THE HIGH COURT

[2023] IEHC 682

[Record No. 2022/4414P]

BETWEEN

PROMONTORIA (FINN) LIMITED AND KEN FENNELL

PLAINTIFFS

AND

ARTHUR O'NEILL, SUSAN DEMPSEY, NIGEL HIGGINS AND ALL PERSONS IN OCCUPATION OF FOLIO 51128F OF THE REGISTER OF OWNERSHIP OF FREEHOLD LAND COUNTY WEXFORD OTHERWISE KNOWN AS THE THATCH, ASKINVILLAR, KILTEALY, COUNTY WEXFORD.

DEFENDANTS

JUDGMENT of Mr Justice Liam Kennedy delivered on the 4th day of December 2023.

1. This judgment addresses the Plaintiff's application for interlocutory relief pending trial. It does not determine any substantive claims, defences or issues in the proceedings, such as the dispute as to repayment arrangements.

2. The First Defendant is the registered owner of a "*buy-to-let*" property known as the Thatch, Askinvillar, Kiltealy, County Wexford ('the Thatch'). The First Plaintiff is the current owner of a registered charge against the Thatch and has appointed the Second Plaintiff (the 'Receiver') as a receiver. By plenary summons dated 23 August

2022, the Plaintiffs sought an order for possession, ancillary orders, damages, interest and costs. This application concerns the Plaintiffs' application by Notice of Motion dated 26 September 2022 for various interlocutory injunctions prohibiting the Defendants (or their representatives) from obstructing the Receiver's steps to take possession. This judgment concerns the application insofar as the orders were sought in respect of (and opposed by) the First Defendant (the Second and Third Defendants did not oppose the application. The Third Defendant had been a tenant in residence but has vacated the Thatch since the proceedings were initiated). In the interests of brevity this judgment will refer to the First Defendant as "the Defendant" and will not reference the Second Defendant.

3. While other matters were initially raised in the affidavits (including the validity of the Second Plaintiff's appointment and a charge involving Celtic Residential Irish Securitisation plc), by the hearing of the application the issues had narrowed and the Defendant relied upon two matters by way of defence to the application, acknowledging in submissions that those were the only basis on which he could oppose it. Those issues will accordingly be the focus of this judgment.

4. It was undisputed that: (a) the Defendant is the registered owner of the Thatch; (b) the First Plaintiff is the current owner of the charge over it; (c) the Defendant has made no payments of interest or capital since 2012 – in fact, the undisputed evidence confirmed that the arrears dated back to 2007; (d) as a result of the failure to make the required periodic payments, the total debt fell due pursuant to the mortgage; (e) the First Plaintiff duly appointed the Second Plaintiff as receiver over the Thatch on 18 February 2016. On the same day, it also appointed him as receiver over one of the other two properties and on 6 January 2017 it appointed him as receiver over the third property; (f) the Defendant refused to vacate the Thatch following the appointment of the

Receiver, or to pay the rent to him; (g) in 2018, the Plaintiffs issued proceedings ("the 2018 Proceedings") seeking reliefs in respect of the other properties which correspond to those sought in these proceedings in respect of the Thatch; (h) on 22 March 2019, after a contested injunction hearing in the 2018 proceedings, Mr Justice Allen granted the injunctive relief sought in respect of the other two properties under the same mortgage deed; (i) the Court of Appeal dismissed the Defendant's appeal from the decision of Mr Justice Allen; (j) a further application in the 2018 Proceedings in respect of alleged breaches of the injunction in those proceedings was resolved when the Defendant offered undertakings to the Court to abide by Judge Allen's previous orders (there is a dispute as to whether that undertaking has been consistently honoured); and (k) there is an outstanding order for discovery in the 2018 Proceedings. Accordingly, it was common ground that, unless the Defendant can establish an arguable defence based on at least one of two issues which they have raised - and subject to Court's equitable discretion - the Plaintiffs appear *prima facie* entitled to the reliefs sought in the Notice of Motion.

First Issue – The Agreed Basis for Loan Repayments

5. The first issue raised by the Defendant concerns whether the parties originally agreed to an "interest only" repayments basis (as he contends) for the entire 25-year mortgage period or (as the Plaintiffs contend) only for the first five years. His affidavits state that: (a) prior to entering into the mortgage arrangements, he owned three properties (including the Thatch), which were financed by separate Permanent TSB loans for each property; (b) in 2007, First Active plc Waterford ("First Active") offered to refinance all three loans on the basis of a 25-year "interest only" facility; (c) he agreed to refinance with First Active on that basis; (d) he signed loan acceptance documents

on 13 April 2007 in the belief that the loans would be interest only for 25 years; (e) in March 2012, Ulster Bank (which had acquired First Active and, with it, the loans) wrote to the Defendant stating that the loans were interest only for the first five years only; (f) the loans were ultimately sold to the First Plaintiff, the currentowner of the charge; and (g) the suggestion that the interest only arrangement was only for the first five years came as a shock to the Defendant (although he has not exhibited evidence of any contemporaneous communications from him responding to the March 2012 correspondence from the First Plaintiff).

6. The Defendant relied on two contemporaneous First Active documents as evidencing his understanding of the agreement, which I will respectively refer to as the "29 March 2007 Document"; and the "Defendant's April 2007 Document" (to distinguish it from documentation exhibited on behalf of the Plaintiffs).

7. The 29 March 2007 Document, entitled "*Your Mortgage Application*", was a "*Personalised application*", produced by First Active for the First and Second Defendants and dated 29 March 2007. The Defendant's affidavit and the submissions on his behalf emphasised the acknowledgment that the borrowers required "*€1,100,000 on an Interest Only basis*" for the full term. Section 5 of the document illustrated the likely cost of monthly interest only payments and reminded the borrowers that the full principal would be repayable at the end of the mortgage period:

> "*The mortgage payments shown above only cover interest. You will still owe €1,100,000 at the end of the mortgage term. You will need to make separate arrangements to repay this*".

The document suggested a separate savings plan to fund the repayment of capital at the end of the term. Accordingly, it is consistent with the Defendant's account of the basis upon which the Defendant agreed to switch to First Active. His submissions suggested that the document explained the rationale for the loan offer - the arrangements must be

interpreted in that light. Any borrower receiving this offer would reasonably conclude that the repayments would be interest only for full term.

8. The Plaintiffs noted that the Defendant's submissions were not based on the terms of the facility agreements or mortgage deeds actually executed by him. Instead, he relied upon a pre-contractual document which, on its face, stated that it was not legally binding. Even if the Defendant could identify misrepresentations in the pre-contractual documents, that could not alter the interpretation of the documents actually entered into. No plea of rectification has been advanced in either proceedings. The document's opening paragraph stated that:

> "*This is not a legally binding mortgage offer and does not oblige First Active plc to provide you with the mortgage described in this illustration.*"

9. The second document relied upon by the Defendant, the Defendant's April 2007 Document, was entitled "*Loan Offer – Consumer Credit Act 1995*" and was addressed to the Defendant. It confirmed the amount and period of the loan. It did not expressly stipulate state that the repayments were to be interest only for the entire period and the suggested monthly repayment figure appeared consistent with an interest only basis. The document also appears to include a "*Loan Acceptance*" form signed by the Defendant which confirmed the loan of €1.1m for 25 years at an initial 4.5% interest rate with monthly repayments of €4,125 (which would, once again, be consistent with interest only repayments). However, there was a dispute about this document. The First Plaintiff's evidence was that the Defendant's exhibit was incorrect or incomplete and that the full copy of the loan offers (which it exhibited) stipulated that the interest only period was to be 60 months rather than 25 years.

10. In this regard, it should be noted that the first affidavit of Adrienne Fitzgibbon had exhibited three loan offers, each dated 13 April 2007, and each signed by the

Defendant. These three documents were confusing in some respects. For example, the second page of each document described the loan type as "*Lifetime ECBR + 0.75% for term 80% LTV Interest Only*" which might appear consistent with the Defendant's position. However, although some figures may not have tallied exactly, the specified monthly loan repayments on the first page appear more consistent with the Plaintiffs' position. The first page of each loan offer showed smaller instalments for the period from 2007 to 2012, as opposed to the period from 2012 onwards, when the various instalments under each loan would increase, consistent with principal repayments from that point. Most significantly, the specific loan offer conditions in each of the three documents expressly stated that:

> "*First Active plc has agreed that the borrower(s) pay interest only for the first 60 months of this loan facility. Thereafter, repayment will revert to capital and interest for the remaining term of the loan*".

Accordingly, each of these documents were more consistent with the "interest only" period being limited to the first five years.

11. The Defendant signed a confirmation in respect of each of these three documents expressly acknowledging that:

- he had received the general terms and conditions and the specific conditions attached to the loan offer and had them explained to them by his solicitor and that he fully understood them;
- he accepted the loan offer on the terms and conditions specified and he undertook to complete the mortgage deed; and,
- he understood that the mortgage and all associated rights and interests would be freely transferable by First Active.

12. Ms Fitzgibbon dealt with the "Defendant's April 2007 Document" at paragraphs 18 - 19 of her second affidavit:

"*18. The document exhibited by Mr. O'Neill is different in some respects from the Third Facility Agreement exhibited to my first affidavit, with these documents appearing to have quite different execution pages, for example. However, the document relied upon by Mr. O'Neill does appear to duplicate certain pages from the exhibit to my first affidavit and to omit others.*

19. For example, while the first page of the "Specific Loan Offer Conditions" applicable to the Third Facility Agreement seem to form part of the exhibits to the Appellant's affidavit (see page 9 of the exhibit), the second page of the said "Specific Loan Offer Conditions", which expressly states that interest only period is to subsist for sixty months and that the loan is to revert to capital and interest payments thereafter, has not been included as part of this exhibit".

13. Ms Fitzgibbon noted at paragraph 25 of her second affidavit that the High Court had rejected a similar argument advanced by the Defendant in response to the same application in the 2018 Proceedings (the Defendant unsuccessfully argued that the bank "*sought to switch the "true" loan offer for a "false loan offer*"").

14. The position was summarised by the 26 January 2023 affidavit of Adrienne Fitzgibbon:

"*9…the First Facility Agreement records the security to be provided in connection with the facility as No. 3 Parkton Mews, Enniscorthy, Wexford. The exhibited First Facility Agreement provides for a term of 25 years, with interest only payments of €814.58 being payable from 15 April 2007 and capital and interest payments of €1,424.28 being payable from 15 April 2012.*

10. The "Specific Loan Offer Conditions" relating to the said First Facility Agreement provide, inter alia, as follows:

> *"First Active plc has agreed that the borrower(s) pay Interest only for the first 60 months of this loan facility. Thereafter, repayment will revert to capital and interest for the remaining term of the loan".*

11. I say and believe that the Second Facility Agreement records the security to be provided in connection with the facility as The Thatch, Askinvillar, Kiltealy, Enniscorthy, Wexford (i.e., the Property). The exhibited facility letter provides for a term of 25 years, with interest only payments of €2,231.25 being payable

from 26/04/2007 and capital and interest payments of €3,764.38 being payable from 26/04/2012.

12. The "Specific Loan Offer Conditions" relating to this Second Facility Agreement again expressly provided that the borrower was to pay interest only for sixty months and thereafter repayment would revert to capital and interest for the remaining term of the loan.

13. The Third Facility Agreement records the security to be provided in connection with a facility as Askinvillar, Kiltealy, Enniscorthy, Wexford. The exhibited Third Facility Agreement provides for a term of 25 years, with interest only payments of €4,125.00 being payable from 4 May 2007 and capital and interest payments of €6,959.24 being payable from 4 May 2012.

14. The "Specific Loan Offer Conditions" relating to the Third Facility Agreement again expressly provided that the borrower was to pay interest only for sixty months and that thereafter repayment would revert to capital and interest for the remaining term of the loan".

15. Although the Defendant's affidavits and submissions maintained that there were two separate loan offers, one dating from 2007, offering interest for 25 years (which he relied on), and the other having been produced by Ulster Bank in 2012, which suggested that the interest only period was limited to five years, the Plaintiffs disputed this contention and, as outlined above, the documentation exhibited by the Plaintiffs supported their position in that regard.

16. It was undisputed that the Defendant had been in default for a considerable period, with arrears dating back to 2007. The Defendant did not explain the arrears other than by reference to his objection to the 2012 communication. He submitted that since the 2007 agreement envisaged interest only payments for 25 years, the suggestion by the Plaintiffs that those arrangements were only for the first 5 years constituted a repudiation of the agreement, thus invalidating the demand letters and the Receiver's appointment. Accordingly, he maintained that the Plaintiffs had no entitlement to bring these proceedings. When asked why the Defendant did not make interest only payments

reflecting the arrangements which he maintained had been reached, his solicitor submitted that, having repudiated the agreement, the Plaintiffs had no right to demand payment or to seek injunctive relief.

17. It appeared that the actual hearing of the current application was the first occasion on which the Defendant had characterised the First Plaintiff as having repudiated the 2007 agreement by mischaracterising its terms in 2012 (by suggesting that the interest only period was only for 5 years). He had not expressly alleged such repudiation previously in these proceedings or when unsuccessfully contesting the corresponding injunction application in the 2018 Proceedings in the High Court and the Court of Appeal. However, he was not legally represented in those proceedings and, although he did not specifically invoke the legal concept of repudiation, it was clear that he justified his position on the basis of his objection to the 2012 communication, which he saw as a unilateral attempt to change the terms of the agreement and as contradicting the basis on which he originally entered the mortgage.

18. When asked in the course of submissions as to the obligation to repay the loans, the Defendant's solicitor argued that the applications sought an exercise of the Court's equitable jurisdiction and that the principles of equity apply. Having unilaterally sought to change the terms of the loans in 2012, the Plaintiffs were not coming to the Court with clean hands and could not seek equitable relief.

19. The Plaintiffs acknowledged the dispute as to the repayment terms but submitted that that issue did not constitute a basis to resist the application. They relied on the terms of the mortgage deed as executed by the Defendant and on the terms of the loan offers issued to (and signed and accepted by) the Defendant in 2007. These, on their face, clearly provided for an interest only period limited to five years. They also noted the absence of evidence of any attempts by the Defendant to make any payments,

even on an interest only basis, or to offer to do so, or to assert repudiation at that time. Instead, without even paying interest, he retained the entire benefit of the substantial loan monies, the corresponding assets and the associated rents, for 11 years since the 2012 communication. If the Defendant genuinely contended that he was only required to make interest only payments, then the appropriate and reasonable course would have been to inform the lender accordingly and to tender those payments. In that event, the only issue between the parties would be who was correct as to the payment terms, which would determine whether the principal should be repaid progressively or only at the end of the loan period. However, he had made no payments whatsoever, which meant that he was in default even if he was correct as to the repayment arrangements. The Plaintiffs argued that the Defendant's defaults were indisputable (whether the payments were viewed as interest only or otherwise) and the mortgage deed clearly stipulated that the total debt became payable in the event of even one default.The Plaintiffs noted that no authority had been cited for the proposition that the disagreement as to repayment terms could, without more, constitute repudiation. They submitted that, even if there had been a repudiation, then the consequence would be that the agreement terminated immediately, so the loan would be immediately repayable in any event. Accordingly, irrespective of the length of the interest only period, there had been default on the Defendant's part. If he maintained that the loan had been repudiated, he had still failed to repay the loan monies. Accordingly, no *bona fide* defence had been raised.

20. The Plaintiffs also characterised as misconceived the Defendant's argument that the mortgage or the Plaintiffs' demands were invalid because certain 2012 loan offers post-dated the execution of his mortgage indentures and no further mortgages were executed subsequently. The Plaintiffs argued that the terms of the loan agreements did not change in 2012, nor was there any evidence of new loan offers at that time. The

Plaintiffs also submitted that, even if there had been new offers and facility agreements in 2012, this would not have invalidated the 2007 mortgage because, under clause 2(a)(i) of the First Schedule to the mortgage, the borrowers covenanted to pay the "*Total Debt*", a term defined as including the unpaid balance of all "*Loans*". The term "*Loan*" was itself defined as meaning the money which the lender had agreed to advance to the borrower in the relevant loan offer, including the unpaid balance of any such sum, and the term "*Loan Offer*" was defined as "*the document or documents issued by the Lender as amended or varied in writing from time to time specifying the amount and terms upon which the Lender will make the Loan*". Accordingly, any variation in the terms governing the operation of the loans subsequent to the execution of the mortgage would not have invalidated the mortgage.

The Second Issue – The Issuing of Successive Proceedings

21. The Defendant's second objection is that these proceedings are unnecessary and that the issues could and should have been addressed in the 2018 Proceedings, which he is defending on exactly the same basis as in these proceedings. The three loans were cross-secured, and the issues and the three properties are inextricably connected and should have been dealt with in the same proceedings. Duplicative High Court actions would traverse the same issues, which would waste court time and involve unnecessary effort and expense for all parties. The Defendant's submissions noted that the Plaintiff's Reply in the 2018 Proceedings referenced the Thatch as one of the properties secured by the mortgage in issue in those proceedings and noted that the appointment of the Receiver as the receiver of all three properties, showing the Plaintiffs' acceptance that the Thatch is part of the bundle of loans which is in issue in the 2018 Proceedings. The dispute regarding the interest only period is an integral part of the 2018 proceedings as

well as in these proceedings. This was reflected by the recent order for discovery in those proceedings. The defence will essentially be the same in both proceedings and the issues should be determined in the one action as the three loans are inextricably linked. The Defendant relied on *McCarthy v. McNulty and MIBI* [1999] IESC 70. In that case, the Supreme Court noted the desirability of finality in litigation and of avoiding multiplicity of suits when allowing a defendant to advance a counterclaim (so as to recover damages paid to other parties arising out of the road traffic accident which had led to the substantive claim).

22. The Plaintiffs responded that there was no application before the Court to strike out or stay the proceedings so, if there was any substance to the issue, it would go to the exercise of the equitable discretion. They accepted that the claims could theoretically have been brought in the same proceedings, but the affidavits filed on the Plaintiffs' behalf had explained the reason for issuing separate proceedings and there was no basis for the Defendant to contend that it was obligatory to pursue the relief in a single action. The Receiver explained at paragraphs 21 – 24 of his affidavit of 19 January 2023 that the 2018 Proceedings were issued in response to the Defendant's actions frustrating the receivership over the other two properties. At that time, the Second Plaintiff was seeking to progress the receivership over this property by serving a notice of termination on the tenants in occupation and by applying to the Residential Tenancies Board. When the original tenants vacated, he sought to engage with the new tenants. It was only when it became clear that the intervention of the Court was unavoidable that he issued these proceedings. Accordingly, although the Court's assistance is now required in respect of the Thatch, it was not unreasonable to limit the 2018 Proceedings to the other two properties due to how matters then stood.

23. The Plaintiff's counsel explained why no issue arose in terms of: (a) the doctrine of *res judicata* (referencing the helpful summary of the authorities by McDonald J. in *George v. AVA Trade (EU) Ltd.* [2019] IEHC 187); (b) issue estoppel (citing the summary of the principle in *McCauley v. McDermott* [1997] 2 ILRM 486 and the classic exposition of the doctrine by Diplock L.J. (as he then was) in *Thoday v. Thoday* [1963] 1 All ER 342); or (c) the rule in *Henderson v. Henderson* (1843) 3 Hare 100 (noting the Irish Courts' approval, in cases such as *Carroll v. Ryan* [2003] 1 IR 309 and *AA v Medical Council* [2003] 4 IR 302, of the formulation of the rule by Bingham L.J. in *Johnson v. Gore Wood* [2002] WLR 72, to the effect that the issuing of successive proceedings may, without more, be an abuse of process if the court is satisfied that the issue in the later proceedings should have been raised in earlier proceedings). The Defendant did not challenge those submissions.

24. The Plaintiffs submitted that, while there were significant facts and issues in common between the two proceedings, the causes of action were distinct. The fact that proofs might overlap did not mean that there was a single cause of action. The Defendant's assertion that these proceedings raise no new issues was incorrect, as they seek relief in relation to the Thatch, which was not sought in the 2018 Proceedings. Nor was there any question of an abuse of process. The Plaintiffs were entitled to issue separate proceedings and their decision had no impact on the current applications in any event.

Outstanding Discovery Order in 2018 Proceedings

25. The Defendant drew the Court's attention to the Plaintiffs' default in complying with a recent order for discovery by Ms Justice Roberts in the 2018 Proceedings. The Plaintiffs were directed to discover documents relating to the basis on which the parties

originally engaged with each other, with a view to resolving the issue as to whether the payments were agreed to be interest only for the entire term or only for five years. The Defendant initially sought to adjourn this application until such discovery had been furnished but the Court declined to do so because: (a) discovery is not normally sought or granted for the purpose of determining an interlocutory application nor was discovery necessary to determine the application on this occasion; (b) a corresponding application had already been dealt with in the 2018 Proceedings without any suggestion that that application should await discovery, rendering it impossible to advance such an argument in these proceedings; (c) there was no suggestion in the Defendant's affidavits that it would be prejudiced in dealing with the applications in the advance of discovery; and (d) although the application had been specially fixed for several months and had been mentioned to the Court on several occasions, this was the first time that an adjournment pending discovery (in the 2018 Proceedings) had been suggested.

26. In the light of the Court's decision to decline to adjourn the application, the Defendant advanced an alternative submission, that the fact that discovery was overdue was relevant to the exercise of the judicial discretion on this application. It was submitted that the absence of discovery as directed (in the 2018 Proceedings) prevented the Defendant from probing the Plaintiff's position and demonstrating an arguable defence on the "interest only" issue. The Defendant submitted that while repudiation had not been pleaded, this could change following discovery. If the Plaintiff had promptly furnished discovery, the Defendant might be in a stronger question to defend this application. It would be unfair to grant injunctive relief until the Plaintiffs had furnished their discovery on the crucial issue.

Arguable Case/Strong Arguable Case

27. The Plaintiffs submitted that they had established a strong arguable entitlement to the reliefs sought. It was accepted the mortgage was executed as security over the property and that the monies were advanced and had not been repaid. There was no dispute about the facts that the Defendant had refused to permit the Receiver to take possession of the property, had impeded and/or frustrated the conduct of the receivership and had failed to remit any rental payments. They argued that the Plaintiffs have a strong case to make at trial that the Defendant's assertion (that the mortgage was in some way invalidated by an alleged unilateral attempt to change the terms of the underlying loan agreements) was without factual or legal merit. The objection to these proceedings being brought separately from the 2018 Proceedings was not relevant to the current applications.

28. The Defendant maintained that there was a clear dispute as to the terms of the original loan, and this was reflected in the terms of the outstanding discovery order in the 2018 Proceedings, and that, given the Plaintiff's default in complying with that order, the Court should assume that the Defendant may be in a position to substantiate its position in respect of the interest only terms and repudiation, in which case all subsequent enforcement steps would be invalid.

Adequacy of Damages and Balance of Convenience

29. The Plaintiffs had tendered an undertaking as to damages and submitted that the balance of convenience favoured the granting of the relief sought. It was clear (and this was not disputed by the Defendant) that the rent paid in respect of the property pending trial would be likely to be irrecoverable in practice in the absence of any injunction, even if the Plaintiffs succeeded at trial. Accordingly, the Plaintiffs would be prejudiced by the ongoing dissipation of rent since the current tenant is unwilling to engage with the Receiver. The undisputed evidence suggested that the Defendant controlled the

property and was receiving rents. He had not advanced any proposal to preserve such rental income pending trial.

30. The Plaintiffs submitted that the application was analogous to *Dowdall v. O'Connor* [2013] IEHC 423, in which McDermott J. held that permitting the defendant to continue to occupy premises would prejudice the receiver due to the loss of future rental income, which would not be recoverable in practice. They argued that, since the Thatch is a "*buy-to-let*" investment property, damages would be an adequate remedy for the Defendant, even if the property was sold, and this would also necessarily be the case if the property continues to be leased pending trial

31. Although the Defendant had not argued that there had been delay in bringing the application, the Receiver explained why it was not brought earlier (specifically due to his efforts to progress the receivership as much as possible and his preference not to resort to litigation until it became unavoidable).

The Decision of Mr Justice Allen on an Identical Application in 2018 Proceedings

32. The judgment of Mr Justice Allen dated 22 March 2019 (on the corresponding application in the 2018 Proceedings): (a) noted the Defendant's acknowledgment that he had stopped paying the loans altogether since March 2012; (b) observed that the Defendant had exhibited what purported to be copies of loan approval letters in support of his claim that the facility letters had changed the terms from the basis which had been agreed, but also noted that these exhibits seemed to be "*manifestly…partial copies only of some of the pages of the copy letters of loan approval that were made available by the plaintiff in the course of these proceedings*"; and (c) concluded that:

> "*there is no bona fide issue to be tried as to whether the loan to the defendants was a 25-year interest only loan. It is perfectly clear from the copy letter of loan approval… that the loan was to be interest only for five years and thereafter to*

revert to interest on capital. If I am wrong on that, it seems to me to be absolutely clear that the defendants have paid nothing since 2012 so that – even if it was an interest-only loan, it was in arrears at the time of Mr Fennell's appointment".

Legal Principles

33. The principles governing applications for interlocutory injunctive relief have been examined in numerous authorities, including *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 and *Campus Oil Limited v. Minister for Industry and Energy (No. 2)* [1983] IR 88, which essentially required the Plaintiffs to demonstrate: (a) a serious issue to be tried; (b) that damages would not be an adequate remedy; and (c) that the balance of convenience favoured granting the injunction. These cases have been analysed in many decisions since, including *B. & S. Limited v. Irish Auto Trader Limited* [1995] 2 IR 142 and *Okunade v. Minister for Justice* [2012] 3 IR 152. In *Merck Sharp & Dohme Corporation v. Clonmel Health Care Limited* [2020] 2 IR 1, the Supreme Court held that adequacy of damages should be considered as part of the balance of convenience rather than as an antecedent factor to be considered in advance of the balance of convenience. In *Charleton v Scriven* [2019] IESC 28, the Supreme Court considered that an application by a receiver seeking to restrain a party from interfering with the collection of rent was essentially prohibitory in nature. However, in that case, and also in *Macray Properties Limited v. Sheridan* [2022] IEHC 399, the Court held that, where no real case of any substance was made by the defendant, it would not matter whether any interlocutory injunctive relief sought could properly be characterised as mandatory or prohibitory, for there would be a more than adequate basis for suggesting that a strong case had been made out. The same approach was followed by Keane J. in *McCarthy v. Murphy* [2016] IEHC 391 (as upheld in [2019] IECA 211). In *Everyday Finance DAC v. Gleeson* [2022] IECA 130, the Court of

Appeal held that an interlocutory application seeking vacant possession of rental properties should be characterised as mandatory, requiring the applicant to establish a strong case likely to succeed at trial, as per *Maha Lingham v. HSE* [2005] IESC 89 ("*Maha*").

Findings

Strong/Arguable Case

34. There is clearly a disagreement between the parties as to the appropriate documentation, but the affidavits of Adrienne Fitzgibbon and the documents exhibited thereto establish a strong case that the interest only period was agreed to be for five years. To the extent that the Defendant was alleging that the loan offers post-dated the mortgage and therefore could not have been enforceable under it, his premise appears misconceived, since the three loan offers were issued in March 2007. In any event, the Defendant's argument that the loan offers must predate the mortgage deed is inconsistent with the wording of the mortgage deed. The Defendant's case is not greatly assisted by the contemporaneous documents he relied upon. For present purposes, the Court can attach little weight to the first document, which was not a legally binding mortgage offer and was clearly superseded by the subsequent mortgage offers. They were the formal documents and were signed by the Defendant. The factual dispute as to the second document relied upon by the Defendant will need to be resolved at trial. However, for present purposes, the documents produced by the Plaintiffs appear more reliable and present a strong case. The conclusions reached by Mr Justice Allen in respect of the identical application are equally apposite on this occasion. There has been no development which would justify a different conclusion.

35. Some issues can only be resolved at trial, particularly as to the repayment terms, whether the First Plaintiff unilaterally sought to vary the agreed terms and, if so, the

consequences of any such action, including whether it constituted repudiation (and, if so, the consequences of repudiation). However, as matters stand, the Plaintiffs have established a strong case. There is no dispute about the fact that loans were drawn down and have not been repaid. There is no dispute as to the facts that the three loan facilities were granted to the Defendant in respect of (and secured by charges over) three different properties, one being the Thatch. Nor was there any dispute as to the arrears which had accumulated since 2007. While the Defendant contends that he was entitled to a 25-year interest only repayment schedule, he has not made payments on that or any other basis for many years. He made no attempt to explain the fact that his arrears go back to 2007, long before the alleged repudiation. The evidence available at this stage does not establish an arguable case for repudiation in 2012; in the Court's view, the obvious and appropriate response to the 2012 communication would have been to inform the lender that it was mistaken and to tender payment on the basis which, according to the Defendant, was agreed. However, it appears that the Defendant's arrears predated and arose independently of any issue with the loan terms, so the 2012 communication cannot excuse the Defendant's default.

36. Furthermore, even if the Plaintiffs' actions constituted repudiation, the Defendant has not established an arguable case that that would free him from repaying the loan monies. Although the Defendant relied on the "clean hands" maxim, his own claws were not fully sanitised since he had retained the loan monies for 16 years, and the associated properties, deriving an ongoing rental income, without making any attempt to repay the interest, let alone the principal.

37. The Court accepts that it may have been premature to include the Thatch in the 2018 Proceedings. The Plaintiffs are not to be criticised for their decision to wait before

issuing these proceedings or the current application. Their desire to explore alternatives to litigation are to their credit and should be encouraged.

38. To have retrospectively included the current claim in the 2018 Proceedings would have required an application for leave to amend and an application to extend the injunctions to the Thatch. Such amendments may in practice have involved greater delay, complexity and expense than the alternative chosen by the Plaintiffs (issuing these proceedings). There would not have been a significant cost or time saving and it would have resulted in the same outcome in any event, with the current application still being required in the 2018 Proceedings. The Defendant has not been prejudiced by the Plaintiffs' decision to issue separate proceedings in respect of the Thatch.

39. That said, the Court sympathises with the Defendant's concern to avoid duplication or unnecessary delay, effort or expense. This legitimate concern can be addressed by the effective management of both proceedings, for example case management, to ensure that both trials proceed efficiently and are determined sequentially by the same judge or by an order for consolidation of the two actions. The issuing of two actions is not a reason to refuse relief to which the Plaintiffs might otherwise be entitled to. The Plaintiffs are not seeking to "have another bite at the cherry" by re-litigating an issue canvassed in earlier litigation. In fact, the greatest relevance of the earlier proceedings is that earlier applications by the same Plaintiffs seeking orders against the same Defendant in identical circumstances were granted by the High Court on the previous occasion, a decision upheld by the Court of Appeal.

40. The Court is not convinced by the submission that the Plaintiffs' delay in making discovery in the other proceedings was relevant to the discretion to grant relief on the present application (in view of the possibility that documents emerging on discovery could reinforce the defence on the payment terms issue). While it is

unsatisfactory that the Plaintiffs have not yet complied with the discovery order, and the Court would expect them to remedy this deficiency as a matter of urgency, the Court does not consider that it can speculate on what may or may not emerge on discovery. Nor does the Court consider that the outstanding discovery order in the earlier proceedings should influence the court's determination as to the appropriate relief in circumstances in which the Plaintiffs have made out a strong arguable case and the Defendant has failed to make out an arguable defence for the purpose of the application. In any event, damages would be an adequate remedy, and the balance of convenience favours the reliefs sought on the application. The Defendant can rely on any discovery at trial. If helpful material is forthcoming, then that would be a matter for the trial of the proceedings. The Court cannot speculate on the outcome of discovery for present purposes. Relief will be granted in the terms sought in the Notice of Motion.

41. As the Plaintiffs have been entirely successful, it would appear to follow that they should be entitled to their costs. Any party wishes to contend for an alternative form of order, they will have liberty to deliver a written submission not exceeding 1,000 words within 14 days of the date of this judgment. In that event, the other party will have liberty to respond likewise within 14 days. In default of such submission being received, an order in the terms proposed will be made.