THE HIGH COURT

[2024] IEHC 310

Record No. 2023/ 231 H.CA

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF/RESPONDENT

AND

RONAN CLARKE AND IRENE CLARKE

DEFENDANTS/APPELLANTS

Judgment of Mr. Justice Mark Heslin, delivered on 21st May 2024

Introduction

1. By means of a Civil Bill for possession, which issued on 28 September 2018, the Plaintiff sought an order, pursuant to section 62(7) of the Registration of Title Act 1964 ("the 1964 Act") and section 1 of the Land and Conveyancing Law Reform Act 2013 ("the 2013 Act") for delivery, to the Plaintiff, of possession of the property comprised in Folio 170L of the Register County Cavan ("Folio 170L") more commonly known as number 8, Mary's Road, Kingscourt, County Cavan ("the property").

2. On 21 November 2023, His Honour Judge Aylmer made such an order ("the possession order"). The Defendants appealed the possession order. For reasons explained in an ex-tempore ruling, I refused the Defendants' application to adjourn the proceedings, which application was moved following the commencement of the hearing on 12 April 2024.

***De Novo* hearing**

3. Section 37 (2) of the Courts of Justice Act 1936 states the following, under the heading of *"Appeals from the Circuit Court in civil cases heard without oral evidence"* (which applies to the present 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…."*

This appeal proceeded by way of a *de novo* hearing.

S. 62 of the 1964 Act

4. The Registration of Title Act 1964, provides, inter alia, as follows:-

> *"62. — (1) A registered owner of land may, subject to the provisions of this Act, charge the land with the payment of money either with or without interest, and either by way of annuity or otherwise, and the owner of the charge shall be registered as such…*

…

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

Conclusiveness of the Register under the 1964 Act

5. In *Tanager Designated Activity Company v. Rolf Kane* [2018] IECA 352, the Court of Appeal considered certain questions of law referred by Noonan J The first of these questions posed was as follows:-

"*1) Does the Defendant have an entitlement to challenge the registration of the Plaintiff as owner of the charge at entry no. 7 on the Defendant's folio in these proceedings, having regard to the conclusiveness of the Register pursuant to s. 31 of the 1964 Act?"*

6. The Court of Appeal answered that question in the negative.

7. In the manner presently discussed, the Defendants entered into a mortgage which secured monies advanced to them by way of a charge on the property. The Plaintiff is the registered owner of that charge.

Summary manner

8. As can be seen from the foregoing, s.62(7) explicitly permits a registered owner of a charge to seek possession in a "*summary manner*". That was the route taken by the Plaintiff when it caused the Civil Bill for possession to be issued.

The s. 67(2) jurisdiction

9. In the Supreme Court's decision in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26 ("Cody"), Baker J examined the s. 62(7) jurisdiction and stated the following from para. 15 onwards:-

"*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…"

10. 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)

Para. 17 of Baker J'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.*" (emphasis added)

Order 5B

11. Circuit Court applications for summary possession of property are governed by Order 5B of the Circuit Court Rules [S.I. No. 264 of 2009] as amended. Order 5B applies to any proceedings in which the Plaintiff claims, *inter alia*: *"recovery of possession of any land on foot of a legal mortgage or charge"* (*per* O. 5B, r. 1). Order 5B, rule 3 provides:-

> *"3. (1) Proceedings to which this Order applies shall be commenced by a Civil Bill in Form 2R of the Schedule of Forms. The special indorsement of claim in such Civil Bill shall state specifically and with all necessary particulars the relief claimed and the grounds thereof.*
>
> *(2) In proceedings to which this Order applies, the Civil Bill shall include a statement immediately following the Special Indorsement of Claim as to whether:*
>
> *(a) the proceedings are commenced in the Court under the jurisdiction conferred by section 101(5) of the Land and Conveyancing Law Reform Act 2009, and in such case, whether section 2 of the Act of 2013 applies to the proceedings, or*
>
> *(b) the proceedings are commenced in the Court under the jurisdiction conferred by section 3 of the Land and Conveyancing Law Reform Act 2013.*
>
> *(3) A Civil Bill to which this Order applies shall be served, together with a copy of the affidavit mentioned in rule 5, on each Defendant not later than 21 days before the return date mentioned in rule 4."*

12. Rule 4 provides that, upon being issued, the relevant Civil Bill shall be assigned a return date before the County Registrar, whereas rule 5 requires that the Civil Bill be accompanied by an affidavit in conformity with the requirements of Form 54 in the Schedule of Forms, sworn by or on behalf of the Plaintiff, verifying and supporting the claim indorsed on the Civil Bill. The relevant procedure was analysed in considerable detail by the Supreme Court in *Cody* (see paras. 20 to 35, inclusive). At this juncture, it is appropriate to say that the Plaintiff has complied in full with the relevant procedure.

What the Plaintiff must prove

13. In *Start Mortgages DAC v. Ryan* [2021] IEHC 719 ("Ryan"), Woulfe J made the following clear (from para. 21) in relation to the burden of proof resting on a Plaintiff in an application of the present type:-

> "*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…*" (emphasis added)

Questions for this court

14. The foregoing *dicta* makes clear that this Court must answer several important questions in order to determine the present claim, namely:

(i) Are the relevant monies *secured* on the property?

(ii) Is the Plaintiff the *owner* the relevant charge?

(iii) Has there been *default* resulting in the monies becoming due? and

(iv) Has the Defendant put forward a *credible* defence?

The Civil Bill

15. The Civil Bill pleads the claim in very clear terms. The special endorsement of claim *inter alia*: (i) describes the Plaintiff; (ii) describes the Defendants; (iii) pleads a loan agreement by which monies were advanced to the Defendants; (iv) relies on a mortgage and charge of 15 May 2007, as registered on 28 May 2007; (v) pleads breach of the terms of the loan and charge; (vi) pleads a failure to discharge the sum advanced, despite demand; (vii) pleads the Plaintiff's conversion to a DAC; and (viii) confirms that the property is situate within the court's jurisdiction, is a principal private residence, and has a market value not exceeding €3 million.

Jurisdiction

16. Section 62 (7) of the 1964 Act and s.1 of the 2013 Act are specifically invoked and the following pleas are made in respect of jurisdiction:-

"1. These proceedings are commenced in the Circuit Court pursuant to s. 3 of the Land and Conveyancing Law Reform Act 2013 as they are proceedings brought by a mortgagee seeking an order for possession of land which is the principal private residence of -

(a) The mortgagor of the land concerned, or

(b) A person without whose consent a conveyance of that land would be void by reason of

(i) The Family Home Protection Act 1976 or

(ii) The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, C.P.C.R.O.C.A.

and the mortgage concerned was created prior to 1 December 2009.

2. Further, or in the alternative, these proceedings are commenced in the Circuit Court as the market value of the property set out in the Schedule hereto does not exceed €3,000,000.00.

3. The Plaintiff will rely at the hearing of this Civil Bill on the affidavit of Eva McCarthy sworn on the 7th day of September 2018 and a copy of the said affidavit and exhibits thereto as served herewith."

Examining the evidence

17. The evidence before the court comprised the following:-

(i) the affidavit sworn on 7 September 2018 by Ms Eva McCarthy, litigation manager for the Plaintiff in support of the Civil Bill for possession (and exhibits A to H);

(ii) the 2 November 2018 statutory declaration of service, by Ms Niamh O'Rourke, regarding service of the Civil Bill for possession on the First-Named Defendant (and exhibit A);

(iii) the 2 November 2018 statutory declaration of service, by Ms Niamh O'Rourke, regarding service of the Civil Bill for possession on the Second-Named Defendant (and exhibit A);

(iv) the 2 November 2018 statutory declaration of service, by Ms Niamh O'Rourke, regarding service of the Civil Bill for possession on the Occupier(s) of the property (and exhibit A);

(v) the affidavit sworn on 20 July 2021 by the Second-Named Defendant (and exhibits A to F);

(vi) the affidavit sworn on 4 November 2021 by Ms Eva McCarthy, litigation manager for the Plaintiff (and exhibit EMC1);

(vii) the affidavit of service sworn on 11 January 2022 by Ms O'Rourke regarding service on the Defendants of Ms McCarthy's 4 November 2021 affidavit (and exhibits A and B);

(viii) The affidavit sworn on 17 January 2022 by the Second-Named Defendant (and exhibits A to C);

(ix) the affidavit sworn on 4 July 2022 by Ms McCarthy (and exhibit A);

(x) the affidavit sworn on 20 July 2022 by the Second-Named Defendant (and exhibits A to G);

(xi) the affidavit sworn on 22 November 2022 by Ms McCarthy (and exhibit EMC1);

(xii) the affidavit of service sworn on 24 November 2022 by Ms O'Rourke regarding service on the First-Named Defendant of Ms McCarthy's 22 November affidavit (and exhibit A);

(xiii) the affidavit of service sworn on 24 November 2022 by Ms O'Rourke regarding service on the Second-Named Defendant of Ms McCarthy's 22 November affidavit (and exhibit A);

(xiv) the affidavit sworn on 31 January 2023 by Ms McCarthy (and exhibit A);

(xv) the affidavit of service sworn on 2 February 2023 by Ms O'Rourke regarding service on the Defendants of Ms McCarthy's 31 January 2023 affidavit (and exhibit A);

(xvi) the affidavit sworn on 6 July 2023 by Ms McCarthy (and exhibit A);

(xvii) the affidavit of service sworn on 11 July 2023 by Ms O'Rourke regarding service on the Defendants of Ms McCarthy's 6 July 2023 affidavit (and exhibit A);

(xviii) the affidavit sworn on 19 July 2023 by the Second-Named Defendant (and exhibits A to F);

Arising from a careful consideration of all the foregoing, a number of relevant facts emerge and I propose to set those out in chronological order, as follows.

25 April 1996 – Defendants registered as owners

18. On 25 April 1996, the Defendants were registered on Folio 170L as joint owners of the property. This can be seen from the entry at part 2 of the said Folio, which comprised exhibit A to Ms McCarthy's 7 September 2018 affidavit (otherwise "the grounding affidavit").

13 April 2007- Loan offer to Defendants

19. On 13 April 2007 a "Loan Offer" letter issued to the Defendants (defined therein as "the Borrower") in respect of €188,500 (defined therein as "the Loan") to be secured on the property. A copy of the said Loan Offer comprises exhibit, C to Ms McCarthy's 7 September 2018 affidavit. The copy loan offer exhibited in the grounding affidavit was not signed by the Defendants. However, the Defendants have neither denied receiving, nor accepting, this offer which begins in the following terms:-

> "*Property: 8 St. Marys Road, Kingscourt, Cavan. Reference number: 801567805*
>
> *Dear Mr. Raymond Clarke & Mrs. Irene Clarke,*
>
> *We are pleased to advise you ('the Borrower') that Start Mortgages Limited ('the Lender') has approved facilities amounting to €188,500.00 ('the Loan') secured on the above property ('the Property') subject to the attached Special and General Loan Conditions…"*

20. The number "*801567805*" which appears on the Loan Offer is the same number which appears on the Defendants' Statement of Account in respect of their repayment obligations under the mortgage and charge which they subsequently entered into. I will presently look at both the charge and the statement of account. Remaining with the Loan Offer, the first page sets out *inter alia* the following:-

"PART 1 – STATUTORY LOAN DETAILS

IMPORTANT INFORMATION AS AT 13/04/2007

1.	*Amount of credit advanced*	*€188.500.00*
2.	*Period of agreement (years-months)*	*40 years*
3.	*Number of repayment instalments*	*480*
4.	*Amount of each instalment*	*€1,353.28*
5.	*Total amount repayable*	*€651,443.31*
6.	*Cost of this credit (5 minus 1)*	*€462,392.31*
7.	*Capital APR **	*8.6%*

8. *Amount of Endowment Premium ** (if applicable)* *N/A*
9. *Amount of mortgage protection premium ** (if applicable)* *N/A*
10. *Effect on amount of instalment of 1% increases in the first year in interest rate **** *€144.41*

** annual percentage rate of change*

*** as calculated at the time of making the agreement. If left blank, the premium is unknown.*

**** this is the amount by which the instalment repayment will change in the event of a 1% percent increase at the start of the first year in the interest rate on which the calculations are based.*

WARNING

Your home is at risk if you do not keep up payments on a mortgage or any other loan secured on it. The payment rates on this housing loan may be adjusted by the lender from time to time." (original in bold)

21. The second page of the loan offer provides "*Additional loan details"* including (i) the type of loan was a remortgage; (ii) the arrangement fee was €475.00; (iii) the interest rate (not APR) was 8.30%; and (iv) the type of interest rate was a standard variable rate.

22. This was followed by *"Conditions precedent"* which included (i) a valuation to be carried out on the property to be mortgaged; (ii) money laundering legislation requirements to be adhered to; (iii) the borrower to complete a variable direct debit mandate with the lender, prior to drawdown, to authorise the lender to collect the agreed monthly instalments due; (iv) a suitable mortgage protection policy to be activated, unless otherwise agreed; and (v) a buildings insurance policy, to include fire cover, to be activated prior to release of funds.

23. Pages 3 and 4 set out *"Special conditions"* and these include the requirement for a solicitor's undertaking to clear certain loans from the advance, within five working days of funds being released. Other special conditions concerned payment of arrangement and administration fees. Special Condition 402 provided:-

"The rate of interest applicable to this loan will vary in line with market interest rates. It will be directly affected by the rise and fall of the European Central Bank Rate."

24. Having indicated that there was a 90 day 'window' for acceptance of the offer, page 4 stated the following:-

"This is an important legal document. We strongly recommend that you seek independent legal advice before signing it. This Offer letter is regulated by the Consumer Credit Act 1995 and your attention is drawn to the Notices set out on page 8 of the letter of offer. The acceptance should be signed in the presence of the solicitor(s) concerned.

We are delighted you have chosen Start Mortgages Limited for your mortgages requirements and look forward to completing the advance as soon as possible. If you have any questions in

relation to any aspect of this loan approval, please contact our new business department who will be happy to assist you."

25. The notices set out on page 8 of the letter of offer concern *inter alia* (i) circumstances in which the lender's obligation to complete the advance would cease; (ii) that the loan offer was made on the basis that title to the property was in the name(s) of the borrower(s); (iii) that, in the event of a conflict between the general and special conditions, the latter would prevail; (iv) that where a loan offer was made to two or more persons, they would be jointly and severely liable; and (v) that the borrower was responsible of their own legal costs and charges including stamp duty on the mortgage. The final of these notices was as follows:-

"18. The Borrower should ensure that he/she/they can afford the mortgages throughout the term should the obligations continue beyond normal retirement age."

26. On any reasonable analysis, the terms of the loan offer are clear and intelligible. This is an issue I will presently return to, given submissions to the contrary made on behalf of the Defendants.

15 May 2007 – the Charge

27. It will be recalled that the Loan Offer made clear that, prior to drawdown of funds, a signed mortgage and a direct debit mandate would need to be in place. By Mortgage Deed, dated 15 May 2007, the Defendants charged the property in favour of Start Mortgages Limited (defined therein as "the Lender") by way of security for monies advanced to the Defendants ("the charge" or "the mortgage"). The charging provisions are set out at paras. 5.01 to 5.07. A signed copy of the charge comprised exhibit B to Ms McCarthy's 7 September 2018 affidavit. The signature of the First-Named Defendant appears as "*1st Borrower*" and the signature of the Second-Named Defendant appears as "*2nd Borrower*". Both signatures appear opposite that of a named solicitor, as witness to their execution of the charge. This is entirely consistent with the Defendants having accepted the Loan Offer (something they have never denied).

28 May 2007 - "Start Mortgages Limited" registered as owner of the charge

28. As can be seen from Part 3 of folio 170L, the charge was registered in favour of "Start Mortgage Limited" on 28 May 2007. For the purpose of these proceedings, this is conclusive evidence. I now propose to address the conversion of the Plaintiff from a limited liability company to a designated activity company (or "DAC").

Change of name by a company

29. The Companies Act 1963 provides, inter alia, the following:-

"*23. — (1) A company may, by special resolution and with the approval of the Minister signified in writing, change its name…*

(3) Where a company changes its name under this section, the registrar shall enter the new name in the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case.

(4) A change of name by a company under this section 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 by its former name may be continued or commenced against it by its new name".

A designated activity company

30. The Companies Act 2014 contains a "*procedure for re-registration as designated activity company*…" and s. 63(12) states the following:-

"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".

Conversion to a DAC

31. The grounding affidavit contains averments to the effect that, on 21 October 2016, Start Mortgages Limited converted from a limited liability company to a designated activity company, namely, "Start Mortgages Designated Activity Company", the Plaintiff herein, in accordance with the provisions of the Companies Act 2014.

32. Although, in the manner I will presently discuss, the Second-Named Defendant has sworn a number of affidavits in which it is contended that there is a *"question"* over the correct Plaintiff, this is no more than an assertion which is wholly undermined by the facts.

"Secured Moneys"

33. The charge defines the *"secured moneys*" as meaning:

"(a) the balance or balances which is or shall for the time being, become due or owing by the borrower to the lender on foot of any secured loan, whether present or future; and
(b) all interest, liabilities and obligations of the borrower to the lender whatsoever and howsoever arising at any time and from time to time on foot of or in connection with any secured loan, whether present or future; and
(c) the expenses and all other moneys which the borrower covenants to pay to the lender or discharge or is liable for under the covenants contained in this mortgage or otherwise in connection with any secured loan;"

It is not in dispute that the relevant loan (i) was advanced to the Defendants; (ii) was secured on the property by means of the charge; and (iii) comprises secured moneys as defined therein.

Covenant to pay

34. The "*Covenants for Payment*", set out at para. 3 of the charge, begin as follows:

"3.01 <u>The Borrower</u> hereby <u>covenants</u> with the Lender <u>to pay the lender on demand the secured moneys</u>…" (emphasis added)

Power to enter into possession

35. Under the heading *"Lender's Powers",* clause 8.01 of the charge provides:

"8.01 At any time after the execution of this mortgage the lender may without any further consent from or notice to the borrower or any other person enter into possession of the Mortgaged Property or any part thereof or into receipt of the rents and profits of the mortgaged property or any part thereof" (emphasis added)

Default in payment 'triggers' the power to enter into possession

36. Under the heading *"Exercise of Mortgagee's Powers"*, clause 9 of the charge goes on to state:

"9.01 the lender shall not exercise any of the powers provided for in clause 8 hereof or conferred by statute until any of the following events shall occur:

(a) default is made in payment of any monthly or other periodic payment or in payment of any other of the secured monies hereunder…"

Statement of Account

37. Exhibit F to the grounding affidavit comprises of a copy of a "Statement of Account" in relation to account number 801567805 ("the statement"). This is the account number concerning the charge on the property and is one and the same number as appeared on the Loan Offer (again, consistent with the Defendants' acceptance of same).

38. The statement, dated 3 September, is addressed to the Defendants and begins *"YOUR MORTGAGE STATEMENT FOR THE PERIOD FROM 11/05/07 TO 31/08/2018"*. After noting a 'zero' opening balance, it records, inter-alia the "*New Advance*" on "*11/05/2007*" of "*188,500.00*" and proceeds to record "*Debit*" and "*Credit*" entries, as well as the then "*Balance*" over the course of the following 11 years.

12 May 2016 – last payment made by the Defendants

39. According to the statement of account, the first default by the Defendants occurred as of 31 July 2010, whereas the final "credit" entry by the Defendants is a "*CHQ Payment*" of "*1,215.23*" on "*12/05/2016".* It is common case that the Defendants have made no payments on foot of the charge for the last 8 years (the 12 May 2016 payment being the last made by them).

Compliance with CCMA

40. At para. 15 of the grounding affidavit, it is averred that the property is the primary residence of the Defendants within the meaning of the Central Bank's Code of Conduct on Mortgage Arrears ("the CCMA" or "Code"). It is confirmed that the CCMA is applicable to these proceedings and para. 15 also contains the following express averment regarding compliance with the Code: *"I say that the within proceedings have not been issued in contravention of any moratorium prescribed by the CCMA or in breach of any other provision of the CCMA".*

41. It is further averred, inter alia, that "… *where possible contact has been made with the Defendants by the Plaintiff (in accordance with the provisions of the CCMA) in an effort to resolve the problem of the arrears and I can confirm that every reasonable effort was made by the Plaintiff to agree an alternative repayment arrangement with the Defendants prior to the issuing of these proceedings*" (see para. 16 of the grounding affidavit). In the manner presently

explained, the Plaintiff has exhibited correspondence which is consistent with the foregoing averments.

42. At paragraph 17 of the grounding affidavit it is averred inter-alia that *"the Plaintiff has complied with provision 45 of the CCMA in that it wrote to the Defendants on 16th day of June 2017 in compliance with provision 45 advising the Defendants that an alternative repayment arrangement (ARA) could not be offered and setting out the reasons for this…".* I now turn to that letter.

16 June 2017- Plaintiff's letter to the Defendants (CCMA)

43. Exhibit G to the grounding affidavit comprises a letter by the Plaintiff, dated 16 June 2017, addressed to the Defendants at the property which, having identified the mortgage account number and the property, began as follows:

"Dear Mr and Mrs Clarke,

We have completed the assessment of your standard financial statement (SFS) and conclude that we are unable to offer you an alternative repayment arrangement (ARA) or restructuring of your mortgage for the following reason(s):

Your SFS shows that you can afford to pay €983.73 towards your monthly mortgage repayments of €1,215.23. The assessment of your SFS and circumstances concluded that the amount that you can pay is not sufficient to sustain any of the ARA's which we have to offer. In addition there is no evidence that your financial circumstances will improve in the short to medium-term. Given these circumstances, entering into an ARA which is not sustainable, and which will see your arrears situation deteriorate each month, is not appropriate.

As required by the code of conduct on mortgage arrears (CCMA) we are writing to inform you of the impact of our decision.

1. *You should be aware that:*

- *You are outside of the mortgage arrears resolution process (MARP) and the protections of the MARP do not apply.*
- *We can commence legal proceedings against you to repossess your property from 18 September 2017 onwards.*

2. *You may now wish to consider other options that may be available to you. These options and their implications are detailed below;*

a. *Voluntary surrender - you may wish to voluntarily surrender your property to us. We are available to discuss this process with you and would ask that you make contact with us should you wish to consider this option.*
b. *Voluntary sale - you may wish to voluntarily sell your property. We are available to discuss this process with you and would ask that you make contact with us should you wish to consider this option.*
c. *Mortgage to rent - please contact us if you wish to explore this option and we will explain the process in place for assessing your eligibility for social housing support from your local authority…" (emphasis added)*

44. The Defendants do not deny receiving this letter. Recalling the fact that the last payment made by the Defendants was on 12 May 2016, the said letter discloses that the position, as of 16 June 2017, can be summarised as follows:

(i) the Defendants had not discharged their repayment obligations for over a year;

(ii) consistent with their inability to make repayments in the manner required by the charge secured on the property, the Defendants furnished financial information to the Plaintiff (in 2 SFS) in the context of seeking alternative repayment arrangements;

(iii) the Plaintiff considered same;

(iv) the Plaintiff declined to offer the Defendants an alternative to meeting their liabilities under the charge;

(v) the Defendants were put on notice that MARP no longer applied and that legal proceedings to repossess the property could be brought as and from 18 September 2017;

(vi) among the options given to the Defendants as an alternative to legal proceedings was to surrender possession of the property voluntarily.

45. It is common case that the Defendants did not surrender the property or meet their liabilities under the charge. Returning to the 16 June 2017 letter, it proceeded to state, inter alia, the following:

"It is important that you consider seeking independent legal and financial advice in relation to this letter.

You may also wish to seek professional advice and support from the Money Advice and Budgeting Service (MABS) to assist you at this stage if you have not already done so. MABS is an independent, confidential and free service for people experiencing financial difficulty. You can contact MABS on their helpline number 0761 07 2000 or www.mabs.ie.

In addition, the following may also be of assistance to you:

The www.keepingyourhome.ie website
The Mortgage Arrears Information Helpline 0761 07 4050

It is your right to appeal this decision. The appeal must be received in writing before 1 August 2017 and must set out the grounds for the appeal. If you would like to receive a copy of our MARP Appeal Request Form, please call our customer services Department on (01) 209 6300 or 1850 818000. Alternatively you can download a copy from the appeals process on our website, www.start.ie.

If you are unhappy with our treatment of your case under the Code of Conduct on Mortgage Arrears (CCMA) or do not believe we have complied with the requirements of this code, please note that you have the right to make a complaint. You can call or write to our Customer Services Department using the details above.

You may also wish to consult a Personal Insolvency Practitioner. However you should note that being classified as a not cooperating may render you not eligible for a Personal Insolvency Arrangement. The following link, www.isi.geov.ie, provides information on the insolvency service of Ireland and processes under the Personal Insolvency Act 2012 (as amended).

A copy of your most recent Standard Financial Statement is available on request.

Should your circumstances improve, please call our arrears support unit on (01) 209 6300 or 1850 818000…." (emphasis added)

46. In the wake of the aforesaid letter, the Defendants did not (i) appeal the Plaintiff's decision; (ii) make any complaint; (iii) contact the Plaintiff to indicate that their circumstances had improved; or (iv) make any payment on foot of the charge.

16 January 2018 – Letter of demand by Plaintiff

47. The ground affidavit contains *inter alia* an explicit averment at para. 11 that *"…all moneys remaining unpaid by the Borrower to the Lender and secured by the mortgage shall immediately become due and payable on demand to the Lender on the occurrence of, inter alia, an event of default as defined in Clause 9.01 therein."*

48. At paragraph 13 of Ms McCarthy's 7 September 2018 affidavit, she avers that *"…on or about the 16th day of January 2018, the Plaintiff wrote to the Defendants and demanded that they repay the entire loan facility including both principal and interest…".* The foregoing averment comprises evidence of service of the 16 January 2018 letter of demand, a copy of which comprised exhibit D to Ms McCarthy's affidavit.

49. As can be seen from its terms, this letter was (i) written by Start Mortgages: (ii) marked for the attention of both Defendants; (iii) addressed to the property; (iv) identified the relevant mortgage account; (v) specified the property, and began in the following terms:

"Dear Mr and Mrs Clarke,

As of 31 December 2017 your account has arrears of €37,494.13.

We now formally demand payment of the balance due on the mortgage amounting to €245,126.62 within 7 business days. In the event that you fail to pay the balance before 25 January 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…"(emphasis added)

50. Para. 35 of the Defendants' written legal submissions states inter alia: "…*the respondent has failed to furnish evidence that the purported demand letters exhibited in the affidavit of Eva McCarthy sworn on 7 September 2018 were actually served on the appellants by way of proof of postage or otherwise".* I disagree. The Plaintiff *has* furnished evidence of service in the form of a

sworn averment by Ms McCarthy. Furthermore, nowhere is it averred that the Defendants did not receive this letter of demand or, for that matter, a *second* letter of demand, to which I now turn.

15 February 2018 - letters of demand by Plaintiff's solicitors

51. It is averred at para. 14 of the grounding affidavit that "*…on instructions from the Plaintiff"* the Plaintiff's solicitors *"…wrote to the Defendants and demanded payment of the sum of €246,335.78 or the Defendants deliver up possession of the premises to the Plaintiff within 7 days…"*. Exhibit E to Ms McCarthy's 7th of September 2018 affidavit comprises of copies of 2 letters, dated 15 February 2018, addressed to the First and Second-Named Defendants, respectively. Each letter names the relevant Defendant at the property address. The title of the proceedings is given in both letters, which begin as follows:

> *"Mortgage account number: 801567805*
> *Total balance: €246,335.78*
> *Current arrears balance: €38,709.36*
> *Property at 8 St Mary's Road, Kings court, Cavan*
>
> *Dear* [Sir / Madam]
>
> *We confirm that we act on behalf of Start Mortgages Designated Activity Company in regard to the above matter.*
>
> *We have been instructed that this mortgage loan account is now in arrears and at the 31st day of January, 2018 the arrears on the said mortgage loan account stood at €38,709.36.*
>
> *We have now received our client's clear instructions to call upon you to discharge all monies due, both principal and interest, in regard to the above mortgage loan account and secured by the mortgage/s or charge/s registered against the above property or to deliver up possession of the property to our client within 7 days from the date hereof.*
>
> *Please note that if all monies due and secured as aforesaid, namely a sum of €246,335.78 is not discharged in full or if possession of the property is not delivered to our client within 7 days of the date of this letter or instructions are to commence proceedings for possession of the property without further notice to you in writing or otherwise…"* (emphasis added)

Default established

52. It is further averred on behalf of the Plaintiff that, despite the aforesaid demands, the Defendants failed to pay the monies due or deliver up possession of the premises and the Plaintiff's power of sale arose under the charge and became exercisable (see paras. 13 and 14 of the grounding affidavit).

53. It is important to recall that, in the present proceedings, the Plaintiff is not seeking summary judgment in respect of a specific sum of money, or 'liquidated' debt. Rather, the Plaintiff is seeking possession of property. Thus, this court is not asked to determine the *quantum* of monies owed by the Defendants which might well involve analysis of how a total sum is comprised (be

that of capital and/or interest and/or penalty interest). The key question for this court is whether there has been "*default*" in the manner defined in the charge by which the loan, which the Plaintiff provided to the Defendants, was secured on the property.

54. At paragraph 12 of Ms McCarthy's 7 September 2018 affidavit, it is averred that the Defendants have "*defaulted*" in respect of their repayment obligations and that "*…an event of default occurred within the meaning of… Clause 9.01 of the Charge*". At paragraph 15 of the grounding affidavit it is averred that "*In breach of the covenants contained in the aforesaid Charge, the Defendants have defaulted in payment of the monies due to the Plaintiff pursuant to the provisions of the Charge…".*

55. Recalling that, if "*default is made in payment of any monthly payment…of the secured moneys…*" this will constitute an *"event"* of default (see clause 9.01 of the charge), I am satisfied that the Plaintiff has established default on the part of the Defendants in respect of their repayment obligations on foot of the charge. In short, secured monies are due by the Defendants.

The Defendants' affidavits

56. The Defendants oppose the Plaintiffs' claim. In response to the grounding affidavit, the Second-Named Defendant swore an affidavit on 20 July 2021 in which she made *inter alia* the following averments:-

- *"…I now question who is the true Plaintiff in these proceedings…"* (para 4);
- *"… it has to be questioned how could it be possible for Eva McCarthy to access these facts and knowledge as a holding company is not involved in the everyday running of Start Mortgages DAC…"* (para 5);
- *"… I say that there are serious misrepresentation of facts throughout the Civil Bill…"* (para 7);
- *"… I say in Article 41 of the Constitution of Ireland that the State recognises the Family as the natural primary and fundamental unit group of society…*" (para 8);
- *"… the alleged lender, Start Mortgages Limited, did not lend its own money…"* (para 8);
- *"… the Circuit Court must honour the maxim of equity: equity follows the law…"* (para 8)

57. Reference to Article 41 of the Constitution and the maxims of equity does not constitute a credible defence to the Plaintiffs claim and it seems to me that the replying affidavit goes no further than making a range of mere or 'bare' assertions which are not underpinned by any evidence.

Source of knowledge

58. On the contrary, the evidence before this court entirely undermines the assertions made. For example, this court has clear evidence as to Ms. McCarthy's source of knowledge, given that paras. 1 and 2 of her grounding affidavit contain the following explicit averments:-

"1. I am the Litigation Manager for Start Mortgages Designated Activity Company ("SMDAC") and employed by Start Mortgages Holdings Ltd. ("SMHL") which is the parent company and sole share holder of Start Mortgages Designated Activity Company. SMHL manages and services all loan held by the Plaintiff, including the loan which was advanced by Start Mortgages Limited 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 its books and records in relation to the Defendants and the account of the Defendants herein save where otherwise appears and where so appearing I believe the same to be true.

2. I beg to refer to the Civil Bill issued herein produced. I say that such of the statements therein as relate to the acts and deeds of the Plaintiff are true and correct and such of the statements therein as relate to the acts and deeds of any other person or persons I believe to be true"

True Plaintiff

59. Insofar as the Defendants contend that a plenary hearing is required because of a so-called *"question"* in relation to *"the true Plaintiff in these proceedings"*, the registration of the Plaintiff as owner of the charge over the property and subsequent conversion to a DAC illustrates that there is simply no question to be answered.

60. At para. 6 of the aforesaid replying affidavit, the Second-Named Defendant makes the following averments:-

"6. I enclose a forensic audit report on the alleged mortgage facility which shows the interest being charged by Start Mortgages to be incorrect from at the latest 1st June 2007 (20 days after drawdown). The identified an (sic) *interest over charge of €33,378.98. This continues and increases daily. I call this exhibit E."*

The 2019 Report

61. The exhibit comprises a copy of a report prepared by a Mr. Eddie Fitzpatrick of *"BankCheck"* dated 15 August 2019 ("the 2019 Report"). It is noteworthy that, although the Second-Named Defendant exhibited the 2019 report two years later, in her 20 July 2021 affidavit, Mr. Fitzpatrick has never sworn any affidavit in these proceedings.

62. In a supplementary affidavit sworn by Ms. McCarthy on behalf of the Plaintiff, on 4 November 2021, Ms. McCarthy avers to her source of knowledge and proceeds to make *inter alia* the following averments:-

- *"I say that the Plaintiff denies in full the contents of the report of Mr. Eddie Fitzpatrick and the statements of opinion made in the entirety of his report"* (para 5);
- *"… I say that the method of calculation used by Mr. Eddie Fitzpatrick in his calculations as outlined in his report is incorrect. Such calculations do not track the debits and credits on the account and therefore the balance as alleged by Mr. Eddie Fitzpatrick is*

incorrect. I say that there has been no overcharging and no overcharging in the sum of €33.373.98, as alleged in his report" (para 6).

63. The foregoing constitutes evidence of the fact that (i) the 2019 report is incorrect, and (ii) there was no overcharging. That is the state of the evidence before this court.

64. Subsequent to 4 November 2021 there has simply been no engagement by or on behalf of the Defendants with the fact that the 2019 report is *"incorrect"* because *"calculations do not track the debits and credits on the account"* in the manner averred by Ms. McCarthy.

65. It was open to the Defendants to obtain affidavit evidence from Mr. Fitzpatrick (e.g. taking issue with the facts averred on behalf of the Plaintiff that his report was incorrect for the reasons given) but the Defendants chose not to do so. Similarly, the Defendants could have sought to have Ms. McCarthy cross-examined with respect to the aforementioned averments, but this was not a course taken.

66. Rather than the author of the 2019 report tendering *any* evidence at any stage, the 'height' of what the Defendants have done is to assert that the contents of Mr Fitzpatrick's 2019 report should be *"deemed as truth"* (see para. 7 of the Second-Named Defendants 17 January 2022 affidavit).

No conflicts of fact

67. For these reasons, I cannot agree with the submission by Counsel for the Defendants to the effect that there are 'conflicts of fact' to be resolved. There are none.

Unsupported assertions

68. It is fair to say that the supplementary affidavit sworn by the Second-Named Defendant on 17 January 2022 'doubles down' on unsupported assertions including the following:-

- *"… Eva McCarthy cannot represent Start Mortgages DAC…"* (para 4);
- *"…The question must be answered as to why a company with whom I have no contract with is named on the Civil Bill?"* (para 5);
- *" I now question who is the true Plaintiff in these proceedings"* (para 5);
- *"… it has to be questioned how could it be possible for Eva McCarthy to access these facts and knowledge…"* (para 6);
- *"… there are serious misrepresentation of facts throughout the Civil Bill…"* (para 9);
- *"… Start Mortgages Limited did not lend its own money…"* (para 11);
- *"… there is serious fraudulent activity on my account. Therefore, I ask for this matter to be dismissed in its entirety or sent to the DPP for criminal investigation or to a plenary hearing"* (para 13);
- *"… myself and my family have not caused any damage or injury to the alleged Plaintiff and I believe that the case against us has been brought under false pretences and have caused our family serious damages along the way."* (para 14)

Inappropriate conduct

69. Once more, the foregoing amount to unsupported assertions which disclose no credible basis for any defence to the Plaintiff's claim. It is also very troubling to note that the Defendants were willing to make allegations of the most serious kind (fraudulent activity and criminality) without a shred of evidence to support those allegations. To conduct their opposition to the Plaintiff's claim in this way was utterly inappropriate in my view.

70. The foregoing comments can also be made in relation to the supplemental affidavit sworn by the Second-Named Defendant on 20 July 2022, in which allegations are made of *"fraudulent misrepresentation"*; *"misrepresentation of truth and facts"*; *"serious misrepresentation of facts on the Civil Bill"*; and *"serious fraudulent activity on my account".*

71. Again, these allegations are as serious as they are devoid of evidence to support them. Hence, they are allegations which should not have been made.

72. The assertions made in the affidavit sworn by the Second-Named Defendant on 19 July 2023 include the following:-

- *"… this Defendant holds a bona fide defence to the Plaintiffs application and…the circumstances and events warrant a plenary hearing…"* (para 2);
- *"… the Plaintiff has failed…to extend the protections of the Mortgage Arrears Resolution Process (MARPS)…"* (para 3);
- *" The Supreme Court decision – Bank of Ireland v O'Malley [2019] IESC 84, such claim by the Plaintiff is considered to be an act of misrepresentation, coercion and fraud, premised on undue enrichment"* (para 5);
- *"…the Plaintiff has failed and or ignored to furnish this Defendant with a Global Deed of Transfer demonstrating the extent of contractual and/or lawful rights, and legislative entitlement the Plaintiff holds in equity and/or in law relating to its legal standing before this court"* (para 6);
- *"… the Plaintiff is a servicing agent to an unknown third party who financed the purchase of this Defendant's mortgage and asset, such actions in purchasing a debt with the intention to profit through litigation is representative of litigation trafficking"* (para 7);
- *"… grave issues demand clarification by An Garda Síochána, the Central Bank of Ireland, the Security Exchange Commission and the European Securities Markets Authority"* (para 10);
- *"… the Plaintiff did on the registration of a charge on this Defendants property relied on a third-party power of attorney contrary to law.* (para 11);
- *"… where the registration of a charge is deemed to be contrary to legislative requirements the charge is void, rendering the Plaintiff with unsecured assets"* (para 12);
- *"… the interest charged by Start Mortgages has been incorrect from at the latest 1 June 2007 (twenty days after drawdown)"* (para 13);

- *"…Start Mortgages…do not have the authority… to enforce a credit agreement…"* (para 18);
- *"… the Plaintiff failed to update the register when securitisation alters the ownership status of the loan originator"* (para 23);
- *"… the Plaintiff has no equitable interest in the loan and has only their legal title so acting as trustee only…"* (para 32);

73. The foregoing, and a range of other unsupported assertions, fail to engage with and certainly do not displace the *prima facia* evidence of the Plaintiff that the right to seek possession has arisen and become exercisable by reason of the Defendants' default in payment of the monies secured on the property by the charge of which the Plaintiff is registered owner.

74. In short, despite the number and length of the affidavits sworn by the Second-Named Defendant, the contents amount to no more than generalised and unsupported assertions to the effect that the court should direct a plenary hearing without there being any issue of fact or law to be determined. It is useful to take one example.

MARPS

75. In *Irish Life and Permanent Plc v Dunne & Anor and Irish Life and Permanent Plc v Dunphy* [2015] IESC 46, the Supreme Court made the following clear, from para. 5.18:-

> *"[5.18]…for a court to entertain an application for possession which was brought in circumstances of clear breach of the moratorium would be for a court to act in aid of the actions of a financial institution which were clearly unlawful (by being in breach of the Code) and in circumstances where the very act of the financial institution concerned in seeking possession was contrary to the intention or purpose behind the Code itself.*
>
> *5.19. In my view a court could not properly act to consider a possession application in those circumstances. It should be recorded that the Code (being the version applicable to this case) does make some provision for the moratorium period being cut short (see step 4 of the M.A.R.P. provisions) or not applying (see provision 48). I am, in this section of the judgment, dealing with a situation where an application for possession has been brought at a time when the Code precludes such action. Like consideration will apply to any similar provisions in the current or any further versions of the Code.*
>
> *5.20. However, in respect of other provisions of the Code, different considerations apply. There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution, in formulating its detailed policies in respect of mortgage arrears and applying those policies to the facts of individual cases, can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the Oireachtas had intended to give the courts such a role then it would surely have required detailed and express legislation which would have established the criteria by*

reference to which the court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law."

76. Whilst the Second-Named Defendant asserts that the Plaintiff has failed to comply with the MARPS and CCMA, the evidence paints an entirely different picture. It will be recalled that the grounding affidavit contains averments that the CCMA was complied with and the protections under the MARPs were extended to the Defendants. The evidence before this court illustrates that the relevant moratorium has, in fact, been complied with.

The 4 main issues relied on by the Defendants

77. Despite the 'scattergun' approach taken on affidavit and the numerous issues raised by the Defendants, during the course of the hearing before me the Defendants' counsel made clear that the Defendants (i) do *not* dispute the contents of the Register; and (ii) accept that the Plaintiff is owner of the relevant charge. The natural consequence of this must be that the Defendants no longer argue that the 'incorrect' Plaintiff is seeking possession. The foregoing, of course, is no concession. Rather, it is an acknowledgment of the conclusiveness of the Register which establishes the Plaintiff's ownership of the charge which created security over the property in respect of the monies advanced to the Defendants. In contrast to the plethora of issues raised in the Defendants' affidavits, during the hearing counsel for the Defendants submitted that there were 4 aspects to the Defendants claim to be entitled to a plenary hearing. These can be summarised as follows:-

1) The Plaintiff's claim 'falls foul' of the test laid down by the Supreme Court in *Bank of Ireland Mortgage v O'Malley* [2019] IESC84;

2) The Plaintiff's proofs are not in order;

3) The terms of the Plaintiff's letter of offer are unfair; and

4) Overcharging of interest creates a set off which gives rise to a defence.

78. With regard to the first of these issues, the Defendants rely, in particular, on the decision of Simons J in *Promontoria (Finn) Limited v Coleman Flavin* [2023] IEHC 663 ("*Flavin*") wherein the learned Judge stated, with reference to summary claims for debt and for possession, respectively, that: "… *the two types of proceedings are analogous in that both seek to obtain substantive relief on a summary application".*

79. In *Flavin*, Simons J dealt with a claim for possession whereby the Plaintiff asserted that it had succeeded to the mortgagee's interest in a mortgage said to have been entered into between First Active Plc and the Defendant in question. Of particular note is that the title to the lands was unregistered; the asserted mortgage predated the commencement of the Land and Conveyancing Law Reform Act 2009; and a principle issue in the case concerned the failure of the Plaintiff to put a copy of the mortgage deed before the court. In short, the evidential position in *Flavin* was materially different to that in the present application. At para. 33, Simons J stated that:

"The only basis upon which the court can be satisfied that a right to take possession has arisen on the facts is to examine the terms of the mortgage. This proof will, normally, only be

satisfied by production of a copy of the mortgage deed. It is not appropriate for the court to speculate as to what the terms of the mortgage might be."

80. The foregoing arose in circumstances where the Plaintiff had exhibited only a Memorial as filed in the Registry of Deeds and, in the absence of a copy of the mortgage itself being before the court, the Plaintiff submitted that it was *"more than probable"* that the terms of the mortgage allowed the Defendant to remain in possession so long as he repaid his secured lending on the agreed repayment terms. It was in the context of these facts – very different to the facts before this Court - that Simons J stated:-

"[35]… The terms of the memorial have been set out in full earlier. As appears, the information provided is limited to the date of the mortgage deed, the identity of the parties and a description of the property. There is no indication as to what the terms of the mortgage are in respect of the right to possession and power of sale.

36. It follows, therefore that the Plaintiff has failed to make out one of the essential proofs of its application. The Plaintiff has failed to establish, even on a prima facie basis that the mortgagee's right to possession has arisen under the mortgage.

37. Counsel on behalf of the Plaintiff seeks to overcome this difficulty by making two related submissions as follows. First, it is said that the court should be prepared to infer that the deed of mortgage likely allows the mortgagee to enter into possession where there are significant arrears. Secondly, it is suggested that there is an obligation upon the Defendant to put forward evidence which negates the contention that a right to possession has arisen.

38. With respect, these submissions are inconsistent with the principle that the moving party must set forth a prima facia case for an order for possession. The position is explained as follows in Bank of Ireland v Cody [2021] IESC 26, [2021] 2 I.R. 381. The Supreme Court emphasised that Order 5B of the Circuit Court rules requires a Plaintiff to set forth a prima facie case for an order for possession (para. 70) and that the grounding affidavit must set out the full proofs to obtain judgment (para. 36). It is only when this is done that the evidential burden shifts to a Defendant to put forward a credible defence to the proceedings.

39. The nature of the shifting evidential burden is elaborated upon in Bank of Ireland Mortgage Bank v O'Malley [2019] IESC 84, [2020] 2 I.LR.M. 42 (at paras. 5.2 and 5.3):-

> *"When it comes to the evidence which is required to be placed before the court, it does seem to me that it is important to emphasise that there is an obligation on any Plaintiff to produce prima facie evidence of their debit if they wish the court to grant summary judgment (or indeed, if, in the absence of the filing of an appearance by the Defendant, they bring an application for judgment in the Central Office). The jurisprudence on the question of what a Defendant must do to resist summary judgment primarily focuses on cases where a prima facie claim to a debt is established and the Defendant wishes to put forward a positive defence. In such cases, it is necessary for the court to assess, in accordance with the detailed requirements which can be found in the relevant jurisprudence, whether what is said to amount to a*

defence amounts to mere assertion or meets the threshold for entitling the Defendant to a full or plenary hearing.

However, it also seems clear that the obligation on a Defendant to establish an arguable defence is, in reality, one which only arises if the Plaintiff has first placed sufficient evidence before the court to establish prima facie the debt alleged is due. There are, therefore, two questions. The first is as to whether the Plaintiff has put sufficient evidence the court to establish a prima facie debt. If the answer to that question is no, then the Plaintiff cannot be entitled to summary judgment in any event. If, however, the answer to that question is yes, then the court must go on to consider, in accordance with the established jurisprudence, whether the Defendant has put forward a credible defence."

40. The position is summarised as follows at the conclusion of the judgment (para 8.2):-

"[…] That obligation is prior to and independent of the obligation of a Defendant to put forward a positive defence. In other words, the Plaintiff must establish the liquidated debt on a prima facie basis before it is necessary for the Defendant to establish any defence which meets the threshold for plenary hearing."

41. Counsel on behalf of the Plaintiff has sought to distinguish O'Malley on the basis that it involves an application for summary judgment in debt proceedings rather than possession proceedings. With respect, the two types of proceedings are analogous in that both seek to obtain substantive relief on a summary application. The Supreme Court assimilated the test for the two types of proceedings as follows in Bank of Ireland Mortgage Bank v Cody (at para. 74 of the reported judgment):-

"[…] a court hearing a claim for summary judgment, whether that be for summary judgment for debt or for summary possession, must be satisfied that the Plaintiff has established its claim and that the Defendant has not put forward a basis for a credible defence either or on the facts or on the law."

42. In conclusion, the Plaintiff has failed to make out its proofs. The court simply does not know the circumstances in which the mortgagee enjoys a right to possession under the terms of the mortgage. The court does not know how the events of default, which displaced the mortgagor's right to possession, are defined."

Threshold

81. It was in the foregoing context that Simons J stated that "*… the two types of proceedings are analogous in that both seek to obtain substantive relief on a summary application*". The learned judge's focus was on the need in both types of proceedings for *prima facie* evidence. Simons J did not suggest that, in terms of 'proofs', the same *evidence* was required. Rather, he made clear that the same *threshold* faced a Plaintiff in both instances.

82. Nowhere in *Flavin* did the learned judge suggest that proceedings which seek possession will be defective unless they contain sufficient details to meet the 'benchmark' laid down by the Supreme

Court in *O'Malley* as to how the specific amount due is calculated. Furthermore, nowhere in *O'Malley* did Clarke CJ state that the level of detail required in a summary claim for debt also applied to proceedings where a Plaintiff does *not* seek judgment for a debt.

Prima facie

83. What is common between both a summary claim for a liquidated amount and a summary claim for a possession is that the relevant Plaintiff must establish their claim on a *prima facie* basis. The Plaintiff in the present claim has done just that. Unlike the position in *Flavin*, this court has had the benefit of the relevant Land Registry folio. Furthermore (and, again, unlike the situation in *Flavin*) the Plaintiff has furnished a copy of the relevant mortgage deed. An examination of the terms of the relevant charge in the context of the balance of the evidence proffered by the Plaintiff means that this court can be satisfied that the right to take possession of the property has arisen.

No authority

84. In response to my questions, counsel for the Defendants confirmed, very appropriately, that he could point to no authority to the effect that a Civil Bill seeking possession must comply with the requirements of *O'Malley* as if the claim were in respect of a debt. Rather, counsel for the Defendant returned, repeatedly, to the phrase *"the two types of proceedings are analogous"* as a basis for submitting that *"the Plaintiff's claim falls foul of the test laid down by the Supreme Court in O'Malley"* (para. 27 of the Defendants' written submissions). For the reasons set out above, I feel obliged to reject this submission.

85. In short, the Supreme Court in *O'Malley* was dealing with a summary claim for a liquidated debt, whereas the Plaintiff in these proceedings is *not* seeking judgment for a debt, the relevant issue in this case being whether the Defendants have defaulted on their repayment obligations *per* the charge, triggering the Plaintiff's entitlement to possession. They have.

86. I am fortified in the foregoing views by the decision in *Start Mortgages DAC v Ryan & Anor* wherein at, para. 40, Woulfe J stated:-

> *"[40]… 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'."* (emphasis added)

87. This is not to say that the evidence before the court discloses any dispute whatsoever in relation to sums due by the Defendants on foot of the charge. In the manner previously examined, the state of the evidence is that the calculations in the 2019 report are incorrect, because they do not

track the debits and credits on the account and there has been no overcharging. Leaving aside the fact that the contents of the 2019 report have not even been averred to by their author, Mr. Fitzpatrick simply not engaged, still less take any issue with, sworn averments to the effect that the basis for his calculations was wrong and, therefore no overcharging has occurred.

88. In short, and despite the submissions made with skill to the contrary, there is no dispute of fact in respect of this issue. Not only is this court not asked to grant judgment for any sum – the relevant issue being default – the grounding affidavit which accompanies the Plaintiff's Civil Bill in the present case exhibits a detailed statement of account showing all debits and credits in relation to the Defendants' repayment obligations in respect of the loan secured on the property the charge. In other words and leaving aside that this is a summary (possession) claim of a different nature to that in O'Malley (debt), there is perfect clarity regarding the Defendant's indebtedness, in light of the statement concerning their mortgage account which comprised part of the Plaintiff's proofs.

Proofs

89. In the Defendants written legal submissions, considerable emphasis was laid on para. 26 of the decision of Holland J in *Cabot Financial (Ireland) Limited v Micheal Kearney* [2022] IEHC 247 ("*Cabot Financial*") where the learned judge was critical of a Plaintiff who sought summary judgment on a *"let's see if the Defendant denies it"* basis and went on to state: *"This implies that a Plaintiff, knowing it does not have the necessary proofs, is not entitled to issue an O'Malley - deficient summons and on foot of an O'Malley – deficient affidavit seek summary judgment on a 'let's see if the Defendant denies it' basis."* Paragraph 32 of the Defendants' written submission begin:-

> *"In the instant matter, the Plaintiff/respondent knew or ought to have known at all material times that its pleading are fundamentally flawed, and at the very least since the Supreme Court clarified the law in this regard. It is submitted therefore, that should this honourable court deem the respondent's Civil Bill deficient in light of O'Malley, the appellants are entitled to their costs as a consequence of and incidental to same…"*

90. In the manner explained in this judgment, the Defendants' submissions represent an attempt to treat the present proceedings as if the Plaintiff was seeking judgment for a debt. However, the Plaintiffs claim is of a very different type. Reliance on *Cabot Financial* cannot avail the Defendants as there is *no* flaw in (i) the way in which the possession claim has been pleaded; or (ii) the evidence proffered in support of the claim.

91. I reject the submission that the Plaintiff's proofs are not in order. An argument made under this heading is that the amounts specified in the various letters of demand were *"incorrect".* Put simply, there is no evidence whatsoever to underpin this 'bald' assertion. For the avoidance of doubt, the 2019 report certainly does not provide any basis for what constitutes no more than a mere assertion, which has been undermined by evidence.

Unsigned loan offer

92. In oral submissions, counsel for the Defendant indicated that the *"the main point"* in relation to the argument that the Plaintiff's proofs are not in order is that the Plaintiff has exhibited an

"*unsigned copy of the loan offer*". In my view, this cannot conceivably constitute a credible defence. This is for a variety of reasons.

93. The Defendants have never denied that they accepted the loan offer in question. Furthermore, when one considers the entirety of the averments made in the various affidavits sworn by the Second-Named Defendant, it is clear that she accepts that the Defendants entered into the exhibited loan agreement, albeit that she now asserts that certain terms in the loan are unfair. Moreover, it is accepted by the Defendants that they received the €188,500.00 referred to in the Loan Offer (which makes explicit that no such loan would be advanced without the Defendants accepting the terms of the Loan Offer) which included a term requiring them to enter the relevant charge. It is common case that the Defendants executed the charge in the presence of their solicitor.

94. Another aspect of the Defendant's argument that the Plaintiff's proofs are infirm is the assertion that no evidence has been put before this court in relation to service of the demand letters. This is an issue I dealt with earlier in this judgment, in circumstances where the grounding affidavit contains evidence of service in the form of averments made by Ms. McCarthy. Nor do the Defendants deny that they received the relevant letters of demand.

95. The Defendants reliance on decisions such as *Bank of Ireland v Ward* [2020] IEHC 249 and *Cabot Financial (Ireland) Limited v Kearney* [2022] IEHC 247 does not establish their entitlement to a plenary hearing. The foregoing, and many other authorities speak, to the obligation on a Plaintiff to establish its claim on a *prima facie* basis, following which it is necessary to consider whether arguable grounds of defence have been raised. For the reasons set out in this judgment, the Plaintiff *has* established its claim on a *prima facie* basis, whereas the Defendants have *not* put forward any credible defence.

96. At para. 21 of the Defendants written submissions reference is made to s. 44 of the Central Bank (Supervision and Enforcement) Act 2013 which provides:-

> *"44. – A failure by a regulated financial service provider to comply with any obligations under financial services legislation is actionable by any customer of the regulated financial service provider who suffers loss or damage as a result of such failure."*

97. Para. 22 of the Defendants written submissions goes on to make reference to the Consumer Protection Act 2007 ("*CPA 2007"*), s. 74 of which provides:-

> *"…(2) A consumer who is aggrieved by a prohibited act or practice shall have a right of action for relief by way of damages, including exemplary damages, against the following:-*
>
> *(a) Any trader who commits or engages in the prohibited act or practice;*
>
> *(b) If such trader is a body corporate, any director, manager, secretary or other officer of the trader or a person who purported to act in any such capacity, who authorised or consented to the doing of the act or the engaging in of the practice.*

(c) Subject to subs. (4) an action under this section maybe brought in the District Court, the Circuit Court or the High Court and such a court may, in that action, award such damages as the court considers appropriate, including exemplary damages."

98. At para. 23 of the Defendants written submissions, it is stated that s. 74 of the CPA 2007 is actionable *per se* and that action can be brought against the relevant corporate body including its directors and/or certain persons in its employ for engagement in unfair commercial practices. Against the foregoing backdrop, para. 41 of the Defendants written submissions states *inter alia*:-

"… the Appellants submit that they are entitled to claim damages as against the respondent pursuant to s. 74 of the CPA 2007. In addition, it is submitted that the appellants also have a right of action in damages as against the respondent pursuant to s. 44 of the Central Bank (Supervision and Enforcement) Act 2013. It is submitted, therefore, that the foregoing issue of interest overcharging provides grounds for counterclaim as against the respondent which should act as a set-off and/or counterclaim as against the respondent…" (emphasis added)

99. I feel bound to reject the foregoing submissions. The state of the evidence before this court is that that there is simply no *"issue of interest over-charging"*. Taken at its height, the Second-Named Defendant made, in 2021, a 'bald' assertion of overcharging for which she purported to rely on a 2019 report authored by someone who has never proffered any evidence to this court. At the risk of repetition, the mistaken basis for, and incorrect findings of, the 2019 report have been averred to. Not having been disputed by the author of the 2019 report, the state of the evidence is that no overcharging occurred.

100. The principles concerning set-off and counterclaim were set out by Clarke J (as he then was) in *McGrath v O'Driscoll* [2004] IEHC 195 but there is no reality in any set off or counterclaim arising in the present case. In response to my questions, counsel for the Defendants confirmed that his clients had *not* brought any statutory claim against the Plaintiff and the Defendants have fallen very well short of establishing any (i) set-off or (ii) counterclaim.

101. Guided by Kingsmill Moore J in *Prendergast v Biddle* (31 July 1957, unreported SC at pp. 12-13) I am satisfied that there is no question of granting judgment in these proceeding being *"…used to shut out a possible defence or to exclude from consideration a triable issue"*.

102. Paragraphs 37 to 40 of the Defendants' written legal submissions state:
"37. The appellants further contend that they can defend the within proceedings on the basis that they are the victims of significant overcharging, and by extension, unfair and/or misleading and/or aggressive commercial practices, on the part of the respondent. It is submitted that the respondent's actions in that regard amount to a serious breach of consumer protection legislation. In support of their contention, the appellants procured a report from banking and financial expert, Mr Eddie Fitzpatrick of Bankcheck which the appellants contend establishes that the respondent has engaged in the overcharging of interest on their account within a matter of weeks from the inception of the loan.

38. It is further submitted that the terms of the underlying mortgage agreement upon which the respondent relies on in order to engage in such practice constitute unfair terms for the

purposes of the UTCD and ought to be deemed non-binding on the appellants. The appellants request this Honourable Court to conduct an assessment of the terms in the mortgage agreement papers adduced in evidence by the Plaintiff for compliance with the UTCD.

39. It is also submitted that in applying charges and/or overcharges to the appellant's account in the manner aforesaid, the respondent has breached the OTCD, and engaged in unfair commercial practices against the appellants as proscribed by the provisions of the Unfair Commercial Practices Directive UCPD and/or the Consumer Protection Act 2007.

40. One of the most invidious features of the respondent's actions is the fact that it continued with its deficient proceedings seeking to take possession of the appellants' family home notwithstanding being on notice of the infirmities in their pleadings and/or evidence. It is submitted that such conduct amounts to unfair and/or misleading and/or aggressive commercial practice(s) as proscribed by the UCPD." (emphasis added)

103. A fatal flaw in these submissions is that they are constructed on the proposition that the Defendants have proffered *prima facie* evidence of overcharging. They have not. For the reasons set out in this judgment, this Court has found *no* infirmities in the Plaintiff's pleadings or evidence. Once again, the arguments made by the Defendants 'boil down' to a range of assertions which are unsupported by facts, and entirely undermined by the evidence.

EU law

104. In oral submissions, counsel for the Defendants argued that *"to rule in favour of the Plaintiff would run contrary to principles of EU law"* and significant reliance was placed on the opinion of Advocate General Medina in *Case C-450/22 Caixabank & Ors. v Adicae & Ors. ('Caixabank')".* It is useful to understand he facts at play in that case.

105. The Spanish "Association of Users of Banks, Savings and Insurance" ("ADICAE") brought a collective action against forty four financial institutions operating in Spain. ADICAE sought an injunction against those institutions which would require them to cease and desist from the use of a general contractual term in their variable mortgage loan agreements which restricted variable interest rates from falling below a certain threshold ('the floor clause'). The judgment at first instance held that the 'floor clauses' were null and void. The Defendant banks appealed to the provincial court in Madrid which dismissed most of the appeals, holding that it was necessary to establish whether the financial institution concealed or misrepresented the economic consequences of the clause concerned. It considered that such concealment or misrepresentation occurs where the bank does not present the 'floor clause' on an equivalent footing to other clauses, to which the average consumer pays attention, mainly those that set out the price of the contract.

106. The court listed certain practices which may constitute evidence of the lack of transparency of the contested clause, such as presenting the 'floor clause' together with information unrelated to the price of the contract; placing the 'floor clause' in the middle or at the end of long paragraphs which begin by dealing with other matters; and presenting the 'floor clause' together with the term limiting the upward adjustment of the interest ('ceiling clause') so that the consumer's

attention is focussed on the apparent security of having a cap on the hypothetical increase of the reference index, thereby diverting his or her attention from the importance of the minimum rate. The banks appealed to the Spanish Supreme Court which made a request for a preliminary ruling.

107. The referring court raised two main issues. The first related to whether a collective action for an injunction was an appropriate procedural mechanism to carry out a review of the transparency of contractual clauses. The second issue related to the definition of the average consumer in circumstances where there were differences among the numerous financial institutions involved in the litigation; the contractual models used; the customers concerned; and in which the terms concerned had been used over a long period of time.

108. Counsel for the Defendants in the present case placed significant evidence on s.(b) of Advocate General Medina's opinion which begins:

"(b) Review of transparency of contractual terms.

37. The requirement of transparency is expressed by the rule that contract terms have to be drafted in plain intelligible language (Article 4(2) and Article 5 of Directive 93/13). Moreover, it follows from the 20th recital of Directive 93/13 and point 1(i) of the Annex thereto that the consumer must gain prior knowledge of the terms of a contract in order to be able to decide, in full knowledge of the facts, whether he or she wishes to be bound by those terms.

38. More particularly, under Article 4(2) of Directive 93/13, the assessment of unfairness must not relate either to the definition of the 'main subject matter of the contract' or to the 'adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, insofar as these terms are in plain intelligible language'. It follows that the application of the exception to the mechanism for reviewing the unfair nature of contractual terms in relation to the core terms (the 'core terms exemption') is subject to the transparency of those terms.

39. Article 5 of Directive 93/13 sets out a more general rule on transparency requiring that contractual terms 'must always be drafted in plain intelligible language'. That provision could be seen as stating, as suggested in academic writing, a 'single overarching principle' of transparency.

40. The Court has ruled that the transparency requirement as it appears in Article 4 of Directive 93/13 has the same scope as that referred to in Article 5 of that Directive.

41. According to the Court, the requirement of transparency must be understood in a broad sense, involving both formal and substantive criteria. Generally, formal transparency refers to the wording and method of presentation of the relevant information to the consumer. By way of illustration, the Commission guidance on unfair terms lists the following aspects of presentation of contract terms as relevant factors for assessing transparency: the clarity of the visual presentation, the fact of whether a contract is structured in a logical way and whether important stipulations are given the prominence they deserve and are not hidden

amongst other provisions, or whether terms are contained in a contract or context where they can reasonably be expected, including in conjunction with other related contractual terms.

42. The review of the substantive transparency of contractual terms goes further than an assessment of the plain and intelligible nature of the drafting of a term and extends to whether a term allows the consumer to comprehend its real consequences.

43. In that regard, according to the settled case-law of the Court, the information provided before the conclusion of a contract, on the terms of the contract and the consequences of concluding it, is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he or she wishes to be contractually bound to a seller or supplier by the terms previously drawn up by the latter. Consequently, that requirement of transparency must be understood as requiring not only that the term in question must be formally and grammatically intelligible to the consumer, but also that an average consumer, who is reasonably well informed and reasonably observant and circumspect, is in a position to understand the specific functioning of that term and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations."

109. Counsel for the Defendants also laid emphasis on para. 46 wherein Advocate General Medina stated:

"46. The concept of the average consumer is a fictio juris which tends to reduce to a common dominator situations which are very varied. As such, it is an objective benchmark. In that regard, the court has ruled that the observance of the transparency requirement must be ascertained in relation to the objective standard of the average consumer, who is reasonably well informed and reasonably observant and circumspect. That standard cannot be deemed to correspond, inter alia, either to a consumer who is less well informed than that average consumer, or to a consumer who is better informed than the latter."

110. In response to my questions concerning the nature of the Defendants' argument on this issue, Counsel's response was to the effect that terms were *"unfair, as they fail to meet the transparency test".* In view of this submission, I asked counsel to identify terms said by the Defendants to be unfair and lacking in transparency. In response, the Defendant's counsel pointed to *"Condition 402"* which appears on p.3 (of 12) of the loan offer dated 13 April 2007 and states:

"The rate of interest applicable to this loan will vary in line with market interest rates. It will be directly affected by the rise and fall of the European Central Bank Rate."

111. With respect, I fail to see how this term is either unintelligible or lacking in transparency. It will be recalled that the loan offer dated 13 April 2007 set out, in explicit terms, that the applicable interest was a *"Standard Variable Rate"*. Condition 402 makes clear the manner in which the rate will vary.

112. When I invited counsel for the Defendants to identify all the terms which his clients regard as unfair, the thrust of his response was to submit that it was not for his clients to do this. In other

words, the Defendants position would appear to be (i) terms in their contract with the lender are unfair; (ii) they are unfair because they are not transparent; (iii) the Defendants have not identified those terms which they regard as unfair; (iv) the Defendants contend that they have no role in doing so; and that (v) an 'own motion' assessment by this court will result in a finding that there are unfair terms.

113. There is no doubt about the obligation on this court to conduct an 'own motion' assessment, but that seems to be to be distinct from the question of what terms, if any, the Defendants say are unfair. In the present case, other than condition 402 to which their counsel referred in response to my query, the Defendants have not identified and do not regard it as appropriate to identify *any* terms they contend to be unfair. The gravamen of their argument is that the Court will find unfair terms and that such a finding is a basis for a defence.

114. Advocate General Medina's opinion is plainly *not* a decision of the CJEU and it seems to me that the state of the law is as set out in the judgments of McDermott J in *Grant & Anor v. The County Registrar for Laois & Ors* [2019] IEHC 185 (*"Grant"*) and in *Permanent TSB Plc. v. Davis [2019] IEHC 184* (*"Davis")* to which I will presently refer.

115. Without prejudice to the foregoing, and returning to look at condition 402 (which states that the interest rate on the loan will vary in line with market interest rates and will be "*directly affected by the rise and fall of the European Central Bank Rate"*) it seems to me that this term is both clear and intelligible. An average customer, who is reasonably well informed and reasonably observant and circumspect, will surely be aware that Ireland is a member of the European Union; that the European Central Bank is a European Union Institution; and that a variable interest rate may do precisely that, i.e. vary. This does not require a 'granular' setting out of the mechanism by which the European Central Bank determines rates. Doing so would serve no useful purpose and is hardly likely to be intelligible to those without expertise in economics or banking or related spheres. The point is not the 'micro' detail of how, but the fact that interest rates will vary and the loan offer makes crystal clear that it will, and that it will be with reference to ECB decisions.

No unfair terms

116. Furthermore, to place Condition 402 in context, it will also be recalled that other terms in the same loan offer made perfectly clear (i) the total advanced; (ii) the term of the agreement; (iii) the number of repayments required; (iv) the total amount repayable; (v) the APR; and (vi) the cost of credit; and (vii) that the loan came with a variable interest rate. Furthermore, the loan offer identified the amount of each instalment (based on the *then* applicable rate) as being €1,353.28; and the effect of a 1% *increase* in interest rate in the first year (being €144.41). Against that backdrop, even if it were the case (and I am not satisfied that it is) that Advocate General Medina's opinion was both binding on this court and created obligations for this court beyond *Grant,* I cannot consider Condition 402 to be other than clear and transparent. No unfairness has been identified with reference to it, or any other terms.

117. In the manner discussed earlier, the Plaintiff has furnished a mortgage statement of account which covers the period 11 May 2007 to 31 August 2018. An examination of the 'debit' entries reveals *inter alia* the following:

- as of 28 February 2009, the monthly 'debit' on the Defendant's mortgage account was the sum of €1,135.95;
- this is *less* than the instalment amount as originally notified to the Defendants in the 13 April 2007 loan offer;
- during the 12 months after February 2009, the largest debit entry was for the sum of €1,206.94 in respect of a "*late d/debit return*" dated "*02/03/2009*";
- as of 17 February 2010, the debit was for the sum of €1,044.63 in respect of a "*late d/debit return*";
- throughout the following 12 months (and with the exception of a debit entry for €1,047.30 on 31 October 2010), every monthly debit was for a similar or lesser sum;
- as of 03 February 2011, the debit entry was for €1,141.86 and the largest debit entry during the following 12 months was for €1,267.76, in respect of "*late d/debit return*" on 01 September 2011 and 04 October 2011;
- as of 02 February 2012, the debit entry was for €1,205.25 and this was the largest debit entry for the following 12 months;
- as of 04 March 2013, the debit entry was for €1,149.74 and this was the largest debit entry for the following 12 months;
- as of 31 March 2014, the debit entry was for €1,049.96 and debits were at or about that level for the following 12 months (the largest being €1,056.22 on 31 January 2015);
- throughout 2015, the largest debit entry was for €1,068.27 as of 31 December 2015;
- throughout 2016, the largest debit was for the sum of €1,097.14 as of 31 July 2016;
- during the entire of 2017, the largest debit was for €1,191.21 as of 31 December 2017;
- thereafter, the largest debit entry from January to August 2018 inclusive was for €1,238.01 as of 31 August 2018, being *less* than the monthly instalment which the Defendants were given notice of 11 years earlier, in the loan agreement dated 13 April 2007.

118. As the foregoing illustrates, this is not a situation where, sometime after entering into a loan agreement with a variable interest rate, the rate *increased* resulting in the monthly instalment being significantly greater than originally calculated when the loan was first offered and accepted.

119. On the contrary, and focussing on the point at which the Defendants ceased making any repayments on foot of the mortgage and charge in question, their monthly liabilities were considerably *less* than when they drew down the initial loan 11 years earlier.

120. The foregoing scenario does not, of itself, mean that all clauses are necessarily immune from the accusation of unfairness. However, the evidence allows this court to say that (i) there could not have been any lack of clarity in relation to the terms of the agreement which the Defendants

entered into; and (ii) as a matter of fact, the Defendants' monthly repayment obligations became lesser not greater as a result of the operation of the perfectly clear terms which they accepted. I say this in circumstances where this Court has carried out its 'own motion' assessment of the relevant terms guided by the principles outlined in *Grant.*

Main subject matter

121. I am satisfied that what is at issue in these proceedings concern terms and conditions relating to the *"main subject matter of the contract"*. I am equally satisfied that these *"core terms"* are transparent. They are clearly presented; readily found; given adequate prominence; intelligible; and capable of being understood and evaluated by the average customer (leaving aside that the Defendants would also appear to have had the benefit of legal advice when entering into the mortgage). The evidence before this Court allows for a finding that that the Defendants understood that they were entering into a mortgage thereby creating security, in respect of their family home, on terms which were both intelligible and transparent.

122. The main subject matter of the agreement which the Defendants entered into with the Plaintiff was that all monies advanced to them would have to be repaid by them by means of monthly instalments in the manner very clearly set out in the loan agreement. The security granted by the Defendants over their property was in accordance with the terms of the loan agreement. The Defendants cannot have been unaware of the fact that, in the event of defaulting on their monthly repayment obligations, the Plaintiff had a contractual entitlement to invoke its right to seek possession of the property.

123. In short, I take the view that all relevant terms (i.e. concerning the creation of the charge; the Defendants' obligations to make monthly repayments, including of interest in the manner provided; and the Plaintiff's right to seek possession of the property in the event of the Defendants' default) constitute matters which are exempt from review for unfairness under Directive 93/13. However, emphasising that the obligation on this Court goes no further than to comply with the approach outlined in *Grant* and *Davis,* even if the *'core terms exemption'* is subject to a separate 'test' concerning the transparency of the terms exempted, I am satisfied that they are entirely transparent.

124. Woulfe J stated, *inter alia*, the following in *Start Mortgages DAC v. Ryan* [2021] IEHC 719 (at para. 36):-

> *"…the issue of unfair terms was one addressed by McDermott J in Permanent TSB Plc. v. Davis [2019] IEHC 184, which, in turn, addressed the decision of the Court of Justice of the European Union in Aziz v. Caixa d'Estalvis de Catalunya (Case C-415/11). In Davis, having considered the terms of the mortgage and the loan agreement, 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."

125. In the present case, leaving aside the fact that the Defendants have not identified the specific terms which they regard to be unfair, it is clear that none of the terms at issue fall outside the 'core terms' and I am satisfied that all such core terms are in plain intelligible language. I am also very satisfied that it would not be disproportionate to refuse the relief sought by the Plaintiff in these proceedings.

No credible defence

126. In the present proceedings, the Plaintiff invokes a statutory jurisdiction to seek possession of property per s. 62 (7) of the 1964 Act. In the manner explained earlier, the proper approach for this court to take has been outlined by the Supreme Court in *Cody.* Furthermore, as Woulfe J made clear in *Start Mortgages DAC v Ryan*:-

"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."

127. The Plaintiff, has without doubt, produced *prima facie* evidence of their entitlement to possession. The question, therefore, is whether the Defendants have put forward a *credible defence* on a *prima facie* basis? They have not. The contended – for defence amounts to no more than, what the Supreme Court in *O'Malley* referred to as *"mere assertion"*.

128. Thus, reliance on *Harrisrange Limited v Duncan* [2003] 4 IR 1 cannot avail the Defendants. Indeed, even if *Harrisrange* were the only relevant authority which this court was entitled to have regard to in the present case, a careful consideration of the evidence and submissions entitles this court to say the following:

- The Defendants have not satisfied this court that they have "*…a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the Defendant says credible?'…"* (*Harrisrange,* principle (vii));
- *"…it is very clear that there is no defence…"* (*Harrisrange* principle (ix));
- What is put forward by the Defendants amounts to no more than *"…mere assertion of a given situation…"* (Harrisrange, principle (xi));
- "*…bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result…*" (*Harrisrange,* principle (xii)) granting the Plaintiff's application is in the interests of justice;
- Given that the Plaintiff has established its entitlement to possession and the Defendants have made out no credible grounds of defence, it would be contrary to the interests of justice and entirely wasteful of time, costs and limited court resources for the matter to be sent to

plenary hearing, there being no issue of fact or law which requires a plenary trial to determine.

Conclusion

129. Having carefully considered the evidence, I am satisfied that the Plaintiff has made out the proofs required to establish a right to possession of the property, on foot of the charge, by reason of default by the Defendants. The Plaintiff has established that it is the owner of the relevant charge by which the Defendants created security over the property. An event of default arose and the secured monies are due. This permitted the Plaintiff to seek possession and, despite multiple demands, the Defendants have failed/refused to deliver up possession. Nor was there any suggestion that the Defendants wished to repay their indebtedness to the Plaintiff, who has established that s. 62(7) of the 1964 Act is engaged.

130. The Plaintiff has established jurisdiction, and the evidence also allows for a finding that the present proceedings are brought *bona fide* with a view to realising the security in circumstances where (i) no payment has been made for 8 years; (ii) arrears continue to mount; and (iii) the Defendants have evidenced no intention to vacate the property to permit a sale. In this regard, it will be recalled that, as long ago as 16 June 2017, the Plaintiff alerted the Defendants to the option of a "*voluntary sale*" as an alternative to legal proceedings. That option was not availed of, then or since, and the Plaintiff has been forced to bring these proceedings.

131. In short, the Plaintiff has established a *prima facie* case on the evidence of its entitlement to an order for possession, whereas the Defendant has not proffered anything sufficient to establish a credible defence.

132. For the reasons set out in this judgment, the appeal must be refused and the order made by His Honour Judge Aylmer affirmed.

133. The Circuit Court order included a *"stay"* of six months. At that conclusion of the hearing before me, counsel submitted that, were this court to affirm the lower court's order, no further stay should be granted, whereas counsel for the Defendants suggested that a further stay would be appropriate.

134. Having carefully considered the matter, I am satisfied that the interests of justice do not require a further stay. I have come to this view having taken all relevant considerations into account, including the following factors:-

- The last payment was made by the Defendants on 12 May 2016, some 8 years ago;
- The Defendants were offered alternatives to legal proceedings (including to surrender possession; a voluntary sale; or to explore a 'mortgage to rent' option) but declined same;
- Circuit Court proceedings commenced in October 2018 and His Honour Judge Aylmer's order was made 5 years later, in November 2023;

- As well as having been entirely successful in the lower court, the Plaintiff has been entirely successful in these proceedings;
- The choices made by the Defendants have resulted in significant delays, and the expenditure of otherwise avoidable costs (Counsel for the Plaintiff submitted, without objection, that the case came before the lower court on 17 occasions, including listings before the County Registrar, before it was ultimately heard on 25 July 2023; and an appendix to the Plaintiffs' written submissions, furnished without objection, sets out the relevant chronology);
- The Defendants conduct has included the making of entirely groundless allegations of fraudulent and criminal activities;
- Whilst this court is granting no stay, it will be necessary for the Plaintiff to take further steps in order to execute this court's order and that will self-evidently involve a further period of time.

135. In circumstances where the Plaintiff has been entirely successful my preliminary but strongly held view is that costs should 'follow the event' and a consideration of s. 169 of the Legal Services Regulation Act 2015 fortifies me in that view.

136. I propose to list the matter no later than 21 days from the start of Trinity term for the purpose of making final orders. The parties are called upon to submit an agreed draft in advance. In the event of any disagreement on the terms of same, each side should furnish their respective draft and I will hear brief oral submissions on same.