

THE HIGH COURT

[2022] IEHC 402

[Record No. 2021/133 CA]

BETWEEN

BANK OF IRELAND MORTGAGE BANK UNLIMITED COMPANY

PLAINTIFF

AND

PATRICIA (OTHERWISE PAT) MOONEY

DEFENDANT

JUDGMENT of Mr. Justice Heslin delivered on the 1st July, 2022.

Introduction

1. This is an appeal by the plaintiff against an order made by the Circuit Court on 29 July, 2021 refusing to grant the plaintiff an order for possession, as sought in the plaintiff's Civil Bill which issued on 13 August, 2015. The plaintiff was formerly known as Bank of Ireland Mortgage Bank. Pursuant to a certificate of incorporation on change of name dated 5 November, 2021, the plaintiff's name changed to Bank of Ireland Mortgage Bank Unlimited Company (hereinafter "the Bank"). An order was made by this Court (Meenan J) to reflect the change of name in the title to these proceedings. The matter proceeded by way of a *de novo* hearing over the course of a full day on 27 May, 2022. At the request of the defendant, every effort has been made to expedite delivery of this judgment.

The Civil Bill

2. The Civil Bill for possession which issued on 7 August, 2015 pleads that, by letter of offer dated 19 December, 2006, the plaintiff made a loan to the defendant in the sum of €140,000 ('the Loan'). The special endorsement of claim cites the account number 25078330 in respect of the Loan. It is also pleaded that, by virtue of a mortgage and charge dated 14 February, 2007 ('the Mortgage') the defendant covenanted to pay, on demand, the balance due and owing to the plaintiff in respect of present and future advances; and that the defendant mortgaged the lands described in folio 32483F of the Register, County Waterford by way of security. It is further pleaded that, in breach of the terms and conditions of the loan and mortgage, the defendant defaulted in her repayment obligations; and that the debt due and owing by the defendant to the plaintiff, as of 22 July, 2015, stood at €100,048.43, inclusive of arrears of €56,597.23. It is also pleaded that, despite demands, the plaintiff has failed, refused or neglected to pay the sums due; that the plaintiff seeks an order for possession with a view to selling the property and realising the sums due by the defendant; that the property is situate within the court's jurisdiction; and that the application is brought *inter alia*, pursuant to the Land and Conveyancing Law Reform Act 2013.

3. The plaintiff's claim is specified to be for possession pursuant to the provisions of O.5(B) of the Rules of the Circuit Court and/or the Registration of Title Act 1964 and/or the Conveyancing Acts 1881-1911 and/or the Land and Conveyancing Law Reform Act 2009 as amended by the Land and Conveyancing Law Reform Act 2013. The property is more particularly described in a schedule to the Civil Bill, being the lands comprised in folio 32483F County Waterford and more commonly known as 5 Blacknock, Kilmeaden, Co. Waterford ('the Property').

Grounding affidavit of Mr. John Reid

4. The plaintiff's application for possession was grounded on an affidavit sworn on 25 July, 2015 by a Mr. John Reid. At para. 1 he avers that he is a legal case manager in the arrears support unit of the plaintiff; that he has access to the banker's books and other records of the plaintiff; that his affidavit is sworn with authority on the plaintiff's behalf and from a diligent perusal of its files and records in relation to the defendant, from facts within his own knowledge save for otherwise appearing and where so otherwise appearing, he conscientiously believes the same to be true.

5. At para. 2 he avers that, insofar as the documents exhibited by him constitute copies of an entry in a banker's book within the meaning of s.9(2) of the Banker's Books Evidence Acts 1879 to 1959 ('the BEA') he confirms that, at all material times the said books were under the plaintiff's control. He avers at para. 4 that the books are kept as the ordinary books of the plaintiff, with all entries made in the usual and ordinary course of the plaintiff's business. At para. 5 he avers that particulars of the principal sum due by the defendant were taken by him from the plaintiff's original banker's book, being its computerised mortgage accounts system ('the MAS'). He further avers that the calculations of the accrual of interest on the principal were made at the rates of interest shown on the MAS being those from time to time applicable to the loan facility provided by the plaintiff to the defendant as checked and confirmed by him. In circumstances where Mr. Reid swore further affidavits in these proceedings, in which he made similar averments in regard to *inter alia*, his role; authority; the provenance of the plaintiff's records relied upon; and his source of knowledge, I shall refer to the averments made by Mr. Reid from paras. 1 to 5 (III) inclusive, as his "source of knowledge" averments.

Loan offer

6. The first of the exhibits to Mr. Reid's affidavit (JR1) comprises the 19 December, 2006 loan offer letter made by the plaintiff to the defendant. The "Application number" on the loan offer letter is 25078330 which corresponds to the account number specified in the Civil Bill for possession. Among other things, the Loan offer letter confirms the amount of credit advanced (€140,000); the period of the Agreement (ten years); the APR (4.7%); the total amount repayable (€175,146.48); the number of repayment instalments (24, variable at 4.450% and 96 variable at 4.750%) as well as the effect on amount of instalment of 1% increased in first year in interest rate (67.73%). The additional loan conditions include *inter alia*:

"13. Property to be Mortgaged (the 'Property'): 5 Blacknock, Kilmeaden, Co. Waterford".

Internal p.5 of 5 of the Loan offer letter begins with the following statement: -

"CONSUMER CREDIT ACT NOTICES

WARNING: YOUR HOME IS AT RISK IF YOU DO NOT KEEP UP PAYMENTS ON A MORTGAGE OR ANY OTHER LOAN SECURED ON IT."

7. The foregoing is followed *inter alia*, by:

"ARREARS

Any sum not paid by its due date is subject to an additional interest charge at the rate of 0.5% per month or part of month (i.e. 6% per annum) subject to a minimum of €2.54 per month from the due date until payment. This additional interest charge is intended to cover the lender's increased administration and related charges due to the Borrower's default. Full details are set out herein."

8. This is followed by *inter alia*, the lender's agreement to lend which is signed on behalf of the plaintiff, below which appear the "BORROWER'S ACCEPTANCE AND CONSENTS". The defendant's signature appears

after the aforesaid acceptance and consents and is dated 20 December, 2006. The first of these is in the following terms:

"(1) I confirm that I have read and fully understand the Consumer Credit Act notices, set out above and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions."

It is not in dispute that the Loan was in fact advanced by the plaintiff to the defendant. Nor is it in dispute that, in circumstances where the period of the Loan Agreement was ten years, the loan term expired as of 21 December, 2016.

Mortgage

9. The second of the exhibits to Mr. Reid's affidavit comprises a copy of the 14 February, 2007 mortgage pursuant to which the defendant, as mortgagor granted security in favour of the plaintiff, as mortgagee, in respect of the property. The mortgage bears the defendant's signature, as mortgagor, and this is witnessed by a named solicitor. It is not in dispute that the mortgage contains *inter alia*, the following provisions: -

1. Covenants for payment

1.01. The Mortgagor hereby covenants with the Mortgagee to pay to the Mortgagee on demand the secured monies and any banker's charges including legal charges associated by the preparation, negotiation and execution of this mortgage or as otherwise may be incidental to this security or to the enforcement of this security and any liability to stamp duty or any other duties on a full and unqualified indemnity basis and whether the mortgagor shall be liable therefore alone or jointly with any person or persons as principal or surety together with interest as hereinafter provided and where the expression 'the Mortgagor' as used in this mortgage includes more than one person it shall include the balance as aforesaid due by each of them whether solely or jointly with another or others (whether or not such other or others or any of them are parties to this mortgage).

1.02 All monies remaining unpaid by the Mortgagor to the Mortgagee and secured by this mortgage shall immediately become due and payable on demand to the mortgagee on the occurrence of any of the following events to say:

(a) On the happening of any event of default other than an event specified in para. (i) of sub-clause 7.01 hereof;

...

and the mortgagor hereby further covenants with the mortgagee to pay to the mortgagee forthwith the sum so demanded together with further interest thereon at the rate applicable to the relevant secured loan from time to time and at any time until the same shall have been repaid in full and shall be payable after as well as before any judgment or order of the court.

...

6. Mortgagee's Powers

6.01 At any time after the execution of this mortgage the Mortgagee may without any further consent from or notice to the Mortgagor 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.

6.02 The Mortgagee shall have the statutory powers conferred on Mortgagees by the Conveyancing Acts as varied and extended by this mortgage including the power to appoint a receiver and in particular subject to the following variations and extensions that is to say:

- (a) The secured monies shall be deemed to have become due within the meaning and for all purposes of the Conveyancing Acts on the execution of this mortgage...

...

7. Exercise of Mortgagee's Powers

7.01 The mortgagee shall not exercise any of the powers provided for in Clause 6 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 moneys hereunder;

or

- (b) There is a breach by the mortgagor of any covenant, condition or agreement contained in this mortgage, or in any offer letter or other credit agreement...

...

B. Definitions

...

(7) "Event of default" means any of the events stipulated in paras. (a) to (j) inclusive of sub-clause 7.01 hereof;"

Land Registry Folio 32483F

10. On 25 March, 2008 the aforesaid mortgage was registered in the Land Registry as a second legal charge against folio 32483F, County Waterford (the 'folio'). A copy of the folio comprises the third exhibit to Mr. Reid's affidavit (JR3). Part II of the folio, which deals with "ownership", identifies the defendant as full owner of the property. Part III, which deals with "Burdens and Notices of Burdens", records a "charge for present and future advances stamped to cover £80,000 repayable with interest" in favour of the Governor and Company of Bank of Ireland (entry no. 1, dated 8 May 2000). This is followed by a "charge for present and future advances repayable with interest. Bank of Ireland Mortgage Bank is the owner of this charge" (entry no. 2 dated 25th March, 2008). It is clear from the foregoing that the plaintiff is the owner of the mortgage registered as a burden on the property.

Failure to repay

11. At para. 10 of his affidavit, Mr. Reid avers that the defendant has failed to make repayments on foot of the Loan. Later in this judgment I will look at the affidavits sworn by and on behalf of the defendant as well as the contents of a formal Defence served. It is appropriate to note at this juncture that there is no dispute as to the fact that the defendant has failed to make repayments which were due to the plaintiff on foot of the loan. The fourth of the exhibits to Mr. Reid's affidavit comprises an eight-page statement of account. This identifies the defendant, the property and relevant account number. The first entry on the statement is dated 31 March, 2007 and it records a debit, as well as a corresponding credit entry, in the sum of €1,415.43. Thereafter, similar debits with equivalent credits are recorded in the succeeding months until a debit and credit entry in the sum of €1,399.54 is recorded on 30 April, 2009.

12. From that point onwards, there is a reduction in both the debit and corresponding credit entries, such that the figures for 31 May, 2009 are both €223.50. It is uncontroversial to say that this records a

change from the payment of capital and interest, to the payment of interest only. From May 2009 until March 2011 monthly debits and credits of €223.50 are recorded. The entries for April 2011 record €248.28 as being the debit and corresponding credit.

13. From May 2011, the monthly debit and credit entries are in the sum of €1,835.29 and for similar amounts until May 2012.

14. From June 2012 to April 2013, the majority of monthly debit and corresponding credit entries, are in the sum of €400 suggesting "interest only" repayments at that point.

15. From April 2013, the statement indicates a reversion to capital and interest payments with corresponding debits and credits for the months of April and May 2013. In respect of June 2012 the statement records: "*First Unpaid DD*" in the sum of €2,181.15. The statement records the accumulation of arrears from that point onwards. The final page of the statement, which is dated 22 July, 2015, records *inter alia*, 26 months of arrears; the then current instalment being €2,176.59; and the closing balance being then €100,048.43.

MAS

16. At para. 11 of his affidavit, Mr. Reid avers that the details of the defendant's liabilities to the plaintiff have at all material times been maintained by the plaintiff in electronic format on the MAS and he referred to a verifying affidavit sworn by Ms. Claire Lyons in that regard. Ms. Lyons swore an affidavit on 12 July, 2015 in which she averred that she is a Manager of the plaintiff bank and an officer thereof. She went on to aver that her affidavit was sworn on behalf of the plaintiff, with its authority, from facts within her own knowledge, save where otherwise appearing and where so appearing conscientiously believing the same to be true. At para. 3(i) to (iii) Ms. Lyons made averments to the effect that, at all material times the defendant's liabilities to the plaintiff were maintained by the plaintiff in electronic format on the MAS, which constitutes the plaintiff's "Banker's Book" for the purposes of the BBEA; that the MAS is the only and ordinary Banker's Book of the plaintiff; that all entries made on the MAS were made in the usual and ordinary course of the plaintiff's business; and that the MAS was at all times within the plaintiff's control.

17. At para. 11 Mr. Reid averred that as of the date of the swearing of his affidavit was that a total balance was due by the defendant to the plaintiff of €100,048.43 inclusive of arrears in the sum of €56,597.23 and that, had the defendant been making monthly instalments, the instalments would then have been in the sum of €2,176.59 per month. The foregoing is entirely consistent with the contents of the eight-page statement with regard to the defendant's account no. 25078330 which comprised exhibit "JR4". At this juncture it is appropriate to note that no issue is taken with the accuracy of the plaintiff's calculations; the fact of default; the amount of the arrears or the total balance owing. On the contrary, at the conclusion of the hearing, counsel for the defendant asked that this court deliver its judgment as soon as possible in circumstances where "the arrears continue to mount" and her client was extremely anxious in that regard. The defendant's counsel also expressed the hope that, during the period prior to the availability of this court's decision, the plaintiff might engage with her client with a view to compromising matters. As I will presently refer to, a feature of this case is that offers have been made by both sides. Self-evidently none have been accepted.

18. As to the grounds of defence advanced, these are set out in the single affidavit sworn by the defendant on 10 May, 2021 and can fairly be summarised as follows:

- That prior to the commencement of these proceedings in August 2015, the defendant's solicitors met with representatives of the plaintiff and made representations on her behalf (defendant's affidavit para. 3);
- The defendant's solicitor was asked at the aforesaid meeting whether or not she would sell the property and the plaintiff was informed that she would not sell the house as she needed it to provide a home for herself and her granddaughter (the defendant being the sole guardian for her granddaughter, who was born in February 2005, following the untimely death of her parents in 2007 and 2009 respectively)(para 3);
- That in 2011 the defendant's health difficulties meant she could not cope with rearing her then seven-year-old grandchild whilst continuing to work and had to take early retirement (para. 4);
- That the defendant explained her circumstances to the plaintiff bank by letter of 1 March, 2012, following which the mortgage was switched to interest only for several months (para. 4);
- The mortgage reverted to full repayment and the defendant was informed by letter dated 20 March, 2014 that the plaintiff was not prepared to offer an Alternative Repayment Arrangement ("ARA") as the loan was "*not sustainable*" (para. 4);
- The defendant does not believe that provisions 39 or 40 of The Code of Conduct on Mortgage Arrears ("CCMA") were complied with by the plaintiff in making their determination that they were not prepared to offer her an ARA and the reasons for refusing to offer an ARA were not explained, save for a "bald statement" to the effect that the loan was "*not sustainable*" (para. 5);
- That the bank was entitled to reduce the loan principle to a specified amount and that, having regard to a valuation of the property which the defendant, dated 19 December, 2016, and taking account of her personal circumstances, the defendant believes that an ARA should have been offered to her and contends that the bank is in breach of the CCMA in failing to do so (para. 5);
- That the defendant's solicitor has engaged consistently with the plaintiff's solicitor including, *inter alia*, providing financial information (para. 6);
- That on 24 July, 2017 the plaintiff made an offer proposing to extend the term of the loan to 2032 with repayments of €246.00 per month subject to receipt of a lump sum of €65,000.00 being discharged up front, which the defendant declined in circumstances where she will be 79 years of age in 2032 (para. 6);
- That the defendant's solicitor made an "open" offer by letter dated 26 September, 2018 of €70,000 in full and final settlement of these proceedings, which offer the plaintiff declined by letter dated 16 October, 2018 (para. 7);
- That the defendant's solicitor made a further open offer, by letter dated 28 January, 2019, of €80,000 together with a monthly payment of €100 for a period of five years (para. 8);
- That, as of May 2021, the defendant is 68 years of age and her granddaughter is sixteen and due to finish secondary school in June 2022, optimistic of going to third level which will take a minimum of a further four years (para. 8);
- That the plaintiff has a number of ongoing health issues (the defendant exhibited four letters from the Gastroenterology Department of University Hospital Waterford, dated 11 October, 2018; 4 December, 2018; 1 August, 2019; and 5 February, 2020, respectively). The defendant also exhibited a 9 April, 2021 letter concerning necessary dental treatment (para. 9); with regard to her health, the plaintiff averred *inter alia* that "*my primary health issue is that of Cirrhosis which is ongoing and*

of grave concern. I am under the care of Dr. Ashaif Morcos consultant, but do not have a prognosis at the moment. I underwent surgery on my ankle on 12 April, 2021". (para. 9).

19. In summary proceedings it is not typical to see a formal defence of the type delivered on 5 October, 2016. Nothing appears to turn on this. In essence, apart from a full denial of any indebtedness, the issues raised in the 5 October, 2016 defence comprise the following:

- That the plaintiff's proceedings should be struck out by reason of an alleged failure to comply with the CCMA;
- That the plaintiff did not act "*reasonably or appropriately*" when, by letter dated 20 March, 2014, the plaintiff decided not to offer the defendant an ARA;
- That the plaintiff's decision not to offer an ARA on 20 March, 2014 "*was totally unreasonable and unconscionable having regard to the level of debt and the defendant's personal circumstances*".

Submissions

20. At the hearing, oral submissions were made by Ms. Ryan BL on behalf of the plaintiff and by Ms. Cleary BL on behalf of the defendant, respectively. On behalf of the plaintiff, it was contended that there was no defence to the claim. The submissions made on behalf of counsel for the defendant reflected the averments in the defendant's affidavit of 10 May 2021. It is fair to say the opposition to the plaintiff's claim was based around three main themes as follows.

21. Firstly, it was contended that, from the very outset, the defendant had engaged with the plaintiff. It was also stressed that the defendant had made a number of offers. Indeed, a feature of the way in which the case proceeded is that after counsel for the plaintiff had finished making the Bank's case, an application was made by the defendant's counsel to admit new evidence comprising correspondence between the parties which included letters dating from May 2022 (i.e. the year after the Circuit Court order) which correspondence referred, *inter alia*, to proposed mediation and settlement offers. A key submission made on behalf of the defendant was to ask rhetorically why the Bank had not accepted the defendant's offer and why it had not explained a refusal to accept the latest offer made. It was clear that a core complaint made by the defendant is that, at all material times, it has been the plaintiff's stance that all sums owing would have to be discharged, notwithstanding the personal circumstances of the defendant.

22. The second aspect of the submissions revolved around the defendant's personal circumstances. At this juncture, I want to state in the clearest of terms that one could have nothing but sympathy for the defendant and her granddaughter. To lose one's parents at a young age or to lose a child at any age is tragic. The defendant and her granddaughter have each experienced such tragic loss. As well as acknowledging how painful this loss must have been and must continue to be, this Court could have nothing but admiration for the love and care which she has provided to her granddaughter. Both were present in court throughout the hearing and their mutual care, concern and affection was plain to see. In submissions, emphasis was laid on their respective personal circumstances including, *inter alia*, their respective ages, the defendant's health issues and her granddaughter's hopes to embark on third level education in the near future.

23. The third aspect of the submissions was to assert that the plaintiff had breached the CCMA disentitling the Bank to any relief. Order 5B, r. 9 of the Circuit Court Rules provides that:-

"On the hearing of any Civil Bill to which this Order applies, the Judge may give judgment for the relief to which the plaintiff appears to be entitled."

Counsel for the defendant laid particular emphasis on the use of the word "may" and submitted that this Court enjoyed an extremely wide discretion and was, in effect, entirely at large as to whether it would grant judgment, or not, in any given case. Building on that submission, counsel for the defendant urged this Court, in the particular facts and circumstances of this case, to exercise what was contended to be a very wide discretion, against granting judgment.

24. Given the nature of the asserted defence to the plaintiff's claim and the emphasis laid by the defendant on the question of engagement with the Bank and proposals made to compromise matters, it is appropriate to refer, in this Court's judgment, to certain correspondence. For ease of reference, I propose to do so in chronological order. In doing so, I do not wish to convey the impression that it is this Court's role, in an application of the present type, to ascertain whether and to what extent offers were made by either party and/or to form any view on such offers as may have been made. Still less is it this Court's role to look at any given offer from a merits-based perspective and to make a value judgment as to whether or not it would have been appropriate for such an offer to have been accepted. This Court has no such jurisdiction. The Oireachtas has not empowered the court to do so. Thus, it seems to me that it would be an impermissible exercise for this Court to do what, in essence, counsel for the defendant urges it to do, namely, to look at an offer or offers and to take the view that an offer *should* have been accepted even though, as a matter of fact, the offer in question was not acceptable to both parties. Having made the foregoing clear, I now proceed to look at certain correspondence which has been exchanged between the parties over the course of the last decade.

01 March 2012 letter

25. On 01 March, 2012 the defendant wrote to the head of the plaintiff's Arrears Support Unit. A copy of that letter comprises exhibit "A" to the defendant's affidavit which sworn on 10 May, 2021. In that letter the defendant referred *inter alia*, to her long history as a customer of the bank and, having made specific reference to her personal circumstances and those of her granddaughter, she stated *inter alia*: -

"As you can see I need your support to look favourably on my situation so that the final settlement of my mortgage can be arranged to meet the needs of your bank and my needs as a loyal customer, taking all of the above in consideration."

26. The letter also referred to correspondence between MABS and the bank on 30 June, 2011 with respect to a certain offer which was no longer valid. Earlier in this judgment I referred to exhibit "JR4" to Mr. Reid's affidavit which comprised a statement of account. It is plain that shortly after the foregoing letter, the defendant's mortgage repayments were switched from capital and interest to interest only in that the statement records monthly payments of €400, the last of which was made and received in March 2013, namely, a year after the aforesaid letter.

27. In the bank's 20 March, 2014 letter it seems clear that, having paid "interest only" for approximately a year, the defendant was written to by the plaintiff by letter dated 20 March, 2014. A copy of this letter comprises both exhibit "B" to the defendant's affidavit and exhibit "JR5" to Mr. Reid's affidavit sworn on behalf of the plaintiff bank. In the manner seen earlier, the backdrop to this letter included a proposal made on behalf of the defendant on 30 June, 2011 which was not accepted. The context in which the plaintiff's 20 March, 2014 letter was sent also included the defendant having paid "interest only" in the period up to April 2013, following which the mortgage reverted to capital and interest, whereupon arrears began to accumulate from June 2013 onwards. Indeed, as of 20 March, 2014, the arrears stood at

€21,782.38 and this sum was specifically noted at the top of the plaintiff's letter which, in addition to specifying the mortgage account number and property address, began in the foregoing terms:

"Dear Ms. Mooney,

I am writing to you under the Mortgage Arrears Resolution Process (MARP).

We have now completed an assessment of your full circumstances including: -

- a. Your personal circumstances.*
- b. Your overall indebtedness.*
- c. The information you provided in the standard financial assessment form (SFS) or otherwise.*
- d. Your previous repayment history.*
- e. Your current repayment capacity.*
- f. Each alternative repayment arrangement (ARA) we currently have available. Each ARA is described in the 'Guide to Dealing with Mortgage Difficulties' we sent you with an earlier letter (it can also be viewed on the Arrears Support section of www.bankofireland.com).*
- g. The effect of the ARA on your financial circumstances.*

We have decided not to offer you an ARA because your mortgage loan is not sustainable.

For a mortgage to be sustainable, you have to be able to meet all of your mortgage repayments in full and on time so that the mortgage loan is repaid in full over the life of the mortgage.

It is unlikely, based on our assessment of your circumstances, that you will be able to repay the mortgage loan in full over its life. We do not believe any ARA we offer will change that position (for example, even if we used an ARA to reduce your repayments to the maximum you can afford).

You have the right to appeal this decision to our Mortgage Appeals Board within the next 25 business days. This is our internal appeals board, which will consider and independently review the decision made about your mortgage loan. If you wish to appeal, please set your reasons for appealing in writing and send them to the Mortgage Appeals Board, Bank of Ireland Group, 2nd Floor, New Century House, Lower Mayor Street, IFSC, Dublin 1.

Your mortgage loan is now being dealt with outside of MARP and the protections of MARP no longer applies. This means that where arrears exist and you do not repay them, we are entitled to commence legal proceedings for possession of the property three months from the date of this letter or eight months from the date the arrears arose, whichever date is later. Irrespective of how we repossess your property, if we sell it for less than the amount you owe us under your mortgage, you will still be liable to repay us the remaining amount you owe us under the mortgage loan, including any accrued interest, any unpaid arrears and charges. You will also be liable for the costs of selling the property.

If you are in arrears and wish to avoid legal proceedings, there are other options open to you. These and other important information are outlined in the "Important Information Concerning Mortgage Arrears" set out in the appendix to this letter (the appendix). In our view, these options would be better for you and us than legal proceedings.

If you are in arrears we show how much your arrears are on page 1 of this letter. If you choose one of the other options described in the appendix you will have to clear any arrears as part of the option. For example, you would have to clear any of the arrears from the proceeds of sale or, if necessary, from other resources if you choose a voluntary sale. Leaving arrears unpaid will have an adverse impact on your current rating (see the appendix for more detail).

We strongly recommend that you get independent and financial legal advice in relation to the options set out in the appendix. Your local MABS Office can provide free and independent financial advice. Their contact details are set out in the appendix.

You have the right to consult a personal insolvency practitioner (or 'PIP'). PIPs are regulated by the Insolvency Service of Ireland and can advise you on your options under the Personal Insolvency Act 2012. For example, on whether you are eligible for a personal insolvency arrangement and if a proposal for one can be made to your creditors (those you owe money to, including us). You can find out more from the Insolvency Service of Ireland website www.isi.gov.ie.

A copy of the most recent standard financial statement you completed is available on request. Please let us know if your financial circumstances improve.

If you have any queries about this letter, please contact your local Bank of Ireland Mortgage Adviser. Alternatively, you can contact our Arrears Support Unit on 0766244444.

Yours sincerely,

Manager

Mortgage Arrears Support Unit."

28. It is a matter of fact that the defendant did not appeal the foregoing decision, despite her entitlement to do so and notwithstanding the fact that she was given notice of that right and provided with details as to how an appeal could be brought. Exhibit JR5 to Mr. Reid's affidavit also includes a copy of the appendix which is referred to in the aforesaid letter. This comprises a table which sets out a range of options open to someone in the defendant's position as well as the implications for them and the bank's rights. The options discussed in the appendix comprise a voluntary sale; a voluntary surrender; trading down; and the mortgage to rent scheme. The appendix also provides information and contact details concerning *inter alia*, the Citizen's Information Board; Social Welfare; Revenue Commissioners; National Consumer Agency and the Insolvency Service of Ireland. Furthermore, the appendix details information with respect *inter alia*, to fees and charges concerning arrears; and legal proceedings and the estimated cost thereof.

The CCMA

29. At this juncture it is appropriate to quote verbatim from clause 45 of the CCMA which provides the following: -

"45. If a lender does not offer a borrower an alternative repayment arrangement, for example, where it is concluded that the mortgage is not sustainable and an alternative repayment arrangement is unlikely to be appropriate, the lender must provide the reasons, on paper or another durable medium, to the borrower. In these circumstances, the lender must inform the borrower of the following:

(a) other options available to the borrower, such as voluntary surrender, trading down, mortgage to rent or voluntary sale and the implications of each option for the borrower; and his/her mortgage loan account including: -

- (i) an estimate of associated costs or charges where known and, where not known, a list of the associated costs or charges;*
- (ii) the requirement to repay outstanding arrears, if this is the case,*
- (iii) the anticipated impact on the borrower's credit rating, and*

- (iv) *the importance of seeking independent advice in relation to these options;*
- (b) *the borrower's right to appeal the decision of the lender not to offer an alternative repayment to the lender's Appeal's Board;*
- (c) *that the borrower is now outside the MARP and that the protections of the MARP no longer apply;*
- (d) *that legal proceedings may commence three months from the date the letter is issued or eight months from the date the arrears arose, whichever date is later and that, irrespective of how the property is repossessed and disposed of, the borrower will remain liable for the outstanding debt, including any accrued interest, charges, legal, selling and other related costs, if this is the case;*
- (e) *that the borrower should notify the lender if his/her circumstances improve;*
- (f) *the importance of seeking independent legal and/or financial advice;*
- (g) *the borrower's right to consult with a Personal Insolvency Practitioner;*
- (h) *the address of any website operated by the Insolvency Service of Ireland which provides information to borrowers on the processes under the Personal Insolvency Act 2012; and*
- (i) *that a copy of the most recent standard financial statement completed by the borrower is available on request."*

30. It seems to me that the fact and content of the plaintiff's 20 March, 2014 letter and appendix constitute *prima facie* evidence of compliance with Clause 45 of the CCMA. Furthermore, the court has before it further evidence in the form of the following averments by Mr. Reid, beginning from para. 15 of his 24 July, 2015 affidavit:

"15. I say that I am familiar with the CCMA 2013, being the most recent Code of Conduct issued by the Central Bank of Ireland (hereinafter 'the Central Bank'). I say that the CCMA 2013 issued by the Central Bank sets out the manner in which lenders must deal with borrowers who are either in arrears with the mortgage on their family home, or are faced with the prospect of entering mortgage arrears. I say that the Central Bank first published the CCMA in February 2009 and further revisions of the CCMA were made in February 2010 and January 2011 respectively. I am fully aware of the responsibilities and obligations placed on lending institutions when dealing with mortgage account arrears and I say that the plaintiff has fully complied with its responsibilities and obligations under the CCMA 2013.

16. I refer to Chapter 3 of the CCMA 2013 which sets out the requirements that lenders must comply with when dealing with borrowers in mortgage arrears or in pre-arrears situations. I say that the plaintiff has fully complied with its obligations under Chapter 3 including but not limited to the following:

- (a) *the plaintiff has established a centralised and dedicated Arrears Support Unit ('ASU') and each branch has at least one person with specific responsibility for dealing with arrears and pre-arrears cases and for liaising with the lender's ASU in respect of these cases;*
- (b) *the plaintiff has a dedicated and easily accessible section on its website for borrowers in, or concerned about, financial difficulties providing them with information and assistance in relation to mortgage arrears;*

- (c) *the plaintiff has in place a MARP as a framework for handling specific cases as specified in Provision 18 of the CCMA 2013 with a view to the parties coming to an alternative repayment arrangement;*
- (d) *the plaintiff has provided the defendant with an information booklet providing details of its MARP including an explanation of the alternative repayment arrangements that may be available to the defendant;*
- (e) *the plaintiff has in place an appeal mechanism whereby borrowers may appeal a decision of the lender taken under the MARP;*
- (f) *the plaintiff has provided the defendant with information about her mortgage arrears and the manner in which it intends to deal with her at regular intervals in compliance with Provisions 23 and 25 of the CCMA 2013;*
- (g) *the plaintiff has provided the defendant with a standard financial statement to complete in order to assess her financial circumstances and to evaluate what alternative repayment arrangements may be suitable for her given the circumstances of her case;*
- (h) *the plaintiff has maintained full records of all steps taken, and all of the considerations and assessment required by the CCMA 2013, and such records are available to the Central Bank on request.*

17. I say that pursuant to Provision 45 of the Code, an alternative repayment arrangement was not offered to the defendant as the Loan was unsustainable. I say that correspondence was issued on 20th March, 2014 advising the defendant that her request for an alternative repayment arrangement had been declined on the basis inter alia, of the defendant's overall indebtedness. The said letter set out that the defendant has a right to appeal the decision and to consult a Personal Insolvency Practitioner. The said letter also set out that the Loan were now being dealt with outside of the protections of MARP and that legal proceedings could commence within 3 months from the date of the said letter or 8 months from the date that arrears first arose, whichever is later. The said letter also outlined that the defendant could avail of the following options: 'voluntary sale', 'voluntary surrender', 'trade down' and 'mortgage to rent'."

31. Taking together (i) the foregoing averments made on behalf of the plaintiff; and (ii) the fact and content of the plaintiff's 20 March, 2014 letter and the appendix thereto; and (iii) the fact that the defendant chose not to appeal the plaintiff's decision (namely the bank's decision not to offer her an ARA because it considered her mortgage loan not to be sustainable) entitles me to hold that there is no failure on the part of the plaintiff to comply with the CCMA.

28 November 2014 demand

32. On 28 November, 2014 the plaintiff bank wrote to the defendant in a letter which specified that the then outstanding arrears came to €39,184.51. The said letter made a formal demand for the defendant to pay all monies owing to the bank within 10 business days. A warning was included in the letter to the effect that if repayment was not made, the bank was entitled to commence legal proceedings, including proceedings for repossession of the mortgaged property. The letter made explicit that "*where the provisions of the code of conduct on mortgage arrears provide that legal proceedings cannot start until a certain period of time has elapsed we will not commence legal proceedings until this time period has elapsed*". The letter concluded by stating that "*If you have a firm and realistic proposal to submit to us, which may influence our intention to start legal proceedings, you should put it forward in writing to us immediately.*"

An appendix to the letter provided details including contact information for where the defendant could obtain advice. Information was also set out with regard, *inter alia*, to the effect of arrears on credit rating; fees and charges concerning arrears; and legal proceedings including an estimate of the costs of same.

Moratorium

33. A key feature of the CCMA is what is commonly described as the "moratorium" in respect of the bringing of legal proceedings. In the manner examined earlier, the bank's 20 March, 2014 letter made explicit that the defendant's loan was now being dealt with outside of MARP and that the bank was entitled to commence legal proceedings for possession upon the later of eight months from the date arrears arose or three months from 20 March, 2014. At this juncture, it is appropriate to note that there is simply no question of any breach by the plaintiff of the moratorium, in that the present proceedings were not issued until 07 August, 2015 *i.e.* over sixteen months after the bank's 20 March, 2014 letter.

17 February, 2015 demand

34. By letter dated 17 February, 2015, the bank's solicitors wrote to the defendant making a further demand that all monies due be discharged within ten days. The said letter advised the defendant of the bank's entitlement to seek possession of the property and a formal demand for possession was made. The letter made clear that the bank reserved its position to proceed with an application for an order for possession, without further notice, in default of receiving a satisfactory response. A copy of that letter comprises exhibit JR7 to Mr. Reid's affidavit.

20 July 2015 demand

35. On 20 July, 2015 the bank's solicitors wrote again to the defendant stating *inter alia*: -
"Pursuant to Provision 58 of the code of conduct on mortgage arrears effective 1st July, 2013, we hereby notify you that the bank has instructed us to apply immediately to the Courts to commence legal proceedings for possession of the Property, in accordance with its entitlement to do so under Provision 56(a) and 56(b)(i)."

36. In the present proceedings, there is no suggestion that the defendant did not receive the correspondence from the plaintiff bank dated 28 November, 2014 and the correspondence from the bank's solicitors dated 17 February, 2015 and 20 July, 2015.

2016 Correspondence

37. On 18 January, 2016, the defendant's solicitors wrote to the solicitors for the plaintiff taking issue with the fact that correspondence had been sent directly to the defendant and requesting details of the number of times the bank made direct contact with the defendant by phone; copies of all correspondence sent by the bank to the defendant; the date upon which the mortgage was signed and a copy of same; and details of all payments made by the defendant in respect of the mortgage. The plaintiff's solicitors replied by letter dated 20 January, 2016. On 14 March, 2016, the plaintiff's solicitors wrote to the solicitors for the defendant, in circumstances where the matter then stood adjourned to 4 April, 2016 to allow the defendant to file a replying affidavit. The letter went on to state *inter alia*, that, should the defendant seek an adjournment in order to make payments due on foot of the mortgage, she was called upon to provide details of her assets and liabilities and to verify same on affidavit, and to set out particulars of any proposals to make such payments. By letter dated 1 April, 2016, the defendant's solicitors wrote to the solicitors for the plaintiff making an offer to settle matters on the basis of (1) a lump sum payment of €60,000 by the defendant and (2) a monthly payment of €100, with applications for possession of the property to be struck out. A copy of the said letter is one of the documents which, during the hearing before this Court, were the

subject of an application to admit additional evidence. The reasons why I acceded to that application were set out in an *ex tempore* decision which I delivered on the day of the hearing. In the manner I explained, it was suboptimal to say the very least, for the application to be brought at such a late stage. Carefully weighing up all matters, I came to the view that the least risk of injustice arose by acceding to the application. It might also be noted the 1 April, 2016 letter was headed "without prejudice" but counsel for the defendant made clear, during the hearing, that the defendant waived privilege in respect of this correspondence. By letter dated 21 July, 2016, the plaintiff's solicitors wrote to the solicitors for the defendant, by which time the matter had come before the Circuit Court on seven occasions. The said 21 July, 2016 letter referred to the defendant's 1 April, 2016 offer in the following terms:

"On the fifth occasion (4 April, 2016), the matter was adjourned on consent in good faith to enable the bank to consider your client's proposal made by (without prejudice) letter dated 1 April, 2016 but which was subsequently outlined by you in open court. We understand that the Bank telephoned your office on 3rd May, 2016 to advise that it required a completed income and expenditure form and supporting documentation in order to evaluate your client's proposal.

...

In an effort to advance the matter and to provide your client with every opportunity to substantiate her proposal of 1st April (and repeated by you in open court) before this matter is next in court, the bank wrote to your client on 18th July last (copied to your office) to confirm that it had not received an income and expenditure form and full supporting documentation to include proof of funds so that her proposal could be assessed. The letter further provided direct contact details to your client of her case manager in the Bank to deal with her case.

Where proposals are made in proceedings such as these, agreement is most often and most efficiently reached between the Bank and the Borrower directly. In circumstances where your client had made a proposal but had not furnished the required income and expenditure form and supporting documentation, the bank sought to contact your office and then the Borrower directly as it is entitled to do as one its [sic] customers to make every effort to resolve the matter. In circumstances where no income and expenditure form has been completed by your client and no documentation provided by your client to the Bank to support her proposal, the Bank has not been in a position to consider the offer made by your client through your office on 1st April last and subsequently in open court. In circumstances where the proposal cannot be considered in the absence of the repeated requested income and expenditure form and supporting documentation and no payments have been made against the Loan Facilities since April 2013, our instructions are to proceed with our application when the matter comes before the court on 25th July next."

38. On 25th July, 2016, the defendant's solicitors wrote to the solicitors for the plaintiff to indicate that, due to a commitment to a specially fixed case, the defendant's solicitor would not be in a position to attend court and would be requesting the Registrar to adjourn the matter. In a reply sent on the same date, the solicitors for the plaintiff indicated that *"given that your request for an adjournment comes after the County Registrar's list has commenced, we are not in a position to consent to your request in this regard."*

39. On 19 December, 2016, Messrs Palmer Auctioneers wrote to the defendant estimating the then market value of the property as being "€75,000 (seventy-five thousand Euro) subject to market conditions".

2017 Correspondence

40. On 24 April, 2017, the defendant's solicitors wrote to the solicitors for the plaintiff on a "without prejudice" basis in circumstances where the matter then stood adjourned to 18 July, 2017. The said letter referred to the valuation of the property and stated *inter alia*, "we await hearing from you in relation to our substantial offer in relation to this matter". The aforesaid letter was another one of the items which the defendant was keen to put before this Court, having waived privilege in relation to the contents of the correspondence.

41. On 18 July, 2017 the plaintiff bank wrote to the defendant. The said letter specified that there was €104,217.90 then owing. It will be recalled that, by letter dated 20 March, 2014, the plaintiff notified the defendant that the bank had decided not to offer her an ARA because it considered that her mortgage loan was not sustainable. That decision was not appealed by the defendant and the plaintiff waited over sixteen months thereafter before issuing the present proceedings by means of the 7 August, 2015 Civil Bill for possession. The aforesaid letter dated 20 March, 2014 had also put the defendant on notice that her mortgage loan was thereafter being dealt with "outside of MARP and the protections of MARP no longer apply". Against the foregoing backdrop, and according to the offer made by the defendant, the plaintiff bank wrote to her as follows: -

"We can offer you an Alternative Repayment Arrangement (ARA) outside of the Mortgage Arrears Resolution Process (MARP).

Dear Ms. Mooney, we are sending you this letter to formally advise you that under the terms of your Mortgage Loan Offer Letter you were contractually obliged to pay the full amount of the Loan by the 28/02/2017 (the 'Maturity Date'). The Maturity Date has now passed which means that the terms of your Mortgage Loan Offer Letter have now expired and the Loan is now overdue for repayment.

You have already provided us with details of your financial circumstances to allow us to carry out a review of your Loan and determine whether an Alternative Repayment Arrangement (ARA) would be suitable for you.

We have decided to offer you an ARA on the basis that we will amend the terms of your expired Mortgage Loan Offer Letter. The attached agreement to amend Mortgage Loan Offer Letter AtAMLOL (the 'Form') sets out the full details of the ARA that we are offering to you at Section A of the Form. This Form includes any special conditions that may apply and also the General Terms and Conditions.

Please note that, as already advised to you, your mortgage loan is no longer covered under the MARP. This means that the ARA is offered to you outside of the MARP. If you are in arrears and you do not accept this ARA we remain entitled to proceed with legal action for the repossession of your property in line with the Code of Conduct on Mortgage Arrears.

What this ARA means for you

When deciding whether to take up this offer, please consider what the arrangement will mean for your individual circumstances including:

- (i) extending the term of an expired Loan and putting an ARA in place means the overall cost of your loan increases;*
- (ii) we may record the ARA with the Irish Credit Bureau (ICB). If you break the terms of the alternative repayment arrangement, we may report that to the ICB. Such a report could*

make it more difficult for you to get credit from us or other financial institutions, for example, you may have difficulty getting a new home/business loan;

- (iii) *if you have a mortgage repayment protection policy, please review its terms and whether the ARA may impact on any repayments that may be made by your policy provider.*

The enclosed Form sets out the full details of the ARA. Please read this Form carefully."

42. The said letter went on to afford the defendant a period of five weeks to accept the ARA should she so wish. The letter also strongly recommended the defendant to "*get independent financial and legal advice to help you decide whether to accept our offer of an alternative repayment arrangement.*" Details were given in respect of the government's Mortgage Arrears Information & Advice Service wherein the defendant could avail of independent advice from a participating accountant, free of charge up to the value of €250 plus VAT, in circumstances where such an accountant would invoice the plaintiff bank directly. The letter provided a website address where a list of participating accountants could be found. The letter then set out the following financial summary statement with respect to the ARA offered to the defendant:

<i>"Total monthly net income</i>	<i>€1994.54</i>
<i>Other monthly unsecured/short term debt repayments.</i>	<i>€50.00</i>
<i>Pre-restructure Full Capital Interest Monthly Mortgage</i>	
<i>Repayment as a % of Monthly Net Income</i>	<i>N/A</i>
<i>Post-restructure mortgage repayment as a % of net income</i>	<i>12.33%".</i>

43. With regard to the foregoing correspondence, it is not in dispute that the term of the defendant's loan was ten years and that term was never extended. Thus, it is a matter of fact that, when the plaintiff bank made the foregoing proposal, the full ten-year term had already expired and the entire loan was overdue. In submissions on behalf of the defendant, her counsel suggested that there was an inconsistency between the fact that the plaintiff took the view as of 20 March, 2014 that it could not offer an ARA because the defendant's mortgage was not sustainable and the fact that this ARA was offered in July 2017. I can see no inconsistency. The stance adopted by the plaintiff as of March 2014 was that the defendant's mortgage was not sustainable in circumstances where she would not be able to meet all mortgage repayments in full and on time such that the mortgage was repaid during the life of the mortgage (*i.e.* by 28 February 2017). In the manner clearly explained, the plaintiff took the view that it could not offer any ARA within the MARP in March 2014. There is no inconsistency with making a proposal *outside* of the MARP over three years later and after the expiry of the ten-year term of the loan. Counsel for the defendant described the Bank's 18 July, 2017 proposal as "*meaningless*" and as a belated attempt on the part of the Bank to "*mend its hand*" in relation to alleged breaches of the CCMA. Regardless of the conviction with which those submissions are made, they are not grounded in the evidence. The defendant has not established a breach by the plaintiff of the provisions of the CCMA and there is no evidence before the court which would entitle it to take the view that sending this 18 July, 2017 proposal was no more than a belated and cynical attempt to try and "cure" a previous breach of the CCMA. Nor can I hold that this offer was "meaningless". It is a proposal which is clear in its terms and was available for the defendant to consider and either accept or reject as she deemed appropriate. In saying the foregoing, I want to emphasise, once more, that this Court makes no comment whatsoever on the merits of the offer. That is exclusively a matter for the parties and those advising them. In the present case, it is not in dispute that the defendant decided against accepting this proposal as was her entitlement. At para. 6 of the affidavit of which the defendant

swore on 10 May, 2021 she makes the following averments in respect of the plaintiff's 24 July, 2017 proposal:

"In the said offer, the Plaintiff Bank proposed to extend the term of the loan to 2032 with repayments of €246.00 per month subject to receipt of a lump sum of €65,000.00 being discharged upfront. I will be 79 years of age in 2032 and I was unable to accept this proposal."

44. Whilst the defendant makes clear the fact that she rejected the proposal and the reason for this, I want to emphasise in the clearest of terms that, just as it is no function of this Court to make merits based assessments of offers, the reason why a particular offer was rejected is not of relevance to a determination of the present proceedings in my view. Once again, this is because the Oireachtas has given this Court no jurisdiction to involve itself in such matters. I stress again that the only reason why this judgment refers to offers made is because of the emphasis laid upon them by the defendant's counsel in opposing the plaintiff's claim. The gravamen of the submission made on behalf of the defendant was to say that, had the plaintiff bank accepted the defendant's offer, arrears would have ceased to mount and the matter would not have troubled the court. In making the following point I do not wish to be at all unkind but, from a first principles perspective, one could just as easily ask why the defendant did not accept an offer made by the plaintiff. The fact that both of those questions can be posed highlights the utter inappropriateness of this Court purporting to involve itself in the weighing up of offers, be that from a quantitative or qualitative perspective. As well as lacking any jurisdiction to do so, it seems to me that, even from a first principles analysis, any attempt by the court to do so could give rise to injustice. I say this because the court has before it merely a "snap shot" in time in the form of a specific proposal but lacks a wealth of information by way of the background to the proposal itself, whether that be related to the conduct of the relevant parties, their specific asset and liability positions, their commercial interests as they see it, or otherwise. To my mind, even if the court had the jurisdiction to conduct a merits based assessment of a particular offer made at a specific point in time (and it does not) the court would lack sufficient evidence to conduct that assessment fairly. In my view, the most that can be said, on the facts of the present case, is that (i) each side made offers at various points, as they were entitled to do; (ii) there was no obligation on the recipient of any offer to accept it; and (iii) neither party accepted any offer made by the other, as was their entitlement.

2018 Correspondence

45. On 26 September, 2018, the defendant's solicitors wrote to the solicitors for the plaintiff stating *inter alia*: -

"We have made it very clear to Judge Doyle that we are willing to pay the market value [circa €70,000] for the property at the moment in full and final settlement of all issues here. The property has been valued by a local Auctioneer and arising out of this our client is willing to discharge same."

46. The letter went on to make reference to the defendant's difficult financial circumstances and to her care of her grandchild and expressed the view that it was *"amazing the Bank are taking such a stance in relation to this matter"*. By letter dated 3 October, 2018, the plaintiff's solicitors wrote to the defendant's solicitors to confirm that further instructions were awaited from the plaintiff. On 16 October, 2018, the plaintiff's solicitors wrote to the defendant's stating *inter alia*:

"... we note that the Defendant furnished a proposal to discharge the sum of €75,000 in full and final settlement (which sum we understand was to come from the defendant's pension lump sum estimated to be €94,500)."

While the bank declined this proposal from the defendant, the bank offered the defendant an alternative repayment arrangement (ARA) as outlined in the attached letter dated 18th July, 2017, wherein the bank inter alia, required the defendant to lodge the sum of €65,000 and the Bank was agreeable to extend the term of the loan to 28th February, 2032 with the repayments to be circa. €246.00 per month...In the letter dated 29th November, 2017, the defendant was informed that if a sum of €70,000 was lodged as a lump sum together with a sum of €100 per month, the bank would consider a life tenure for the defendant at the property. The bank had requested that the defendant revert to this ARA by 11th December, 2017. We are instructed that your office spoke with the case manager on 12th December, 2017. This ARA was not accepted by the defendant. We are instructed that Mortgage to Rent is not an option due to the Property being in positive equity. Please note that this letter is also written in open correspondence and shall be produced to the Court if necessary."

47. By letter dated 5 November, 2018, the defendant's solicitors wrote to the plaintiff's solicitors to suggest that there was a lack of humanity on the part of the plaintiff in relation to the matter and to suggest that it was astounding that the bank were taking such an attitude in light of the defendant's difficult circumstances. By letter dated 12 November, 2018, the plaintiff's solicitors gave notice that the matter would be called on. On 29 November, 2018, the plaintiff's solicitors wrote to the defendant's solicitors to notify them that a hearing date had been allocated for 11 December, 2018 in the judge's list. By letter dated 4 December, 2018, the plaintiff's solicitors furnished a supplemental affidavit sworn by Mr. Reid for the purposes only of appraising the court of the up-to-date position with regard to the defendant's arrears. On that issue, Mr. Reid has sworn a total of nine supplemental affidavits, the last of which is dated 22 July, 2021. In that affidavit, Mr. Reid avers that the balance owing by the defendant then stood at €109,556.50. He further averred that, were the defendant making monthly instalments, these would be in the sum of €2,331.86 per month. There is no dispute in relation to the fact of the arrears; the quantum of the arrears; or what the monthly repayments amount to. Obviously, the present proceedings do not comprise an application for a money judgment. Rather, the relief sought is possession of the property.

2019 correspondence

48. On 28 January 2019, the defendant's solicitors wrote to the plaintiff's solicitors making an offer in full and final settlement of all outstanding matters on the basis of a payment of €80,000, plus a monthly payment of €100 for a period of five years. Although that correspondence was headed "Without prejudice" the defendant has waived privilege. On 29 January, 2019 the plaintiff's solicitors responded to state that in light of the defendant's recent proposal, they were instructed by the bank to adjourn the matter for a period of two to three months to consider same. By letter dated 02 May, 2019, the bank responded on a without prejudice basis and no privilege has been waived by the plaintiff in respect of that correspondence. On 6 June 2019, the defendant's solicitors wrote to the plaintiff's solicitors stating inter alia: -

"We are writing to you by way of open correspondence considering the fact that we have made a more than generous offer which your client is unwilling to consider and we feel now that your client being in such a dominant position that we are left with no choice but to refer the matter to the Financial Ombudsman. When we are making the complaint we shall forward you the relevant documentation so that we (sic) are aware of the position".

49. By letter dated 26 June 2019, the plaintiff's solicitors wrote to the defendant's and stated inter alia:

“Firstly, we are at a loss to understand the basis of any complaint to the Financial Services Ombudsman in circumstances where the Bank has a legitimate right to reject any proposals your client may make which do not adequately satisfy her indebtedness to it.

. . .

You will no doubt be aware that the Bank wrote to you under the cloak of without prejudice correspondence on 2nd May 2019. While we do not wish to set out the contents of this letter in open correspondence; suffice to say, it was clearly set out that the Bank considered your client’s proposals and set out its position in respect of same. Notably, your client has not responded to the Bank’s letter and has not advanced matters arising therefrom. It follows, that where your client has refused and/or neglected to adequately deal with her indebtedness to the Bank, we are instructed to seek an order for possession against her. . .”.

50. On 10 December, 2019, the plaintiff’s solicitors furnished a supplemental affidavit sworn by Mr. Reid in which he averred the total then owing by the defendant. On 16 December, 2019, the defendant’s solicitors wrote to the plaintiff’s solicitors notifying them that they would be making an application to the Circuit Court on 17 December, 2019 for an adjournment in order to consider the contents of that affidavit. By letter dated 16 November, 2019, the plaintiff’s solicitors indicated that an adjournment application would be opposed. It appears that an adjournment was granted and by letter dated 19 December, 2019, the plaintiff’s solicitors noted the adjourned date of 31 March, 2020 and called for any replying affidavit by 31 January, 2020. By letter dated 28 January, 2019, the plaintiff’s solicitors indicated that they would not be consenting to an application for an adjournment on 30 January, 2019.

2020 correspondence

51. By letter dated 11 March, 2020, the plaintiff’s solicitors indicated that they were under instructions to call the matter on for hearing when the case was next in the call-over list on 16 March, 2020. By letter dated 25 November, 2020, the plaintiff’s solicitors confirmed their instructions to seek a hearing date for the case when the matter was in the call – over on 30 November, 2020. On 9 December, 2020, the plaintiff’s solicitors wrote to confirm that the matter had been called on for hearing on 16 December, 2020. They confirmed their instructions to seek an order for possession on that date and a further supplemental affidavit sworn by Mr. Reid was sworn by way of an update as to the defendant’s indebtedness. By letter dated 14 December, 2020, the plaintiff’s solicitors wrote to indicate the plaintiff’s opposition to an application which the defendant intended to make on 15 December, 2020.

2021 correspondence

52. The defendant has not exhibited any correspondence from 2021. It will be recalled that the Circuit Court gave judgment on 29 July, 2021, refusing to grant possession. A notice of appeal issued on 5 August, 2021.

2022 correspondence

53. It was very clear from the application made on behalf of the defendant during the hearing before this Court that she was particularly anxious to put before the court correspondence which post – dated the Circuit Court’s decision. Given the emphasis on this correspondence, it is appropriate to refer to it as follows.

54. On 16 May, 2022, the defendant’s solicitors wrote to the plaintiff’s in open correspondence formally inviting the plaintiff to engage in mediation. By letter dated 17 May, 2022, the plaintiff’s solicitors indicated that instructions were being taken and self – consent to a change of name application to reflect the plaintiff’s

current name. By letter dated 18 May, 2022, the plaintiff's solicitors responded to the invitation to mediate, as follows:

"The Bank has given due consideration to your request for mediation.

In doing so the Bank notes that there has been no payment to your client's loan agreement, the subject matter of these proceedings, since 21st March 2017. Moreover, the bank notes that your request for mediation comes just ten days before this matter is due to be heard by the High Court. In addition, we are instructed that there have been no recent proposals put forward by your client (or any financial representatives appointed on her behalf) to the Bank in seeking to address the significant indebtedness which exists on her loan account, which currently stands in the sum of €110,583.96.

Given your client's inaction on the question of your indebtedness to date and her continual refusal to honour her loan and mortgage agreements, it is the Bank's position that your client is not committed to addressing her indebtedness to it and in consequence, a mediated settlement is unlikely to be reached. Indeed, if a settlement was to be reached in the absence of an Order for Possession, given your client's continual breach of her loan agreement and mortgage, there is no guarantee that she will honour any mediated settlement. As such, the Bank is not prepared to engage in mediation.

That being so, the Bank will work with your client on the question of her indebtedness to it, and, to this end, is prepared to acquiesce to a six-month stay on any Order for Possession obtained herein. However, where these proceedings issued in 2015 and your client continues to breach of her loan agreement and mortgage, and, in consequence, remains significantly indebted to the Bank, the Bank requires finality to the matter. In consequence, it will call this matter on for hearing on 19th May 2022 with a view of having it heard on 26th May 2022".

55. The defendant's solicitors wrote to the plaintiff's on 24 May 2022 in the following terms: -

"We are solicitors for the defendant in the above entitled proceedings to hereby offer the sum of €85,000.00 all in (sic) full and final settlement of the matter which is due before the Court on Thursday next the 26th of May 2022. Please take your client's instructions and confirm if they are in agreement to accept said sum. Same can be paid within seven days.

As you are aware our client is in very difficult circumstances being the sole guardian of her granddaughter who hopes to start third level education in September.

Our client also has several health problems.

Our client shall also in the not too distant future lose the Child Benefit Allowance of €140.00 per week and the orphan's allowance.

We would urge you to consider this matter so closure may be brought to this case without litigation being required".

56. I want to emphasise, yet again, that the reason why this judgment has looked so closely at the correspondence exchanged between the parties, including the offers and counter offers made and declined is because of the emphasis placed upon this aspect in submissions made on behalf of the defendant. The thrust of those submissions was to argue that, taking on board the defendant's personal circumstances, the court should exercise its discretion against granting the relief in circumstances where it was contended that the defendant has made settlement offers which it was unreasonable for the plaintiff bank to decline. The foundation underpinning those submissions was that the court's discretion is, in essence, unrestricted,

by reason of the use of the word "may" in Order 5B, r. 9 of the Circuit Court Rules which states that: "*On the hearing of any Civil Bill to which this Order applies, the Judge may give judgment for the relief to which the plaintiff appears to be entitled*".

57. Regardless of the skill and conviction with which these submissions are made, I regard myself as obliged to take a different view. In the manner referred to earlier in this judgment, this Court does not have the jurisdiction to assess the "reasonableness" of an offer made by either party. Thus, it could no more hold that it was unreasonable for the bank not to accept one of the defendant's offers than it could hold that it was unreasonable for the defendant not to accept one of the offers made by the bank. There is no dispute in the present proceedings about the fact that (i) the loan term was ten years which expired in February 2017; (ii) despite paying "interest only" between May 2009 and April 2011 and again, between May 2012 and March 2013, the defendant went into arrears from June 2013 onwards; (iii) no payment whatsoever has been made since March 2017; (iv) there is no dispute in relation to the quantum; (v) there is no dispute about the defendant's default, demand having been made; and (vi) the plaintiff is the owner of the mortgage registered as a burden on the defendant's property.

58. In the manner analysed earlier in this judgment, I am satisfied that the plaintiff has complied with the CCMA. Even if I am entirely wrong in that view, it is fair to say that there is no evidence whatsoever which would allow for a finding that the plaintiff has breached the moratorium prescribed by the CCMA. Indeed, there is not even a suggestion made by the defendant that proceedings were commenced *less* than eight months from the date when the arrears arose or three months from the date of the plaintiff's 20 March, 2014 letter which confirmed the bank's decision not to offer an ARA because the bank regarded the loan as not sustainable. The undisputed fact is that the present proceedings were not issued until over sixteen months later, on 7 August, 2015. Thus, there is simply no question of any breach of the CCMA moratorium. In legal submissions, counsel for the defendant laid emphasis on this Court's decisions in *Permanent TSB PLC v Davis* [2019] IEHC 184; *Irish Life and Permanent plc. v Duff & Anor* [2013] IEHC 43; and *StepStone Mortgage Funding Ltd. v Fitzell & Anor* [2012] IEHC 142. These authorities were said to permit this Court to refuse the plaintiff's application where there had been a breach of any provision of the CCMA. The thrust of the submissions by counsel for the defendant was to suggest that full compliance with every aspect of the code was required and that failure to comply with any provisions in the code could disentitle a plaintiff to possession. I regard myself, however, as bound to apply the principles which were set out with clarity by the Supreme Court in *Life & Permanent PLC v Dunne and Irish Life & Permanent plc v. Dunphy* [2016] 1 IR 92. There, the Supreme Court considered a case stated in the first proceedings wherein this Court queried whether non-compliance by a lender with the CCMA affected that lender's ability to obtain an order for possession. At para. [63] Clarke J. (as he then was) observed that: "*the Code imposes a moratorium on seeking possession in certain circumstances*".

59. The learned judge went on to note that the purpose of the CCMA in that regard was to provide a window of opportunity to explore whether there were other solutions to the mortgage arrears problems of the borrower in question and if there were, to take action to put same in place. He then observed that: -

"A financial institution which, entirely ignoring the provisions of the Code in that regard, simply went ahead and sought possession as soon as it was legally entitled so to do would be doing the very thing which the Code is designed to prevent. 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) . . .”.

60. Having taken the foregoing view in respect of a breach of the moratorium (something which simply does not arise in the present case) the learned judge went on to make the following clear: -

“[65] However, in respect of the 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”.

61. The foregoing observations by the Supreme Court seem to me to be highly relevant to two issues in the present case. Firstly, it fortifies me in the view that it is no function of this Court to assess the reasonableness or otherwise of such engagement as has taken place between bank and borrower, be that under the auspices of the CCMA or otherwise. Secondly, it makes plain that, whereas a breach by a financial institution of the moratorium would affect its ability to obtain possession, different considerations apply to breaches of other aspects of the CCMA. Thus, even if there was evidence suggesting a breach of the CCMA (and there is not) I regard myself as bound to take the view that arguments built on alleged breaches of the CCMA simply cannot avail the plaintiff, given that there has been no breach of the moratorium by the plaintiff. The Supreme Court’s views were made crystal clear at para. [72] wherein the learned judge stated: “. . . *am satisfied that, in the limited cases of a breach of the moratorium, but in no other cases unless and until appropriate legislation is passed, a court should decline to make an order for possession”.*

62. For the sake of completeness, no legislation has been passed which alters the foregoing position. Moreover, there is without doubt prima facie evidence of compliance with the moratorium in the present case.

63. Having carefully considered all the evidence put before the court by the defendant in the form of her averments and the documentation which she chose to exhibit, and having also carefully considered the submissions made on her behalf, I am satisfied that no defence to the plaintiff’s claim has been made out. One would have to have a heart of stone not to feel for the defendant and her granddaughter who have experienced such tragic loss. Similarly, one could have nothing but sympathy for someone who has health issues. However, in one of the authorities to which the defendant’s counsel drew this Court’s attention, McDermott J. stated in his 28 March 2019 decision in *Permanent TSB PLC v Davis* that: -

“This is inter-partes litigation in which the court is considering the lender’s contractual rights and entitlement to pursue its remedy in accordance with the terms of the contract. The court is not permitted to act solely on the basis of sympathetic factors such as ill – health to refuse relief if the proofs are otherwise in order (Bank of Ireland v. Smyth [1993] 2 IR 102 per Geoghegan J.).”

64. The foregoing speaks to the reality that this Court, in the present application, does not enjoy the extremely wide discretion which counsel for the defendant contended for. In *Start Mortgages Ltd. & Ors v*

Gunn & Ors. [2011] IEHC 275, Dunne J. considered, at length, the nature and extent of the court's discretion in the context of the right of a lender to apply for an order for possession pursuant to s. 62 (7) of the Registration of Title Act 1964, notwithstanding its repeal by s. 8 of the Land and Conveyancing Law Reform Act 2009. As noted earlier in this decision, the Civil Bill makes clear that the plaintiff's claim is for possession of the property pursuant to O. 5 (B) of the Circuit Court Rules and/or the 1964 Act and/or the 1881 – 1911 Conveyancing Acts and/or the 2009 Act as amended by the 2013 Act. It should also be noted that the mortgage in the present case was entered into prior to the coming into force of the 2009 Act. In the manner carefully analysed by Dunne J., this Court's discretion in an application of the present type is very limited indeed. Because a central theme in the submissions made on behalf of the defendant is that this Court is, in essence "at large" as regards the exercise of its discretion, it is useful to quote the following passage from the learned judge's decision in *Start Mortgages*: -

"49. It would be useful at the outset to consider the nature of the "right" in this case. The "right" contended for by the plaintiffs in these cases is the right to apply for possession pursuant to section 62(7). Different submissions have been made as to when that right could be said to have been "acquired" or "accrued". I will consider the submissions in that regard at a later stage in the course of this judgment.

50. I was referred in the course of the submissions to a number of judgments which refer to the exercise of the court's power to make orders under s. 62(7) or its equivalent. The first of the cases referred to was the decision in Birmingham Citizens Permanent Building Society v. Caunt [1962] 1 Ch. 883. Russell J. in that case considered at p. 912 the nature of the court's jurisdiction to decline to make an order for possession in the following terms:-

"Accordingly, in my judgment where (as here) the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend and so forth."

65. I was also referred to the decision of this Court in *Anglo Irish Bank Corporation PLC v Fanning* [2009] IEHC 141 in which the decision in *Birmingham Citizens Permanent Building Society v Caunt* [1962] 1 Ch 883 was quoted with approval. In that case a different passage from the judgment of Russell J. was cited where he said at p. 891:

"There appears no trace, prior to 1936, of any right in any court to deny a mortgagee asserting or claiming his right to possession, the appropriate order - though to this a qualification has to be made in that a court in the exercise of its inherent jurisdiction for proper reason to postpone or adjourn a hearing might by adjournment for a short time afford the mortgagor a limited opportunity to find means to pay off the mortgagee or otherwise satisfy him if there was a reasonable prospect of either of those events occurring. Indeed, it would be to me surprising if there had been such a trace, having regard to the fact that a legal mortgagee does not necessarily require any assistance from the court to assert his right to possession. Moreover, a mortgagee once rightfully in possession could never be ousted by the mortgagor except on paying off in full."

66. The reference to 1936 in that passage is a reference to the fact that rules of the Supreme Court in United Kingdom were changed at that time. The position in the Anglo case was that the defendant had on affidavit asserted that he was entitled to seek an indemnity from a third party in respect of some of the indebtedness to the plaintiff which was secured on foot of the mortgage in that case. Having cited with approval the passage from the judgment of Russell J. at p. 891, I accepted the submission on the part of the plaintiff that as there was default in respect of the home loan element of the borrowing the plaintiff was entitled to possession, saying:

"I am of the view that in any event the plaintiff is entitled to possession by reason of the default in the home-loan element of the borrowing secured by the mortgage."

I should, for completeness, refer at this point, to the decision in the case of Bank of Ireland v. Smyth [1993] 2 I.R. 102 in which Geoghegan J. had to consider the provisions of section 62(7). At p. 111 of his judgment he stated:

"It is submitted on behalf of the defendants that, as a matter of discretion, I ought to refuse the application for possession. It is suggested that the wording of s. 62(7) of the Registration of Title Act, 1964, gives the court this discretion, and that the judgment of Denham J. in First National Building Society v. Ring [1992] 1 I.R. 375 supports the view that I should exercise it against the plaintiff, I disagree. I do not think that First National Building Society v. Ring [1992] 1 I.R. 375 has any relevance to this case. The decision of Denham J. turned on an interpretation of s. 4 of the Partition Act, 1868. But the wording of that section is totally different from the wording of s. 62(7) of the Registration of Title Act, 1964. The words 'may, if it so thinks proper' in s. 62(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."

67. Geoghegan J. continued that passage by looking the history of the right of a legal charge holder to obtain an order for possession for the purposes of a sale out of court. He stated:

"It had been held in Northern Banking Company Ltd. v. Devlin [1924] 1 I.R. 90 that even though the Registration of Title Act, 1891, conferred on a registered owner of a charge the rights of a legal mortgagee under the Conveyancing Act, 1881, nevertheless a registered owner of a charge, unlike a legal mortgagee, could not obtain an order for possession for the purposes of a sale out of court, because the legal mortgagee's right to possession arose by virtue of his estate in the land at common law, and not by virtue of the Conveyancing Act, 1881. This yawning gap in the rights of a legal chargeant was heavily criticised by Glover in his Registration of Land in Ireland, 1933. The position was corrected by s. 13 of the Registration of Title Act, 1942, which is in identical terms to s. 62(7) of the Registration of Title Act, 1964. The historical background to the subsection therefore reinforces me in the interpretation which I give to it. I do not believe that the Oireachtas intended a wide discretion which could take sympathetic factors into account."

68. It is clear from the authorities referred to above that s. 62(7) conferred on a registered owner of a charge the right to obtain an order for possession for the purposes of a sale out of court. It can clearly be seen from the decision in the Smyth case, the decisions in the *Birmingham Citizens Permanent Building Society v Caunt* and *Anglo Irish Bank v Fanning* that the scope of the discretion conferred on the court is very limited. In practical terms if the principal sum due on foot of the charge has become payable the registered owner of the charge is entitled to an order for possession. That is not to say that the borrower

is not entitled to an adjournment of proceedings to pay off the mortgage in full or alternatively to come to an arrangement with the lender as to the repayment of the mortgage. However, if the proofs of a plaintiff are in order and there is no other bar to an order being made, then it seems, the court has no discretion but to make the order. Accordingly, it was argued by the plaintiffs that there is a right to apply for an order for possession, when repayment of the principal monies secured by the instrument of charge has become due.

69. Section 62(7) of the 1964 Act provides as follows:-

"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."

70. It was the foregoing provision which Dunne J. considered in *Start Mortgages*. Just as O. 5B, 5. 9 uses the word "may", the same word appears in the phrase "...the court may, if it so thinks proper, order possession of the land...". In the manner examined earlier, the authorities demonstrate that this Court has a very limited discretion to refuse an application for possession. In essence, the court must apply equitable principles, as opposed to sympathetic factors and this means ensuring that the application is made *bona fide* for the purposes of realising the security which the borrower charged in favour of the lender. In the present case, the evidence demonstrates this to be so. The court has before it a positive, indeed uncontroverted, averment made by Mr. Reed on behalf of the plaintiff Bank (at para. 24 of his 24 July 2015 affidavit) to the effect:-

"...that the Orders sought in the special endorsement of claim are necessary in order to facilitate the sale of the mortgaged lands by the plaintiff to recover the monies advanced to the defendant..."

71. It is appropriate for this Court to ask whether, as a matter of law, it can properly be said that the monies (i) are secured and (ii) are due. The answer to both questions is undoubtedly yes, having regard to the evidence before this Court. Carefully considering all evidence and submissions, I take the view that it would not be disproportionate to refuse the relief sought by the plaintiff. The defendant has not advanced any stateable or *bona fide* defence in law or in fact in respect of the plaintiff's claim. On the evidence, the plaintiff has established its entitlement to an order for possession of the mortgaged property. The loan term of ten years expired over five years ago. Although the defendant is critical of the fact that none of her proposals were accepted, it is equally clear that the plaintiff has made efforts to explore alternatives with the defendant. I stress, yet again, that this Court is simply not entitled to make value judgment as to the reasonableness or otherwise of any proposal made, be that one which emanated from the Bank or which was made by the borrower, via her solicitors.

72. For the reasons set out in this judgment, it is appropriate to grant the relief sought by the plaintiff. It is also appropriate to grant a stay on the order for possession. I note that in very recent correspondence from the plaintiff's solicitor which, having regard to the defendant's successful application to admit new evidence, was put before the court at the hearing, the plaintiff indicated a preparedness to agree to a six-month stay on any order for possession. There was also an indication given that there was a willingness on the part of the plaintiff to engage with the defendant during the period of a stay. Although a matter for the parties, that is something which this Court is very gratified to note. Certainty in the law constitutes a

legitimate public policy objective. Even from a first principles analysis, it would run in entirely contrary to the foregoing objective if this Court regards itself as entirely free to ignore contractual and commercial arrangements freely entered into by a borrower at a particular point in time regardless of how tempting that might be in light of the tragic loss they subsequently suffered and the alteration in their personal circumstances. This Court has nothing but admiration for the defendant as caregiver to her granddaughter and expresses the hope that a resolution, mutually acceptable to Bank and borrower, may yet be found. In a manner explained in this judgment, the foregoing hope does not, however, constitute a basis to refuse an application in respect of which there is no *bona fide* defence. A stay shall apply for six months which, even if no resolution can be found, shall facilitate the defendant in trying to source alternative accommodation.

73. It seems uncontroversial to say that, in the context of a debt owing by a borrower to a bank, what represents a reasonable proposal is subjective rather than objective. In other words, it seems entirely possible that a borrower might regard a substantial "*discount*" on their debt as being reasonable, given their particular circumstances, be they financial or personal or a combination of the two. On the other hand, a bank might well regard it as reasonable that a borrower on or in full the contractual commitments which they bound themselves to, including the surrendering up of property pledged as security for their indebtedness. Thus, the Bank, if it is prepared to contemplate any "*discount*", may genuinely regard a modest reduction in a lender's liabilities as reasonable or may regard as reasonable an alternative restructuring of the entire liability, be that by way of extending the term or otherwise. The reality that reasonableness may well be a very subjective concept, coupled with the fact that the court has not been intimately or at all involved with what might be a lengthy history involving facts the court is wholly unaware of, seems to me to highlight the folly of the court purporting to decide what offer(s) are or are not reasonable. In making the foregoing comment, I want to reiterate that the court enjoys no jurisdiction to do so yet a central element in the defendant's submissions was, in essence, to suggest that the Bank has been and continues to be unreasonable by not accepting one of the defendant's offers. That, contended the defendant, should weigh heavily against the Bank being granted an order for possession in the present case.