two separate investor/buyers for an amount in the region of €1M with a deal under discussion which would have facilitated availing of the once off CGT retirement relief scheme. And while in the process of underselling the property the receiver in a senseless, unnecessary, mindless act also disposed of specialised and customised machinery and contents and left the plaintiff with substantial losses including loss of significant CGT reliefs, instead of the entire matter being resolved as negotiated and agreed. As the particular combination of specialised and customised machinery and equipment is not available second-hand the plaintiff holds the defendants responsible for the full replacement cost to include all associated consulting sourcing, travel and commissioning.
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- (b) Furthermore Mr Fennell in his letter from Deloitte to the Plaintiff announcing his appointment stated that *"your interest in the property ceased as at the date of my appointment"* this is a gross misrepresentation of his authority as I Aidan Kelly the Plaintiff was the registered owner of the property at the time, I did not consent to his appointment which was adversarial and he in my view was not validly appointed for a number of reasons.
21. The Plaintiff claims that K-Tech Security Unlimited a security agent employed by the receiver wrongfully forced entry into the business premises of the Plaintiff, without lawful authority to do so. As a result of the receiver's agents' actions, the Plaintiff suffered and continues to suffer defamation, loss, damage and inconvenience The Receiver's agent by his action committed a criminal Act by breaching provisions of Statutory Instrument No 195/2015

Private Security Regulations 2015 and the Private Security Services Act 2004 by forcing entry to a private premises without lawful authority and license to do so.

22. The plaintiff claims that apart from the damage/destruction of the specialised and customised proto type machinery ~~and~~ equipment and contents of Unit 20 built up over a number of years and the panic strongly opposed and unauthorised sale of the premises by Havbell DAC with an overall loss to be calculated, ~~he~~ the plaintiff met the qualifying criteria and was entitled to a range of Tax reliefs in a once off business retirement relief scheme/s with the Revenue Commissioners whereby an individual ~~exiting~~ selling his business and associated personally owned premises and equipment simultaneously, could benefit from a once off relief threshold of up to three million euro ~~in the region of 500K~~ on the sale of the Unit 20 pension investment property associated with the continuity of his business trading there up to/at the time of retiring from and selling his business and associated assets including the Unit 20 property.

(a)Havbell were fully apprised of the importance of this All in writing by Chris van der Lee & Associates with supporting documentation from fully qualified Chartered Tax Consultants Dermot Byrne & Associates and of the importance of this as part of and to enable the overall settlement of €1 million as agreed with Havbell to be achieved. Indeed, it was pointed out strongly that to proceed to re-activate the Receiver and sell ~~the Unit 20~~ property without agreement would cause very significant losses, damages and consequences.

23. The Plaintiff had performed on all negotiated agreement with both Permanent TSB and Havbell DAC however it is these parties that reneged on their agreements and in the process caused considerable personal anxiety, trauma and unnecessary financial loss and health damage to the plaintiff and his family.

24. Havbell are seeking unjust enrichment as they, prior to the alleged purchase of the Plaintiff's loans from Permanent PTSB P.L.C. (formerly Irish Life & Permanent P.L.C.) fully briefed and aware of the probable adjustments to account balances due to negligence, overcharging, miscalculation of interest charged and inappropriate penalty charges and possible pending legal consequences arising from breach of contract by the actions of Permanent TSB P.L.C.

25. It is the Plaintiff's claim that Havbell DAC purchased the mortgage/s at a significantly reduced/discounted price due to all the foregoing and potential adverse legal outcome following the PTSB's unwarranted and destructive actions contrary to prior agreements.

26. The Plaintiff because all his documents pertaining to PTSB and Havbell were destroyed by the receiver, reserves the right to bring further evidence to the court in support of his damages and negligence claim.



27. Appointment of alleged Receiver

1. It is the Plaintiff's claim that Havbell DAC did not have the capacity to appoint the receiver by power of attorney as it is the plaintiff's belief no power of attorney specific to the subject mortgage/s is or was in existence. Furthermore, Havbell could not rely on the mortgage indenture (7 April 1999) which incorporates 1999 Irish Permanent terms & Conditions as neither document contains a stand-alone power to appoint a receiver. Furthermore the "attorney" appointing a receiver a Mr. Karl Smith (Havbell Company Director) even if acting as company director under 2014 Companies act would not have had the capacity as he was/is not a sole director.
2. Notwithstanding, if Havbell had the power to appoint the receiver there is no power of possession explicitly contained in any security document presented by the defendants and the former charge holders and for clarity instead of breaking into the property the alleged receiver should have had his standing clarified by the court before breaking and entering in private constitutionally protected property by a security company K-Tech who have no statutory authority.
3. The alleged receiver when re appointed/re-activated without notice to the plaintiff dishonouring and contrary to agreement between Havbell and the plaintiff the terms of which were carried out by the plaintiff by action and deed. As stated above and in all the foregoing it is the plaintiff's view that Havbell did not have the capacity to appoint the receiver and even if they did, they could only appoint him within the confines of the Conveyancing Act 1881 & 1911 limiting him to being a rent receiver.
4. When re-activated the Receiver issued the plaintiff with a notice to empty the contents of the 4200sq.ft. factory premises. The premises contained specialised equipment tools machinery, office equipment stocks and company records. The Notice to empty the building amounted effectively to a two-day time span over a weekend in the middle of a Covid 19 lockdown when the Government were insisting people limit their contacts and 5 km restrictions were in place, an impossible feat without an undue risk to Health and Wellbeing especially given the Plaintiff's age/vulnerability group and an example of the arrogance and bullyboy behaviour and disregard for Public Health displayed by the Receiver, Link Asset Services and Havbell.
5. The receiver then proceeded to empty the entire contents of the premises to include all equipment tools and personal documents (PTSB docs etc) of the plaintiff stored in a large 3 drawer Chubb fireproof cabinet with the records for three companies only some of which were retrieved in very poor condition. In addition, the Customer Data records on circa 4,000 customers are missing.
6. The receiver/Havbell then placed the property for sale on a auction web site BIDX-1 without proper presentation 12 Nov 2020 and sold same for €451k.

7. It is the Plaintiff's claim that as stated inter alia Havbell did not have the capacity to appoint the receiver, Havbell entered into serious well-grounded negotiations ~~with~~ which the plaintiff entered into in good faith and by agreement between both parties the plaintiff employed a professional team to fulfil agreed targets at all times reporting to Havbell as scheduled. The Plaintiff has incurred & accrued significant costs and Professional Fees which will be sought as part of this claim.
  
8. It is the plaintiff's claim that he is also at the loss for replacement value of All specialised machinery and contents removed and for loss of value on the fire sale of the industrial premises plus the value of the once off Tax allowances and reliefs.

**The Plaintiff claims the following reliefs:**

**(a) Breach of Contract by Irish Permanent TSB PLC**

The Plaintiff claims substantial damages for the breach of contract by the predecessor of Havbell PTSB leading plaintiff to loss of property entitlement, Property rental income, personal distress, financial loss, loss of the purchaser for half his premises and the substantial clearance of his mortgage as agreed with PTSB. The Plaintiff also claims Unfair Terms in Mortgages on Unit 20 Beechwood Close.

**(b) Breach of agreement by Havbell**

The plaintiff claims substantial damages in the amount of loss of revenue tax reliefs of circa €500k and loss on the panic sale by the receiver of the industrial premises to a very significant amount and other damages to be advised.

**(c) Wilful destruction of equipment and rushed sale of property by receiver**

The plaintiff claims compensatory damages for breaking and entry, wilful destruction of his specialised machinery, stocks, equipment & tools, and if the receiver is found to be invalidly appointed aggravated damages for trespass negligence.

Havbell were fully aware of the consequences of purchasing a legacy litigation asset price for Yet Havbell were-seeking Compensation can only be assessed after interrogatories and discovery and with the assistance of the court

**(d) Aggravated damages.**

**(e) Costs.**

**(f) Liberty to Apply**