THE HIGH COURT

[2023] IEHC 364

RECORD NO. 2023/2 CA

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

DENIS CONNAUGHTON AND BRID CONNAUGHTON

DEFENDANTS

Ex tempore judgment of Mr. Justice Heslin delivered on the 9th day of June 2023

1. I propose to give a ruling now in relation to the case which proceeded today. Doing so will take a considerable amount of time, which is just as it should be, in order that the parties can understand the reasons for the court's decision.

2. On 12 January 2023, the Circuit Court ordered that the Plaintiff recover from the Defendants possession of the property comprised in Folio 35554 F of the Register of Freeholders Co. Limerick, described as property situated at Slugaire, Dooradoyle Road, Limerick (and I will refer to the foregoing as "the property" in this ruling).

3. The 12 January 2023 Order also placed a 'stay' on execution, for a period of 6 months from that date. In addition, a second order was made on 12 January by the learned Circuit Court Judge refusing the First-Named Defendant's application for discovery; and during the course of this ruling I will refer to the discovery application.

4. The First-Named Defendant, representing himself, issued a Notice of Appeal to this Court, which is dated 17 January 2023. The appeal proceeded today by way of a *de novo* hearing.

5. I am grateful to counsel for the Plaintiff and to Mr. Connaughton, who represented himself, for the clarity with which both Mr. Newman and Mr. Connaughton made their respective submissions.

6. On 30 May 2023, Ms. Ruth Tobin swore an affidavit in which she averred that, on 9 February 2023, the Plaintiff's solicitors wrote to the First-Named Defendant confirming that his appeal was

listed for hearing on 9 June, i.e., today. She also exhibited a copy of the relevant letter, which is dated 9 February. In addition, she exhibited the relevant certificate of postage.

7. Having regard to this evidence, I am satisfied that the appellant was put 'on notice' of today's hearing date in respect of his appeal.

8. The Civil Bill for possession pleads *inter alia,* the following with regard to jurisdiction. The proceedings are brought in the Circuit Court pursuant to s. 3 of Land and Conveyancing Law Reform Act 2013; they are proceedings brought by a mortgagee seeking an order for possession of land, which is the principal private residence of the mortgagors of the land, or a person without whose consent a conveyance of that land would be void; and the mortgage in question was created prior to 01 December 2009.

9. It is also pleaded that the court enjoyed jurisdiction, pursuant to s. 22(1) of the Courts (Supplemental Provisions) Act of 1961, and the property does not have a market value over €3 million.

10. These pleas mirror the contents of s. 3(1) of the aforesaid Act of 2013, and whereas s. 3(2) of the 2013 Act goes on to provide that such proceedings *shall* (and the mandatory term is used) be brought in the Circuit Court. In the manner more fully explained in this ruling, I am satisfied that jurisdiction has been established in light of s. 3 of the 2013 Act.

11. As to the Plaintiff's claim in the Civil Bill for possession, which issued on the 1st of August 2018, it is articulated in the following terms (and I quote):-

> *"AND THE PLAINTIFF CLAIMS:-*
>
> *A. An order for possession of the property more particularly described in the schedule hereto pursuant to section 62(7) of the Registration of Title Act 1964; Section 1(2) of the Land and Conveyancing Law Reform Act 2013; and Order 5B of the Rules of the Circuit Court;*
>
> *B. Such further or other relief as may be necessary or appropriate;*
>
> *C. The costs of the proceedings".*

12. Before proceeding further, it is appropriate to quote, *verbatim,* s. 62(7) of the Registration of Title Act 1964 (which I will refer to as "the 1964 Act") upon which section the Plaintiff relies.

13. S.62 of the 1964 Act concerns the *"Creation and effect of charges on registered land"* and it is not in doubt that the property in question in these proceedings comprises registered land over which a charge has been registered. Section 62(7) states the following:-

> *"When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said*

part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession".

14. In this way, s. 62(7) explicitly permits a registered owner of a charge to seek possession in a "*summary manner*". That is, of course, the route taken by the Plaintiff, by means of the Civil Bill for possession which gave rise to an application to the Circuit Court, resulting in the order appealed against today.

15. This Court has considerable guidance in relation to the significance and effect of s. 62 (7) as a result of Superior Court authorities. For example, in the Supreme Court's decision of 14th of April 2021 in ***Bank of Ireland Mortgage Bank v. Cody*** [2021] IESC 26, Ms Justice Baker examined the s. 62(7) jurisdiction, and it is appropriate, for the purposes of this ruling, to quote from para. 15, onwards, of the learned judge's decision in the *Cody* case:-

"*15. The jurisdiction conferred by that section applies to proceedings for possession by the registered owner of a charge once monies secured by the charge have become due. The subsection does not identify what is meant by the making of an application "in a summary manner", but the Court is given a discretion, if it so thinks proper, to order possession of the land to be delivered up, the consequence whereof is that the owner of the charge thereupon becomes a mortgagee in possession.*

16. In Bank of Ireland v. Smyth [1993] 2 IR 102, [1993] ILRM 790, Geoghegan J. rejected the notion that s. 62(7) confers a wide discretion which enables a court to refuse an application for possession on grounds of sympathy. He thought the words "may, if it so thinks proper" simply mean that the court should apply equitable principles in considering the application for possession, but not "sympathetic factors" and thus ensure that the application is made bona fide with a view to realising the security…"

16. Baker J then quoted as follows from the decision of Geoghegan J in *Smyth:*

"*The words 'may, if it so thinks proper' in s. 62, sub-s. 7 mean no more, in my view than, that the court is to apply equitable principles in considering the application for possession. This means that the court must be satisfied that the application is made bona fide with a view to realising the security*." (p. 111)

17. Para. 17 of Ms Justice Baker's decision in *Cody* continued as follows:

"*17. The procedure was explained in the decision of this Court in Irish Life and Permanent v. Dunne [2015] IESC 46, [2016] 1 IR 92, in which it held that any court seeking to make an order for possession under s. 62(7) must first ask itself whether, as a matter of law, it can properly be said that the monies are secured and are due*".

18. These foregoing *dicta* makes clear that three fundamentally important questions, which this Court must answer in the present case, comprise the following: -

(i) are the relevant monies *secured* by way of mortgage?

(ii) has there been *default,* resulting in the secured monies having become *due*? and;

(iii) is the application made *bona fide* with a view to realising the security?

19. Guided by the authorities which illustrate that these are the three key questions for the court to ask in this application, I now turn to the evidence which is before the court to see what answers to those three questions emerge.

20. Ms Eva McCarthy swore an affidavit on 4 July 2018 on behalf of the Plaintiff. At para. 1, she makes the following averments [and I quote]:-

> "*I am the litigation manager for Start Mortgages Designated Activity Company and employed by Start Mortgages Holdings Ltd. (SMHL) which is the parent company and sole stakeholder of Start Mortgages Designated Activity Company. SMHL manages and services all loans held by the Plaintiff including the loan which was advanced by the Bank of Scotland Ireland Limited (BOSI) to the defendants. I make this affidavit on the plaintiff's behalf and with its authority from facts within my own knowledge and from a diligent perusal of the plaintiff's books and records in relation to the defendants and the account of the defendants herein save where otherwise appears and where so otherwise appearing I believe the same to be true*".

21. Those are uncontroverted averments. At paragraph 7, of the said affidavit, she avers that the Defendants mortgaged and charged the property to BOSI, pursuant to an indenture of mortgage and charge, dated 01 September 2005. She exhibits a copy of same, together with a copy of BOSI's "Home Loan Mortgage Conditions" applicable thereto.

22. Clause 1.2 of the Mortgage states:

" '*Conditions' " means the Bank's Home Loan Mortgage Conditions attached hereto".*

23. It is also noteworthy that, pursuant to clause 5.3 of the mortgage, the Defendants irrevocably and unconditionally consented to the Bank, at any time, transferring or assigning the benefit of the mortgage and charge. In a manner presently explained, such an assignment took place, ultimately to the Plaintiff herein.

24. It is appropriate at this juncture to note what appears in Clauses 8 and 9 of the mortgage which was signed by both of the Defendants. Looking first at Clause 8, it is entitled "*The Bank's powers and the enforcement of the mortgage*". Clause 8.1 begins:-

> *"At any time after the bank has demanded the repayment of the debt or following a request by the borrower and insofar as the law allows, the bank may. . ."*

Clause 8.1 (c) goes on to state: -

> " *. . . take possession of the property".*

25. Turning to Clause 9, it is entitled *"Events of default*", and it begins in the following terms:-

> "*9.1 The bank shall not exercise any of the powers provided for in Clause 8 hereof or conferred by any enactment until any of the following events shall occur…"* and events of default are specified from para. 9.1 (a) onwards.

26. At Paragraph 9 of her affidavit, Ms McCarthy refers to, and exhibits, the offer of mortgage loan, dated 25 August 2005, pursuant to which a facility in the sum of €450,000 was advanced to the Defendants, by way of term loan.

27. I pause at this juncture to say it is not asserted by the Defendants that €450,000 was not advanced to them.

28. The loan offer exhibited specifies the Account Number in respect of the facilities as follows: *"3626200".* The period of the loan agreement is stated to be 20 years; involving 240 monthly repayments. The said offer contains the signatures of both Defendants, who are identified therein as the "*borrowers*" and their signatures are witnessed. Ms McCarthy also avers *inter alia* that the funds were advanced for the purposes of re-mortgaging the property.

29. At paragraph 11, Ms. McCarthy avers that BOSI advanced the loan facility to the Defendants on 23 November 2005.

30. I pause to observed to observe that this is an uncontroverted averment and, moreover, there is objective evidence supporting that, in the form of a statement of transactions which I will presently come to.

31. At paragraph 10, Ms McCarthy avers *inter-alia* that, whereas the loan advanced to the Defendants was subject to a 'tracker' interest rate, BOSI offered an interest-rate amendment by letter dated 12 June 2007, whereby the interest rate would be fixed for the period ending on 31 January 2010 and would be variable thereafter. Ms McCarthy goes on to aver that the Defendants signed the relevant interest amendment documentation, on 26 June 2007, and she exhibits a copy of that signed documentation.

32. It is appropriate to note that the copy documentation exhibited in relation to the interest rate amendment identifies the Defendants by name; contains their signatures by way of consent; and specifies the Account Number in respect of their loan facilities, as being "*3626200*". This is of course the same account number as originally specified in the Loan Offer dated 25 August 2005, which the Defendants accepted.

33. At para. 15 of her affidavit, Ms. McCarthy exhibits copies of Feb 2015 correspondence, from BOSI to the Defendants, giving notice that their loan facility and related obligations would be transferred to "Start Mortgages Limited".

34. At paragraph 3 of her affidavit, Ms McCarthy exhibited a copy of the relevant folio in respect of the property, being Folio 35554 F, Co. Limerick, and it is appropriate to look at certain of its contents, as follows.

35. As would be normal, Part I identifies the "*Property*". Part II concerns "*Ownership*" and records that the Defendants are full owners. Part III concerns *"Burdens and notices of burdens*". Entry number 4 in Part III is in the following terms:-

> *"17-Aug-2009 Charge for present and future advances repayable with interest…"* (and a dealing number is given) *"BANK OF SCOTLAND (IRELAND) LIMITED is owner of this charge. The title to discharge was transferred by virtue of a cross-border merger made in accordance with directive 2000 556 EEC of the European Parliament and of the Council that was approved by order of the Court of Sessions of Scotland to take effect at 23:59 hours GMT on 31 December 2010, see entry number 5 below.*
> *The title to this charge has been transferred, see entry number 6. 26 May 2017…"'*

36. Entry number 5 is dated 9th of April 2015 and recorded that "BANK OF SCOTLAND PLC' was owner of the charge at entry number 4. Entry 5 has been deleted, and entry number 6 appears in the following terms:

> *"10 April 2015 - Start Mortgages Limited is the Owner of the charge registered at Entry No. 4".*

37. For the sake of completeness, the final entry, being entry number 7 in Part III of the property's Folio, records the registration of a judgment mortgage on the 5th of April 2018 against the First-Named Defendant obtained by an entity described as 'Precision Blast Systems Ltd' in certain District Court proceedings with a 2017 record number; and the date of the judgment appears to be the 7th of February 2018. It does not seem to me to be uncontroversial to say that this is, on the face of it, evidence of financial difficulties which the First-Named Defendant was experiencing as of 2017 and 2018.

38. Paragraphs 12 and 13 of Ms McCarthy's affidavit deal with the 'cross-border merger' which is referred to in entry number 4, at part 3, of Folio 35554 F.

39. With respect to the acquisition of the charge by Start Mortgages Limited, Ms McCarthy makes the following averment at paragraph 14 of her affidavit:-

> "*By deed of assignment executed between Bank of Scotland plc. and Start Mortgages Limited on 20 February 2015, Bank of Scotland plc. unconditionally, irrevocably and absolutely assigned to Start Mortgages Limited all such rights, title and interest as detailed therein in the loan agreement and the mortgage and charge as referred to by your deponent above. I beg to refer to a true copy of the operative portion of the said deed of assignment upon which marked with the letters 'ENCC 6' I have signed my name prior to the swearing hereof. Terms which are confidential and commercially sensitive, and which are not relative to the within proceedings have been redacted".*

40. Looking at the exhibited Deed of Assignment, although it is clear that much has been redacted, one can see that '*Schedule 1'* contains the following account number under the heading *"Primary Account No."* "*3626200".* This is one and the same account number as appears in the original loan

offer (which the Defendants accepted, in 2005), and which also appears in the Defendants' acceptance of the interest rate amendment (in 2007). In other words, the contents of the deed of assignment objectively support what is an uncontroverted averment of an absolute assignment.

41. At para. 16 of her affidavit, Ms McCarthy exhibits correspondence from Start Mortgages Limited to each of the Defendants giving notice to them of its interest in their facilities; confirming that it would be servicing the loans going forward; and explaining the practical implications of the transfer from BOSI to Start Mortgages Limited.

42. It is appropriate to refer at this juncture to s. 31 of the 1964 Act, which refers to the conclusiveness of entries in the Register as to ownership. Section 31 (1) of the Registration of Title Act 1964 is entitled *"Conclusiveness of Register"* and begins in the following terms:-

> "*The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon. . .*".

43. In opposition to today's application, the First-Named Defendant does not say that he has brought legal proceedings challenging the conclusiveness of entries in his Folio on the basis of alleged fraud or mistake and, in the manner I will presently explain, there is simply no evidence today of any fraud or mistake, as opposed to what amount to mere or 'bare' assertions.

44. Therefore, taking the evidence in the form of the contents of the Folio, with respect to the property, in particular Part III concerning burdens, in conjunction with the relevant statutory provision in the form of s. 31 (1) of the 1964 Act, this Court has, today, conclusive evidence before it to the effect that, as and from the 10th of April 2015, Start Mortgages Limited, and no other party, was the registered owner of the relevant mortgage and charge. This was very obviously as a result of a transfer or assignment in respect of ownership from the original mortgagee, and we saw that this was Bank of Scotland. We also saw that one of the terms agreed to by the Defendants was to consent irrevocably to such transfer or assignment.

45. Continuing then to look at Ms. McCarthy's affidavit, at paragraph 18, she avers that, by means of an ordinary resolution pursuant to the Companies Act 2014, Start Mortgages Limited, a private company limited by shares, converted to a designated activity company, on 21 October 2016. She also exhibits a true copy of the Certificate of Incorporation on Conversion to a Designated Activity Company (or "DAC" for short), which certificate is dated 21 October 2016.

46. At paragraph 19, Ms McCarthy refers to and relies upon S. 63 (12) of the Companies Act 2014. This section provides as follows: -

> "(12) *The re-registration of an existing private company as a designated activity company pursuant to this Chapter shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings*

which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status".

47. I am satisfied that the net effect of this provision, coupled with s. 31 of the 1964 Act, is that the court has conclusive evidence before it, today, that the Plaintiff is the registered owner of the mortgage and charge which was created by the Defendants, as mortgagees, pursuant to which the monies borrowed by them are secured on the property in question, as registered.

48. As such, the Plaintiff is entitled to exercise all the rights conferred, by the mortgage and by law, on the registered owner of the charge. Therefore, I am satisfied that the evidence before the court allows for a finding that the relevant monies are *secured* on the property.

49. I now turn to the question of *default.* As I mentioned earlier, section 9 of the Mortgage Conditions, deals with events of default and clause 9.1 (a) specifies the following:

". . . the borrower fails to pay any sum on the due date for payment as outlined in the facility letter or any other sum due and payable to the bank".

50. Clause 9.2 (b) provides *inter-alia* that if an event of default has occurred, the bank may at any time demand immediate payment of the sums outstanding. At paragraph 20 of her affidavit, Ms. McCarthy avers inter-alia that:- "*The defendants have repeatedly defaulted on the repayment of sums due to the plaintiff".* That is an uncontroverted averment. It is also underpinned by objective evidence supporting it.

51. At paragraph 21, of her affidavit Ms. McCarthy avers that, on 22 March 2018, the Plaintiff wrote to the Defendants, demanding payment within 7 business days, of the loan balance then due and owing by the Defendants, which stood at €483,625.99. She goes on to aver that, despite this demand, the Defendants did not discharge the loan balance due and owing. The relevant correspondence is exhibited, and it comprises letters of the 22nd March 2018, to each of the Defendants, both of which letters begin in the following terms:-

"*As of 28 February 2018, your account has arrears of €12,924.89 which constitutes an event of default. We now formally demand payment of the balance due on the mortgage amounting to €483,625.99 within seven business days. In the event that you fail to pay the balance before 4 April 2018 we shall instruct our solicitors to institute legal proceedings for the possession of your mortgaged property. The potential outcome to you may be the loss of your property. Payments can be made by sending a bank draft or cheque made payable to Start Mortgages DAC to the address listed above or by contacting our Arrears Support Unit ..."*

52. Ms McCarthy goes on to aver, at para. 22, that, on the 6th of April 2018, the Plaintiff's solicitors wrote to the Defendants, calling upon them to deliver up vacant possession of the property and that, despite this request, possession has not been delivered up. That correspondence is also exhibited.

53. At para. 23, it is averred that arrears on the facility have continued to increase since the demands of 22 March 2018. Particulars of the debt are given, made up of the loan balance and the loan arrears as of 30th of June 2018.

54. Ms. McCarthy also exhibits a true copy statement of account, dated 2nd of July 2018, showing the transaction history on the loan account. The contents of that statement reflect her averments. In particular, if one looks at the statement, one can see that it records inter-alia an advance of €450,000 made on 23rd of November 2005. The statement proceeds to record entries for debits, credits and the then balance, on an ongoing basis. The last significant credit entry is for €600, in April 2015, and this is described as a "*bank payment*". No bank payments are recorded thereafter.

55. The only further credit entries, which appear between 30th of April 2015, and 31st of August 2016, inclusive, are described as "*tax relief*" (and these comprise of sums of between €75, and a single cent).

56. Ms McCarthy avers, at para. 24, that "…*the defendants are unable to meet their repayment obligations under the loan agreement"*. The objective evidence undoubtedly supports such an averment. I should also say that it is not disputed by the First-Named Defendant that the last payment made was indeed made in April 2015, some eight years ago.

57. Recalling the second of the important questions which this court has to decide, I am satisfied that the Plaintiff has established that the Defendants have *defaulted* in respect of their obligations to the Plaintiff, resulting in the monies becoming *due* by them to the Plaintiff and that, despite demands, the monies due have not been paid. Earlier I made reference to the entitlements of the Plaintiff in such a scenario, including to seek possession. This is in the context of s. 62 (7) of the 1964 Act, which I have previously quoted *verbatim*.

58. At paragraph 25 of her affidavit, Ms McCarthy refers to the fact that, under the mortgage conditions, the Plaintiff has the power of sale and all other powers conferred upon Mortgagees, by the Conveyancing Act of 1881 (subject to certain modifications, in particular, that the power of sale conferred therein is exercisable without the restrictions imposed by s. 20 of the 1881 Act).

59. At para. 26, Ms McCarthy makes the following averments: -

> "*By virtue of the aforesaid default by the defendants, the plaintiff is desirous of exercising the said power of sale. I say and believe and am so advised that it would be difficult to sell the property as long as the defendants or any person remains in possession of same. I am further advised and believe that the price of the property would be greatly enhanced of the property is sold with vacant possession".*

60. The foregoing are uncontested averments, and they speak directly to the third question which this Court has to decide. In other words, this evidence allows for a finding that the present application is made *bona fide,* with a view to realising the security.

61. From paras. 27 to 30, Ms McCarthy makes averments to the effect that the Plaintiff has complied in full with the Central Bank's "Code of Conduct on Mortgage Arrears" (or "Code").

62. As averred at para. 29, by letter dated 27 August 2015, the Plaintiff wrote to the Defendants, pursuant to provision 28 of the Code, notifying them that they would be classified as '*not co-operating'* if they did not carry out specific actions within 20 business days, in order to enable the Plaintiff to complete an assessment of their circumstances. That correspondence is exhibited and, as the letter makes clear, what was required of the Defendants was to complete and return a "Standard Financial Statement" (or 'SFS'); or to make contact to arrange a time to provide details in order to complete same.

63. The 27th of August 2015 letter to the Defendants went on to *inter alia*, specify the implications of being classified as not-co-operating; the letter give details of where the Defendants could seek advice; and the letter urge the Defendants to act immediately.

64. At para. 30, Ms McCarthy avers that the Defendants did not comply with requests in the 27 August 2015 letter. She goes on to aver that, in those circumstances, the Plaintiff wrote to the Defendants on 13 October 2015, in accordance with provision 29 of the Code, notifying the Defendant that they had been classified as not-cooperating and that the Plaintiff was in a position to immediately commence legal proceedings.

65. That correspondence is also exhibited. Among other things, the 13th of October 2015 letter to the Defendants gave notice of their right to appeal, within 30 business days, the Plaintiff's decision to classify them as not co-operating.

66. I pause here to observe that there is no evidence before the court that any such appeal was brought by the Defendants.

67. In light of the evidence to which I have referred in this ruling, thus far, and having regard to the averments made by Ms. McCarthy at paras. 33 and 34, I am satisfied that the Circuit Court enjoyed jurisdiction to hear the claim, just as this Court enjoys the jurisdiction to deal with the appeal, by way of a fresh hearing.

68. On the 11th of July 2018, Ms. Georgina Lanigan, solicitor for the Plaintiff, swore an affidavit in which she averred *inter alia* that the Plaintiff was advised of the matters prescribed by s. 14 of the Mediation Act 2017 prior to the institution of the proceedings.

69. On the 30th of July 2018, the Plaintiff's solicitor furnished a Certificate to the effect that the requirements set out in Circuit Court Practice Direction CC17, dated the 10th of August 2015, relating to the issuing of proceedings for possession, had been complied with.

70. It will be recalled that the proceedings were issued, by way of Civil Bill for possession, on 1st August 2018. On the 5th of November 2018, the Circuit Court made an order (i) granting the Plaintiff liberty to serve the Civil Bill by prepaid ordinary post, addressed to the property; (ii) giving 10 days for the entry of an Appearance (with the 10 days 'running' from the date of posting of the Civil Bill and a copy of the court's order); and (iii) the Plaintiff was also granted liberty to serve all subsequent documents in this manner, namely, by ordinary prepaid post, addressed to the property.

71. On the 3rd of May 2019, Ms. Grainne Lowney swore an affidavit in which she averred that, on 22 November 2018, she served, by ordinary prepaid post, addressed to the Defendants at the property, all of the following (i) the Civil Bill for possession; (ii) Ms. McCarthy's affidavit and the exhibits thereto; (iii) the Statutory Declaration in respect of the Mediation Act; and (iv) the Circuit Court's 5 November 2018 order, which granted, as I say, substituted service.

72. Ms. Lowney went on to aver that the envelopes had not been returned undelivered She also exhibited two certificates of posting, addressed to the First and Second-named Defendants, respectively, both of which are dated the 22nd of November 2018.

73. I refer to the foregoing i.e. conclusive evidence as to service of the proceedings as it is beyond doubt that the Defendants and each of them were away of the averments and exhibits relied upon well in advance of the hearing. It is fair to say that in submissions the First-Named Defendant contended that he got less than an appropriate hearing in the Circuit Court. In the manner touched upon later in this ruling, and for the reasons set out in it, I am entirely satisfied that there is simply not a scintilla of evidence to support the proposition that there was anything less than a fair hearing in the lower court.

74. Continuing with the evidence before the court, there is a supplemental affidavit proffered by Mr. Justin Nevin, Litigation Manager, on behalf of the Plaintiff. It is a short affidavit. Mr. Nevin avers, on behalf of the Plaintiff, that, as of 30th of April 2019: (i) the balance outstanding on the Defendant's loan account stood at € 491,880.06; (ii) that arrears amounted to €21,150.03; (iii) that the then monthly payment due by the Defendants to the Plaintiff was €587.51; and (iv) that the Defendant's loan account was 36 months in arrears.

75. This fortifies me in the view as to *default* with respect to secured monies having been established. Mr. Nevin went on to aver that the Plaintiff had received no payments from the Defendants since the swearing of the affidavit on the 4th of July 2018, that being Ms. McCarthy's affidavit, and he further averred that the last payment made by the Defendants was on the 7th of April 2015, in the sum of €600. In the manner that I have already touched on, that accords precisely with the contents of the statement in respect of the transaction history on the Defendant's account.

76. Mr. Nevin also exhibited a mortgage statement covering the period from the 23rd of November 2005 to the 30th of April 2019, and the contents of that statement are consistent with his averments.

77. On the 1st of July 2019, Ms. Lowney swore an affidavit in which she averred that she served Mr. Nevin's supplemental affidavit, as sworn on the 3rd of May 2019, together with the exhibit thereto by ordinary prepaid post to the Defendants at the property on the 27th of June 2019. Ms. Lowney went on to aver that the envelopes had not been returned undelivered.

78. Ms. Lowney also exhibited copies of two letters, addressed to the First and Second-named Defendants, respectively, as well as two certificates of postage addressed to the First and Second-named Defendants, all being dated the 27th of June 2019.

79. As well as enclosing Mr. Nevin's supplemental affidavit, sworn on the 3rd of May 2019, and the updated statement of account, which Mr. Nevin exhibited, those letters notified each of the Defendants that, when the proceedings came before the Circuit Court, the Plaintiff's solicitors had instructions to seek an order for possession and that it was important for the Defendants or their legal representatives to attend. I note this in circumstances where, among the submissions made by the First-Named Defendant, is that he was taken by surprise in the Circuit Court, to the effect that he was unprepared to meet an application for possession. The foregoing evidence, it seems to me, allows for a contrary finding, but that observation is very much an aside, given that today is a hearing *de novo.* Thus*,* nothing turns on that observation, which is made for the sake of completeness.

80. On the 16th of October 2019, the First-Named Defendant signed a document entitled "*Special motion for discovery".* This was accompanied by a document entitled "*Special affidavit in support of motion for discovery"*, and that was sworn by the First-Named Defendant on the 16th of October 2019. I took several hours yesterday to familiarise myself with the entirety of the papers as filed and the contents of the motion and grounding affidavit in respect of the First-Named Defendant's application for discovery can fairly be summarised as follows:-

- there was, in effect, a blanket denial of the debt;
- the Plaintiff's claim was denied in equally 'bald' terms;
- the Plaintiff's right to make a claim was denied;
- jurisdiction was denied;

81. Among other things, the First Defendant stated *inter-alia* that "*…I do not recognise judicial functions nor quasi-judicial functions of the State…"*. He went on to state *inter alia* that "*… judicial decisions in regard to family home possessions appear corrupt, in spite of same breach of contracts. I say that possession of real property is nine tenths of the law and that all any court can do, if commenced correctly with original jurisdiction, is determined one tenth of the law; specifically in regard to claim upon title…*".

82. Among other things, the first Defendant asserted an entitlement to what he described as "… *sworn proof of ownership of the current court seal, and its origins, prior to any recognition".* I pause here to make the following observation. This Court has been tasked with hearing the case today. There is no burden of proof *on* the Court which must be satisfied *by* the Court as a condition of entering on the hearing. Any contention to the contrary is, with respect, wrong-headed. Nor, it is fair to say, is this an issue which featured in the oral submissions made today by the First-Named Defendant.

83. Continuing, then, to summarise the gravamen of his application for discovery, whilst reference was made *inter alia* to the Unfair Terms in Consumer Contracts Directive No. 93/13/EEC, it does not appear to me that any specific terms, be that in the loan facility, mortgage and charge, or the mortgage conditions, is identified and said to be unfair in that context.

84. The First-Named Defendant seeks, by way of discovery, that a director of the Plaintiff swears an affidavit of discovery in respect of what he described as "… *a sworn and attested copy of the alleged unaltered on the face original wet ink signed Master trust loan application, to include the general Master trust loan conditions and Master trust special loan conditions".*

85. A demand by way of discovery is also made for what the First Defendant described as the "*Master trust loan offers*"; "*Master trust loan offer acceptances*"; "*Master trust general loan conditions*"; "*Master trust special loan conditions*"; and the "*Master trust facility letter*".

86. The First Defendant also calls upon the Plaintiff to provide a date, time and place for his experts to forensically view what he described as "*… the alleged unaltered on the face original wet ink signed*…" documents which he claimed to be entitled to obtain, by means of discovery.

87. The First-Named Defendant also states inter alia "… *It is further conclusive that the alleged trust is a sham device as set out by the applicant in his claim. Thus, the First-Named respondent herein motions the court for discovery of the following…."* and what follows is a list of the documents to which I have made reference. This list includes "*original wet ink*" documents signed by the Plaintiff/Respondent in the form of the loan application; loan offer; acceptance; mortgage and charge; rateable valuation certificate; statement of account; the cost to the Plaintiff of the purchase from Bank of Scotland, of the facility; as well as what the First Defendant described as "*sight of all the original wet inked Deeds of Transfer and Assignments".*

88. Ms. McCarthy swore a supplemental affidavit on the 18th of October 2022 in response to the first Defendant's application for discovery, and the averments made therein can fairly be summarised as follows:-

- it was inappropriate to seek discovery, in the context of summary proceedings seeking possession;
- without prejudice to same, all relevant documents have already been exhibited by the Plaintiff;

- Ms. McCarthy positively averred, at para. 6 of the Supplemental Affidavit of the 18th of October 2022, that she again compared the copy documents with the originals and can confirm that the exhibits are true and accurate copies of the originals.

89. I pause to say that this is uncontroverted by way of averments and it is evidence as to the *fact* that the copies exhibited constitute true copies of the originals.

90. Continuing by way of a summary of the averments in the replying affidavit, they include averments to the effect that the documents sought by the First Defendant to the extent that they have not already been exhibited, are entirely irrelevant to the proceedings and, therefore, unnecessary. It is averred that the Defendants have not in fact find sworn any Replying Affidavit in response to the Civil Bill for possession and, accordingly, nothing asserted by the Plaintiff in the proceedings was, strictly, in dispute. I pause here to observe that that is of course the case, but I am taking the contents of the affidavit grounding the discovery motion as articulating the First-Named Defendant's opposition to his claim. Later in this ruling I will address a further affidavit sworn by the First-Named Defendant a mere 9 days ago.

91. Continuing then to summarise the averments in Ms. McCarthy's supplemental affidavit: issue was taken with the First Defendant's criticisms of the court below and the County Registrar with respect to the Unfair Terms in Consumer Contracts Directive; it is averred that the Plaintiff is seeking to enforce the core terms of the agreements between the parties, which, it is contended are not subject to scrutiny under the directive. I pause to say that that is an entirely fair observation to make.

92. It is also averred by Ms. McCarthy that the proceedings concerned an application for possession of property, in circumstances where the Defendant borrowed money from the Plaintiff's predecessor, which money was repayable over a period of years on a monthly basis subject to interest. It is averred that the terms and conditions provided expressly that if the Defendants failed to repay the monies advanced, in accordance with the terms of the facility, the property was at risk, and the Plaintiff would be entitled to enforce its security and seek possession of the secured property. It is averred that these represent the core terms in respect of the legal relationship between the parties, and that these are the core terms which are sought to be enforced. Again, I pause to observe that these are entirely accurate averments with respect to the legal position having regard to the evidence before the court. It is also averred, and again appears to me to be entirely consistent with the objective evidence before the court, that at all material times in executing both the facility letter and mortgage, the Defendants were represented by a solicitor and had every opportunity to obtain legal advice on the contents of the documents they were signing, and the consequences of a breach of the loan facility and/or mortgage.

93. It is further averred by Ms. McCarthy that the Defendants have not disputed borrowing the monies in question and have not disputed their default. Again, I pause to say that this is entirely so. There is no allegation that monies were not *borrowed*. There is no claim that there has been no *default.*

94. Finally, by way of summarising the contents of Ms. McCarthy's Replying Affidavit, it is contended on behalf of the Plaintiff that it has established that its ownership of the charge as registered owner, and that is undoubtedly true. It is also contended that the Plaintiff has established that s. 62(7) of the 1964 Act is engaged, and that is also entirely so. It is contended that the Plaintiff has established jurisdiction, and again that is so. It is also contended that the Plaintiff is *prima facie* entitled to an order for possession, and I entirely agree. No affidavit was sworn by the first Defendant in response.

95. Putting to one side that fact that the First Defendant purported not to recognise the Court, but simultaneously claimed to be entitled to a Court order for discovery, it is clear, even from the first paragraph of the First Defendant's motion, that his request for discovery was based on the proposition that the Plaintiff had made what he described as "*unverified claims".* That is simply not so. On the contrary, the Plaintiff has verified its claim by means of sworn affidavits, sworn averments, and the exhibiting of relevant documentation which, in objective terms, entirely supports and is consistent with the averments made.

96. It is also fair to say that underpinning the First Defendant's application for discovery - and this is borne out by the submissions made today by the First-Named Defendant, which I will presently come to - is the proposition that something untoward is at play, which discovery is required in order to uncover, or illustrate. Indeed, he uses terms in his discovery application such as a "*sham device*". I am entirely satisfied that this is nothing more than a 'bald' assertion, which is simply not underpinned by a shred of evidence. On the contrary, this bare assertion runs entirely contrary to, and is entirely undermined by, the conclusiveness of entries in the Defendant's Folio, namely Folio 35554 F, in respect of the Plaintiff's ownership of the mortgage and charge.

97. Indeed, the contents of that Folio illustrates why there was, and is, no entitlement on the part of the First Defendant to be given the discovery he seeks. It is not unfair to summarise matters by saying that, despite having already been furnished with copies of all the relevant documents, and based on an entirely unsupported assertion that some sort of wrongdoing is at play, the Plaintiff is seeking to embark on a "fishing expedition", namely, a trawl through documents, in the hope of finding something to assist him.

98. Even if these were plenary proceedings – and, crucially, they are not - it would be entirely inappropriate and unjust to permit such a fishing expedition which would also, of course, be entirely wasteful of time and cost. The premise upon which the First Defendant sought discovery is a fundamentally flawed one, because it nets down to a mere assertion of wrongdoing which lacks any evidential basis. I am entirely satisfied that discovery must be refused in its entirety regardless of how it is framed, be that "*wet ink*" signed documents, or otherwise.

99. To explain further why this is so, an example might be of assistance in terms of the parties understanding the reasons behind the court's decision making. Take, for example, Mr.

Connaughton's documents, in other words documents bearing his signature. First, the Defendants do not deny that they signed the loan offers or the mortgage. This is not a situation where the Defendants claim that signatures were forged. This is not a situation where they claim that they signed documents under duress or undue influence, or that they were misled as to the meaning of the documents which they signed and, as I touched on earlier, the evidence is to the effect that they had legal advice at all material times.

100. Furthermore, and leaving aside the reality that not only has it been re–averred that all originals have been compared with the copies and are consistent with each other, and leaving aside the reality that the original mortgage was in court today and viewed by both parties and by the court, a fundamental and insurmountable difficulty facing the First-Named Defendant is that the mortgage reflective of the loan agreement has long since been registered and it is unnecessary to quote again s. 31 of the 1964 Act. Whether the First-Named Defendant appreciates this or not, no expert evidence is required for this Court to know that it is common practice for two mortgages, in other words two exact versions of the same mortgage, to be executed, one for each side as it were. Both are originals, each being a counterpart of the other. It is completely irrelevant and unnecessary for the First-Named Defendant to get discovery of documents he executed, in circumstances where he already has true copies of them and it is equally irrelevant and unnecessary that he have discovery of the documents concerning the assignment.

101. Mr. Connaughton was not a party to the transaction between Bank of Scotland and Start. Neither of the parties to that transaction take issue with the signature on the relevant assignment; the validity of the execution; or the validity of the terms. That being so, it seems to me that it is simply not open to Mr. Connaughton to do so. Thus, he is not entitled to be given a "wet ink" copy of the assignment without, it also has to be said, providing any *reason* for seeking same, other than what might be taken to be the implicit desire to try and find on examining that documentation something which the First-Named Defendant hopes may assist him. However, the reality – and it is an insurmountable problem for the First-Named Defendant - is that none of this can assist him, because there is not a shred of evidence casting doubt on the validity of the terms of the assignment; or on the validity of the averments made with respect to the assignment; or any other documents; all of which, as I say, have now been *registered.* All we have is a 'bare' assertion on the part of Mr. Connaughton to the effect that something "*highly suspicious*" is at play in respect of documents, in particular, the assignment.

102. Section 27 (2) of the Courts of Justice Act 1936 is of relevance in the present case, in that it states the following, under the heading of 'Appeals from the Circuit Court in civil cases heard without oral evidence' (which applies to the case from the court below):-

> "*(2) Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made…."*

I pause here to say that the will of the Irish people, as expressed through legislation enacted by the Oireachtas, is for this appeal to proceed by way of a *de novo* hearing. If the First-Named

Defendant did not inform himself that this is the way his appeal would proceed, it seems to me that, with all due respect, he cannot lay the blame for that at the door of anyone else. Section 37 (2) concludes:-

> *"…. but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal"*.

103. Order 61, r. 8 of the Rules of the Superior Courts amplifies the foregoing in the following manner:-

> "8. *Where any party desires to submit fresh evidence upon the hearing of an appeal in any action or matter at the hearing or for the determination of which no oral evidence was given, he shall serve and lodge an affidavit setting out the nature of the evidence and the reasons why it was not submitted to the Circuit Court".*

I pause here to observe that this is something the First-Named Defendant has not done. O. 61, r. 8 continues:-

> *"Any party on whom such affidavit has been served shall be entitled to serve and lodge an answering affidavit or to apply to the Court on the hearing of the appeal for leave to submit such evidence, oral or otherwise, as may be necessary for the purpose of answering such fresh evidence, provided, however, that the Court may at any time admit fresh evidence, oral or otherwise on such terms as the Court shall think fit, and may order the attendance for cross-examination of the deponent in any affidavit used in the Circuit Court or the High Court".*

104. It seems to me that, not having complied with the provisions of O. 61, r. 8 as to serving an affidavit setting out the reasons why evidence was not submitted to the Circuit Court, the First-Named Defendant has deprived the Plaintiff of the opportunity to put on affidavit any answer. However, and more fundamentally - because it is clear that this Court does enjoy a wide discretion to admit fresh evidence - the First-Named Defendant has never proffered the *reason* why evidence which he seeks to have admitted today was not put before the Circuit Court.

105. It is in that context that I allowed the First-Named Defendant's 1st of June 2023 affidavit to be opened in full *de bene esse*. The key propositions which are articulated in that affidavit can fairly be summarised as follows. The First-Named Defendant claims that there is a lack of jurisdiction. He asserts that the case should go to plenary hearing. He contends that the summary process was wrongly chosen by the Plaintiff. He asserts that the Circuit Court Judge was misled into believing that the Plaintiff had a valid entitlement to possession in a summary manner. He asserts that the Plaintiff is not the holder of his mortgage. He contends that the Plaintiff is hiding the true position. He submits that if the Plaintiff is confident of its claim, then discovery should not trouble the Plaintiff. He contends that a course of dealings as between himself and Bank of Scotland with respect to the tracker mortgage issue, in effect, means that the Plaintiff is not the true mortgagee. He contends, with reference to Central Bank principles of doing no further harm, that it was not appropriate for the Plaintiff to proceed against him, and the gravamen of his submission is that

Central Bank principles have been breached. I pause to observe that it is for the Central Bank to determine whether any principle which it has jurisdiction over has been breached. That is not an issue in the present case. A key theme in the affidavit of the 1st of June is that the Plaintiff has created an account with a number to which the first Defendant is a stranger. He asserts that he gave no permission for this. He asserts that a sham device has been created. Reliance was placed on what the First-Named Defendant describes as the "*alleged mortgage",* being signed on the 1st of September 2005, and it undoubtedly was, but stating that it was made on the 11th of September 2005.

106. It is certainly the case that on the first page of the mortgage, the date of the 1st of September 2005 is given. That reflects the date on which the signature of the First-Named Defendant and the second was affixed. But it is true that the mortgage begins with a line that it was made on the 11th of September 2005. I am entirely satisfied, however, that nothing turns on that for the purposes of the application which this Court has to decide, and I will presently return to the reasons why. It was submitted that there was no consideration for the contract between the parties, in particular, the First-Named Defendant asserts that what he calls the "*alleged funds"* were, in his terms, "*allegedly advanced*" before the 1st of September 2005 and, thus, he contends, no funds were advanced on foot of the contract.

107. There is clear evidence in the form of averments and objective evidence in the form of a transaction statement to the effect that the funds were advanced in November of 2005. The First-Named Defendant asserts that the foregoing calls into question what he describes as the due diligence and procedures of the Land Registry in the context of registration. I pause here to say that this is, in substance, an attack on the conclusiveness of the Register, without, it has to be said, any evidence of fraud or mistake being tendered and without, as I observed earlier, any proceedings having been brought which would seek to have the Register's entries amended.

108. Among other things, the First-Named Defendant says that he has no recollection of signing the mortgage. He says that the deed of assignment, dated the 20th of February 2015, was "*fabricated*" to give the impression that his mortgage was included in what he characterises as the alleged sale. Again, this allegation of fabrication is utterly unsubstantiated by way of evidence. It is a clear example of a 'bare' or mere assertion.

109. I also carefully considered the oral submissions made today by Mr. Connaughton which were made with clarity and no little skill. They can fairly be summarised as, firstly, reflective of the contents of his 1st of June 2023 affidavit. Secondly, his 1st of June affidavit included several exhibits and, therefore, it is appropriate to refer to those.

110. Exhibit DC 1 dates from the 11th of May 2022. That seems to me to allow for a finding that it plainly could have been put before the Circuit Court Judge, as it was available to the Defendant well *before* the trial which gave rise to the Circuit Court order for possession of the 12th of January 2023 and, indeed, the order refusing discovery. It is a letter giving notice that Bank of Scotland

will be refunding overcharged interest. Similar comments reply in relation to a letter of the 29th of March 2021, which also comprises part of exhibit DC 1.

111. Exhibit DC 2 is a remediation statement. Among other things, it shows the Defendant's failure to pay over a number of years and it also goes on to explain sums which are being credited to his account in the context of the tracker mortgage process.

112. Exhibit DC 3 is a copy of the mortgage.

113. Exhibit DC 4 is a notice of attendance in relation to the First-Named Defendant's attempt to view documents, as of the 21st of October 2022.

114. Again, all of the foregoing was available to the First-Named Defendant in advance of the trial before the Circuit Court. This is all the more so in respect of exhibit DC 5, which is merely a copy of Ms. McCarthy's exhibit EMCC 6, namely, the 20th of February 2015 deed of assignment.

115. In oral submissions today, the First-Named Defendant contends that he has been "*hoodwinked*". He laid particular emphasis on Exhibit DC1, and the gravamen of his submission was that his dealings with Bank of Scotland on the tracker mortgage issue mean that Bank of Scotland, not the Plaintiff is, he contends, the true mortgagee. In the manner explained in this judgment, with reference to Part III of his Folio, the logic in that submission is, with respect, entirely flawed.

116. In submissions, the First-Named Defendant characterises Bank of Scotland as "*driving this"* and whether that be a reference to the tracker mortgage process or the proceedings, nothing turns on that. The Register is conclusive as to ownership in the manner I have explained.

117. He also drew a distinction, in oral submissions, between, on the one hand, a Bank of Scotland account number as referred to in correspondence between the bank and him, and, on the other hand, an account number created by the Plaintiff, in circumstances where the First-Named Defendant contends that he had no hand, act, or part in the creation of that Start account number. That may well be so, but it is not determinative at all of ownership of the relevant charge, which, in the manner I have explained, is illustrated by the entry in Part III of the Folio.

118. He submits that the Plaintiff has not produced bank statements, as opposed to transactional histories. He submits that he has forensic auditors who want to go through the statements so that they can see "*what the position is*", and he submits that he has so informed the Plaintiff. The first Defendant contends that a plenary hearing would "*uncover a lot of the information*" that he requires for his forensic auditors. I pause here to make certain observations: First, relevance in terms of discovery is to be determined with reference to the pleadings. Second, there is no dispute on the pleadings which gives rise to discovery being necessary. Third, these are summary proceedings in which all relevant documents have already been furnished on affidavit. Fourth, there is an

uncontroverted averment that copies were compared with originals and that the former are accurate in terms of reflecting the latter.

119. The First-Named Defendant also referred to as "*concocted*" and "*extraordinarily suspicious*", documents which were registered by the Land Registry, including the mortgage and the deed of assignment. The gravamen of his submission is that the Land Registry should not have relied on their contents. I am entirely satisfied for the reasons articulated in this ruling that it is simply not open to the First-Named Defendant to challenge, in the present proceedings, the conclusiveness of entries in Part III of his Folio, still less by making entirely unsubstantiated allegations that something has been "*concocted*", and is, "therefore", suspicious, unsupported by any evidence whatsoever and amounting to nothing more than 'bare' assertions.

120. The First-Named Defendant's submission was that a plenary trial would allow his concerns around the validity of the documents to be dealt with. The thrust of much of his submissions - reflective of his recent affidavit - is that the documents before the court are suspect and they cannot be relied upon. He also submitted that Ms. McCarthy's affidavit cannot be relied on, by reason of not clarifying that his account was one involved in the tracker mortgage issue, and because, according to the First-Named Defendant, "*her documents are suspect*". With reference to the Supreme Court's decision in *O'Malley,* the first Defendant also claims that the Plaintiff has not adequately particularised its claim. I pause here to observe that *O'Malley* concerned not a claim for possession for property, but an application for summary judgment in relation to a sum of money, and I will presently return to that issue in due course.

121. The first Defendant also characterised the position as being to say that he is a victim of a tracker mortgage issue in relation to other accounts and that he is a victim of a *"miscarriage of justice*". He submitted *inter alia* that, with respect to the mortgage deed, "*There was no agreement in place. There was no contract*".

122. In relation to the hearing before the court below, he submitted *inter alia* that he was not prepared for the hearing; he was taken by surprised and was shocked; he was totally hoodwinked; and that he was there to deal only with the discovery matter, and not with the possession claim.

123. His attitude to the present proceedings can be distilled into two or three core submissions, namely, (i) his contention that this is not a summary matter; (ii) his submission that *"there is a lot to be discovered";* (iii) and his contention that the matter needs to go to plenary hearing.

124. He submits that *"A very serious affidavit is before the court with proof of wrongdoing".* I pause to say that there is no such proof. There is no more than an allegation of wrongdoing which is not underpinned by evidence.

125. He submits that the matter should be entirely set aside for want of jurisdiction. Again, on that issue, I am satisfied that jurisdiction has been established. It is very clear having regard to s. 3 of the 2013 Act to which I have referred.

126. He also submitted that he was "*hoodwinked a little*" in relation to today's hearing, and this submission was based on his contention that he did not understand or know that today would proceed by way of a *de novo* hearing.

127. He contended that he was prepared for an appeal, rather than a fresh hearing, and I have already addressed that, given what s. 37 (2) of the 1936 Act provides.

128. Among the First-Named Defendant's submissions was to assert that the assignment from Bank of Scotland to Start was *"A botched and cooked up document made to look as if it was relevant to my mortgage when it is not"*. Once again, this is simply a 'bald' or bare assertion, lacking, entirely, a scintilla of evidence.

129. He submitted that a "*deception*" was perpetrated on the Circuit Court Judge. That deception, according to the First-Named Defendant, related to what he says are the "*true facts*", showing "*damning evidence*". The thrust of that submission is that the Plaintiff concealed from the Circuit Court Judge the reality, as the First-Named Defendant perceives it to be, that the Plaintiff is not the owner of his mortgage. Again, that submission is entirely undone by the evidence.

130. The First Defendant also submits, with reliance on Articles of the ECHR and the Constitution, that he has been denied due process and he also placed reliance on principles derived from *Re: Haughey* [1971] IR 217*.* In that regard, although that is not an issue before the court today, I am entirely satisfied that the criticisms made of the hearing which took place in the court below are entirely devoid of an evidential basis. There is simply no evidence of the learned Circuit Court Judge affording the First-Named Defendant any less than a full and fair hearing. The evidence before the court today also allows for a finding that he was given explicit written advance warning of the hearing and was put clearly on notice by the Plaintiff that the Plaintiff would be seeking an order for *possession* and would be opposing his *discovery* application. Earlier in this ruling I referred to this notice, which is not confined to correspondence of October, but it also includes a letter opened to the court today of the 3rd of January 2023.

131. However, even if I were entirely wrong to take the view that the First-Named Defendant was squarely on notice that, on the 12th of January 2023, both possession and opposition to his discovery application would be advanced, it is beyond doubt that the First-Named Defendant has been on notice of today's *de novo* hearing and in a position to put such opposition to the claim as he wished. However, that comment is subject to the following important observation: nowhere in his 1st of June 2023 affidavit and nowhere in his oral submissions to the court today did Mr. Connaughton address the glaring absence of a *reason* as to why the complaints he now articulates in a 1st of June 2023 affidavit were not put before the Circuit Court.

132. I am satisfied, therefore, that the First-Named Defendant has failed to comply with the requirements of O. 61. Furthermore, given that no *reason* has been given as to why the evidence he now seeks to adduce was not put before the Circuit Court I am declining any application to admit this new evidence.

133. If I were to do otherwise, it would be to admit a wide range of complaints, in what is a final hearing - in other words, in a hearing against which no appeal lies. Therefore, to admit the contents of the 1st of June 2023 affidavit would, in reality, be to deprive the Plaintiff/Respondent of any opportunity for an appeal against a decision in which the contents of the 1st of June 2023 affidavit played any part. To look at matters another way, it seems to me that the First Defendant could and therefore should have put the material referred to in his 1st of June 2023 affidavit before the Circuit Court in advance of the 12th of January 2023 decision. Had he done so, the Plaintiff could have engaged with that material in such manner as it wished. In short, both sides would have engaged fully with the entire contours of the case and both sides, against that backdrop, would have had the opportunity to appeal, should either side wish, to this Court.

134. Having made that decision, and entirely without prejudice to the decision not to admit the 1st of June 2023 affidavit sworn by the First-Named Defendant, I want to make clear that nothing turns on that decision for the purposes of the outcome of today's hearing. In short, I am entirely satisfied that nothing averred to in or exhibited by Mr. Connaughton in his 1st of June 2023 affidavit provides any defence or any possibility of any defence in respect of the present claim.

135. As Woulfe J. made clear in *Start Mortgages DAC v. Ryan* [2021] IEHC 719, the "proofs" which a Plaintiff in an application of the present type faces or must discharge are straightforward and I now quote directly from para. 21 of the decision in *Start v. Ryan*:-

> "*21. At para. 49 of her judgment in Cody, Baker J. stated that the owner of a charge who seeks to obtain possession pursuant to s.62(7) of the 1964 Act has to prove two facts: (a) that the Plaintiff is the owner of the charge; and (b) that the right to seek possession has arisen and is exercisable on the facts. The summary process is facilitated by the conclusiveness of the Register as proof that the plaintiff is the registered owner of the charge and this is a matter of the production of the Folio, and, as the Register is by reason of s.31 of the 1964 Act conclusive of ownership, sufficient evidence is shown by that means: see the discussion in the Court of Appeal judgment in Tanager DAC v. Kane [2018] IECA 352. That judgment held that the correctness of the Register cannot be challenged by way of defence in summary possession proceedings, and that a Court hearing an application for possession pursuant to s.62(7) of the 1964 Act is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and the right to possession has arisen and become exercisable*.
>
> *22. Order 5B requires a plaintiff to establish a prima facie case on the affidavit evidence for an order for possession, and it is then necessary for the Defendant to proffer evidence or argument sufficient to establish a credible defence"*

136. The Plaintiff has on the evidence proven (a) and (b) as referred to in para. 21 above, namely, that it is the owner of the charge and that the right to seek possession has arisen and is exercisable on the facts.

137. Furthermore, the Plaintiff has established a *prima facie* case on the evidence for an order for possession.

138. Finally, with respect to this authority, the Defendant has not proffered evidence or argument sufficient to establish a *credible* defence.

139. The First Defendant cannot, in seeking to oppose this summary claim for possession, challenge the correctness of the Register, still less by utterly unsubstantiated allegations of wrongdoing. Yet this is precisely what the First Defendant is seeking to do.

140. It is perfectly clear that his request for discovery is intimately connected with this aim. In other words, discovery is sought in aid of what is a collateral attack to the conclusiveness of the Register by means of a challenge to documents which have been registered.

141. I am also satisfied that the tracker mortgage issue is not at all relevant to the present claim and provides no possible defence to the present claim. In this regard, it is also useful to quote from para. 40 of the decision of Woulfe J. in the same case:-

> "*The Courts have accepted that in a suit for possession, as opposed to a suit for the debt, a Plaintiff was entitled to possession even if there was a dispute as to part of the indebtedness. For example, in Bank of Ireland v. Blanc [2020] IEHC 18, O'Regan J. stated as follows (at para. 30):*
>
> > *'The issue of how much money is due and owing and the guide to the granting or withholding of possession was dealt with by Ms. Justice Dunne in the High Court in 2009 in Anglo Irish Bank Plc v. Fanning [2009] IEHC 141, when it was indicated that a default was the issue, not the amount. That is clearly the case in circumstances where possession only is sought and not judgment of a particular sum of money, and possession is the only matter before this Court'*
>
> *In light of the above authorities this issue does not establish a credible defence"*.

142. Those comments seem to me equally applicable in the present case. I say this in circumstances where I am entirely satisfied on the evidence that default has been established.

143. Returning, briefly, to the question of discovery, it is also useful to quote the following from the 15th of May 2017 judgment of Eagar J. in *ACC Loan Management Ltd. v. Kelly* [2017] IEHC 304. At para. 17 the learned judge stated the following under the heading of "*Discovery in summary summons proceedings*":-

> "*The Court is clear that the issue of discovery does not correspond with the requirements of an application for summary judgment. The Court refers to the Irish Life and Permanent*

plc. trading as Permanent TSB v. John Hanrahan & Celina Hanrahan [2015] IECA 125, where Moriarty J. in the High Court refused discovery in summary summons proceedings. The defendants appealed to the Court of Appeal and in a judgment delivered on the 10th day of June, 2015 Kelly J. (as he then was) stated as follows:-

> *'4. The adjudication will be as to whether an arguable defence has been laid out by Mr. Hanrahan on foot of the affidavit evidence which he has already filed or indeed on foot of any further affidavit evidence which he may file between now and the matter being determined by the judge.*
>
> *5. The application for discovery was dealt with in the High Court by Moriarty J. who pointed out and, in my view, pointed out quite correctly, that normally an application for discovery does not fall to be dealt with at this stage of proceedings. In that regard the judge was on solid ground because discovery ordered in respect of issues that will fall to be tried at the trial of the action.*
>
> *7. We are a long way indeed from the delivery of a formal defence in the present action as I have already pointed out the matter is pending before the Master who will have to go to a judge's list. A judge will have to decide whether there is a prima facia defence made out. If he takes the view that there is such a defence, then the case will be adjourned for plenary hearing and there will be an order made for the exchange of formal pleadings.*
>
> *8. It is by reference to the pleadings that the question of the entitlement to discovery falls to be determined. There is ample case law demonstrating that it is by reference to pleadings alone that one has to identify the issues that fall to be tried'*."

144. I pause at this juncture to say that, having carefully considered the entirety of the evidence and submissions, the First-Named Defendant has not made out any arguable defence. The First-Named Defendant has not made out any *prima facie* defence, and - as the authorities have made clear, and as is an uncontroverted statement of fact - these are summary proceedings where discovery is not appropriate. The comments by Eagar J. and former President Kelly fortify me in the views previously expressed when refusing to grant the application for discovery.

145. Regarding the dates of the 1st and the 11th of September 2005, which appear on the Defendant's mortgage, no expert evidence is needed for the court to say that, as is common practice, a borrower's solicitor completes a mortgage. And whilst there appears to be an obvious error made by the insertion of the 11th of September as opposed to the 1st of September 2005, nothing turns, or can turn, on that issue for the purposes of determining this claim. This is because the undisputed evidence is that (i) there was a loan facility; (ii) it was secured by a mortgage; (iii) €450,000 was drawn down in November 2005 subsequent to the execution of the mortgage; (iv) that mortgage is registered; (v) ownership, by way of a transfer from the original mortgagee, Bank of Scotland, to the Plaintiff, is also registered; (vi) there is incontrovertible evidence of default, and indeed it is common case that no payment has been made since April 2015, some eight years ago.

146. These are not proceedings seeking judgment in a specific sum. They are possession proceedings. Nor is there any evidence put forward today which would allow for a finding that, but for the tracker issue, there would not have been default. Indeed, that is not a case even made by the First-Named Defendant. On the contrary, default and a failure to pay despite demand, has been well established by the Plaintiff.

147. As an aside, perhaps, and bearing in mind the timeline, it does not seem unfair to say that the entries at Part III in relation to a separate judgment mortgage speak to the First Defendant's financial difficulties outside of mortgage and loan facility obligations, and I say this, given that it was in 2018 there was a registration of a judgment mortgage. That registration was three years after the last payment made on foot of the relevant account, which was €600 in April of 2015.

148. To draw this ruling to a conclusion, a core assertion by the First-Named Defendant is that the matter should proceed to a plenary hearing, and in this regard the First-Named Defendant refers to the well-known decision of McKechnie J in *Harrisrange Ltd v. Duncan* [2004] 4 I.R. 1. With all due respect to the First-Named Defendant, I have already outlined in this ruling the three questions which this court must decide in an application for possession having regard to s. 62 (7), and *Harrisrange* is not the appropriate approach.

149. In the manner examined earlier, the authorities illustrate that this Court has a very limited discretion to refuse an application for possession. However, and entirely without prejudice to that observation, even if *Harrisrange* were the correct approach for this Court to take today, and it is not, I make the following observations in light of para. 9 of McKechnie J.'s reported decision in *Harrisrange*, where he summarises the position in relation to a situation where leave to defend is sought.

150. I am entirely satisfied that there are truly no issues arising. I am satisfied that what the first Defendant says is simply not credible. The foundations of his opposition to the application net down to a contention that the mortgage and, in particular, the assignment to Start, is "*suspicious*" and is "*concocted*", and that is simply not credible. It does not reach that minimum test of credibility, not being underpinned by any facts or circumstances or evidence which would allow the court to take the view that it is in any way credible. It is, as I have said repeatedly, simply a 'bare' assertion of wrongdoing.

151. For this reason, I am very clear that there is no defence and I am equally clear that the only thing proffered by the First-Named Defendant is a mere assertion of a given situation, namely, an assertion of wrongdoing.

152. Given that part (x) of para. 9 in *Harrisrange* emphasised that the approach is the achievement of a just result, I am also entirely satisfied that the justice of the situation certainly does not require a plenary hearing.

153. Given the reliance placed by the First-Named Defendant on the Supreme Court's decision in *O'Malley*, it is also appropriate to quote, as follows, from para. 8.3 of the 29th of November 2019 judgment of Clarke CJ:-

> "*8.3 For the reasons also set out earlier in this judgment, I would hold that there was insufficient detail in the evidence submitted to provide the Court with an ability to assess whether the precise claim to the debt alleged had been established on such a prima facie basis. In my view, the observations in the summary judgment jurisprudence, which indicate that a defendant should not be given leave to defend if the basis put forward for resisting the Plaintiff's claim amounts to mere assertion, cut both ways. A plaintiff, in order that a prima facie claim to the precise debt can be established, must do more than merely assert. While the basis for there being a claim in general terms was fully set out by the Bank, it does not seem to me that the evidence as to why the precise sum claimed was said to be due amounted to anything much more than assertion. In particular, it is not clear as to what calculation led to the assertion that the sum claimed was the precise amount due, nor as to the amount of capital and interest and whether the total included surcharges and/or penalties"*.

154. Several comments are appropriate in light of this *dicta.* First, *O'Malley* concerned a claim for summary judgment in relation to a specific sum, or what the learned Chief Justice called "*a precise sum*". It was a debt claim. This is not such a claim.

155. Furthermore, the debt claim in *O'Malley* had been made out in general terms but not sufficiently particularised. This possession claim has been particularised in detail.

156. A passage from *O'Malley,* which I have quoted, deserves repeating, and these are the words:-

> ". . . *the observations in the summary judgment jurisprudence, which indicate <u>that a defendant should not be given leave to defend if the basis put forward for resisting the plaintiff's claim amounts to mere assertion</u>. . .*" (emphasis added)

Those words underpin, in my view, the reality that no plenary hearing can be ordered in this case. Even the *O'Malley* decision, which the First-Named Defendant seeks to rely on, is entirely against him, in circumstances where what he has done is to put before the court today no more than mere assertion.

157. Finally, to return to the core threefold questions which I outlined at the start of this ruling:-

(i) **Are the relevant monies *secured* in this case by way of mortgage?** Yes they are, that has been established, without doubt, on the evidence.

(ii) **Has there been *default,* resulting in the secured monies having become *due*?** Again, this has, without doubt, been established by the Plaintiff. As I say, there has been no payment since April 2015, some eight years ago and more; and

(iii) **Is the application made *bona fide* with a view to realising the security?** Again, the answer is yes.

158. As to the court's own motion assessment in respect of the Unfair Terms in Consumer Contracts Directive, I return to the decision by Woulfe J. in Start Mortgages *DAC v. Ryan* [2021] IEHC 719. At para. 36, the learned judge stated *inter alia* the following:-

> ". . . *the issue of unfair terms was one addressed by McDermott J. in Permanent TSB Plc. v. Davis [2019] IEHC 184*"

Later, Woulfe J. went on to state: -

> "*McDermott J. highlighted the provisions of Article 4(2) of the Directive, which provides as follows*:
>
> > '*Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language'*.
>
> *In Davis, McDermott J. held that the defendants were consumers within the terms of the Directive, and the 1995 Regulations, but the alleged unfair terms related to the core terms of the agreement between the parties, primarily to the terms regarding repayment of the amount advanced in the context of income and the ability to repay"*.

159. Para 37 continued as follows:-

> "*37. In the present case, it appears that the second named respondent was probably not acting as a consumer so as to trigger the application of the 1995 Regulations. In any event, the First-Named respondent has not identified any terms of the loan agreement, outside of the core term relating to the mortgage rate which he referred to during his oral submissions, which could be viewed as unfair. In the circumstances, this issue does not establish a credible defence"*.

160. In the present case, no term is identified by the First-Named Defendant which is said to be unfair. Furthermore, I am entirely satisfied that nothing outside of the core terms of the lending and security arrangement is at issue in the present claim.

161. I am entirely satisfied that it would not be disproportionate to refuse the relief sought by the Plaintiff. The Defendant has not advanced any stateable or *bona fide* defence in law or in fact in respect of the Plaintiff's claim. On the evidence, the Plaintiff has established its entitlement to an order for possession of the mortgaged property and, having carefully considered all the evidence as well as all the submissions, the appropriate finding is for the court to refuse discovery.

162. Therefore, and for these reasons, I am refusing discovery and the Plaintiff is entitled to an order for possession.