THE HIGH COURT

[2023] IEHC 741

[2023 110 CA]

BETWEEN

ELAINE MADIGAN

PLAINTIFF /RESPONDENT

AND

PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY

& TOM O'BRIEN

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Heslin delivered on the 19th day of December, 2023.

1. This case involved an appeal from a decision of the Circuit Court and proceeded before me by way of a *de novo* hearing. Put succinctly, this case is about whether or not the Plaintiff signed a mortgage deed. The Plaintiff contends that the signature on the mortgage (and on other documents presently discussed) is *not* hers.

2. The case was defended 'squarely' on the basis that the signature *is* the Plaintiff's and that she signed the mortgage in the presence of a solicitor, who applied his signature to the deed, as witness to hers. He was the sole witness for the Defendants, whereas, in addition to the Plaintiff's evidence, the Court had the benefit of expert testimony from a handwriting expert retained by the Plaintiff.

3. In short, this Court's task is to determine whether, on the balance of probabilities, the Plaintiff signed the mortgage, or not. If this Court finds that the Plaintiff did not sign the mortgage, the Plaintiff's claim must succeed, the inescapable inference being that her signature was forged by another, rendering the mortgage a fraudulent instrument. If this Court finds that she did sign the mortgage, there can be no question of such fraud and her claim must fail.

Background

4. Prior to commencing the within proceedings, the Plaintiff made a complaint to the Law Society in early 2019, to which I will refer presently. In October of that year, the Plaintiff applied *ex parte* for certain injunctive relief.

5. By order made on 31 October 2019, his honour Judge Garavan granted an interim injunction which, inter alia, restrained the Defendants (the second Defendants being a receiver appointed by the first Defendants) from advertising or attempting to sell the Plaintiff's property, which is a bungalow in Curracloe, Co. Wexford, comprised in folio 2703F of the Register, Co Wexford ("the property").

6. In the manner presently explained, the property is a modest holiday home built by the Plaintiff's parents, which she purchased from them some 3 decades ago.

7. It appears that the Covid 19 pandemic resulted in delays in respect of the interlocutory hearing. The Plaintiff's application for interlocutory orders was vigorously opposed by the Defendants, who relied, in particular, on averments made by the solicitor identified as witness to the Plaintiff's signature on the mortgage. Later in this judgment, I will look in some detail at certain of those averments.

8. On 17 June 2022, her Honour Judge Doyle granted interlocutory relief to the Plaintiff , by way of an order which stated, in relevant part:

> *"THE COURT DOTH ORDER Restrain Defendants from any sale or advertisement of said property whether online, private treaty or any other way pending full trial and proceedings. Reserve costs.*
>
> *Maintenance and management of the property to be left to Defendants, noting that it should be properly maintained and managed. Garden curtilage to be maintained…"*

9. The Plaintiff contends that the circuit court's orders in relation to maintenance and management of the property have not been complied with and, in due course, I will examine the evidence touching on this issue.

10. A trial took place before Judge Doyle on 11 May 2023 and it is the circuit court's order of that date which has given rise to this appeal.

Single-issue case

11. In the manner put accurately and succinctly by Mr Cahill SC, for the Defendants, this is a "*one-issue case*", that issue being whether, or not, the mortgage in relation to the property was signed by the Plaintiff.

The mortgage

12. A copy of the mortgage was before the Court. It bears the date "*22 March 2004*" on the first page. The execution page contains a signatures in relation to the Plaintiff's husband, Mr Richard Madigan, and the Plaintiff's name is also signed. On the face of the document, both of these signatures are witnessed by Mr Eamon Keenan, solicitor, and I will presently refer to his evidence.

3 documents

13. On the Defendants' case, that the Plaintiff signed 3 documents in the presence of Mr Keenan in his office, on 15 March 2004, namely, (i) the mortgage in favour of Ulster Bank; (ii) a Client's Retainer and Authority, and (iii) a Client's Authority for the purpose of Mr Keenan's office taking up title deeds, the Plaintiff gave clear and consistent evidence that she did *not* sign any of these 3 documents. In short, she contends that her signature on these documents was forged.

Handwriting expert

14. In the manner I will presently come to, the view of a handwriting expert, Mr Madden, entirely supports the Plaintiff's case. It is appropriate to note that no expert of any sort gave evidence on behalf of the Defendants. Nor was not suggested by the Defendants that, at any stage, they ever sought or obtained any opinion from a handwriting expert which ran contrary to Mr Madden's views.

15. In short, the expert evidence points entirely one way i.e. supportive of the position which the Plaintiff has maintained at all material times since she first learned (from the receiver, in 2019) that the mortgage was registered as a burden on her property's folio.

16. The Plaintiff was equally clear in her evidence to this Court that her signature *does* appear on a "Credit Agreement" application. However, her testimony is that the manuscript entries on that document, which refer to a first legal charge being taken over the property, were *not* on the document when she signed it.

Full Defence

17. The basis of the Defendants' opposition to the Plaintiff's claim is clear from the "*Preliminary Plea"* in the Defence, delivered on 31 March 2021:

> *"By way of full defence to these proceedings the Defendants plead that the within proceedings are frivolous, misconceived and bound to fail. In particular, the plea that the Plaintiff herein did not execute a mortgage in favour of the First Named Defendant's predecessor in title over a property situated at Lark Rise, Ballinamorragh, Curracloe, Co. Wexford folio WX2703F (the "Property") or that said mortgage was fraudulently executed on about 22 March 2004 is unsustainable and bound to fail because (a) the plaintiff and her husband Mr Richard Madigan executed said documents by way of their then retained solicitors Sexton Keenan & Co on or about 15 March 2004 in connection with the mortgage of the property, which said mortgage was registered with the Property Registration Authority of Ireland and was completed in or about 15 October 2009"* (emphasis added)

18. The Defendants have not made any counterclaim. The Defendants do not plead the existence of any lien, or equitable interest. Rather, and put succinctly, the Defendants' case is that:

- the Plaintiff executed the mortgage;

- therefore, there is no question of forgery or fraud in respect of the mortgage instrument registered in the Land Registry/Property Registration Authority ("PRA"); and
- the Defendants are entitled to rely on the charge created by the mortgage instrument, which appears at Part III of the relevant folio, as a burden on the property.

Submissions

19. Before proceeding further, I want to express my thanks to Mr O'Connor SC, for the Plaintiff and to Mr. Cahill SC, for the Defendants. Both made submissions with clarity and great skill during the 2-day hearing which took place on 1 and 2 Nov 2023, in Waterford. At the conclusion of the hearing, the parties wished to supplement the said oral submissions by means of written submissions, and these were prepared with obvious sophistication. I have carefully considered all the foregoing, which have been of great assistance, and will refer to the principal submissions during the course of this judgment. Regardless of the skill and sophistication with which submissions, oral or written, are made, it is the *facts* which emerge from an analysis of the evidence which must determine the outcome of these proceedings. Thus, I turn to the evidence to see what facts are, and are not, established.

The Plaintiff

20. The Plaintiff is a businesswoman and a married lady. She and her husband have 3 children, who are now in their 30s.

21. The property in question is a modest 3- bed bungalow. The Plaintiff has had a long-standing connection to the property. It was built by her parents, in 1975, when she was 12. The Plaintiff's grandmother, who was an actress, and who left her children when they were young, spent a lot of time at the property, where the family were reunited.

22. This was a very important place to the Plaintiff, who purchased the property from her parents in the mid-1990s for £30,000.00, at which point the Plaintiff s children were very small, i.e. 1, 3 and 5, respectively.

23. The property was used every weekend and the Plaintiff referred to activities which the children engaged in locally, including horse-riding. She described the property as *"a very special place"*.

24. I pause here to say that uncontroverted evidence before the Court allows for a finding that, whilst the property is a *modest* one, the Plaintiff has a *major* connection to it – a connection which spans 4 generations and is bound up with memories and links to family, including: the Plaintiff; her parents; her grandmother; and the Plaintiff's children.

25. As of 2004, the Plaintiff and her husband were living in Kildare, having built a house there in 2002. The children were then aged 9, 11, and 14. The Plaintiff was running a business as a beauty therapist in Naas. Her husband was in the jewellery business, and was also getting involved in property investments at that time. This was a very busy period. Generally, the

Plaintiff looked after the children, cooking etc, whereas her husband looked after property matters. The Plaintiff's husband was adjudicated bankrupt in 2014.

26. With respect to the "loan", the subject of the 2004 Credit Agreement document, which bears the Plaintiff's signature, her testimony to the effect that she did not know if it was even drawn down.

27. As regards discussions between herself and her husband, the Plaintiff's uncontroverted evidence included to say "*I had no reason to discuss Curracloe. It was never in his name. It was in my name".*

28. The Plaintiff also gave uncontroverted evidence that she did not check entries in the Land Registry concerning the property as she had "*absolutely no reason to*" do so, in circumstances where she never mortgaged it to Ulster Bank (the first Defendant's predecessor).

Folio

29. The relevant folio currently shows a charge for present and future advances in favour of Ulster bank, having been registered at part III of the folio, on 12 October 2009.

30. At this juncture, it is appropriate to note that the folio before the Court describes the Plaintiff, and no other, as "*Full owner"* with absolute title, as and from 6 April 1995. In other words, her husband was *never* 'on title' even as part-owner.

31. This is of some significance, given that the mortgage was, on its face, made by a "mortgagor" comprising not only the Plaintiff (who *has* title to the property) but her husband (who does *not* and never had).

The Mortgage

32. In relation to the mortgage, the Plaintiff's sworn testimony include to say:

"I never signed that mortgage";

"I never would have signed that mortgage";

"I never would have signed that house away";

Her testimony also included, with respect to the signature on the mortgage, to say: *"No"* that is "*definitely not my signature"*

33. The Plaintiff's evidence was just as clear and consistent under cross-examination as it had been during her 'evidence in chief'. Her testimony is entirely consistent with the established fact of the Plaintiff's long-standing connection with, and emotional attachment to, the property.

34. Furthermore, although I will shortly look in detail at his evidence, it is appropriate to note at this juncture that the expert evidence of Mr Madden is entirely supportive of the Plaintiff's testimony. He is satisfied, not merely on the balance of probabilities, but, in effect, beyond doubt, that the signature on the mortgage is *not* the Plaintiff's.

Original mortgage

35. I should also mention, at this juncture, that, whilst copies of the mortgage were included in the pleadings and books provided to the Court by both sides, Mr Madden also went to the trouble of inspecting the *original* mortgage in the PRA and, thus, his sworn evidence to this Court was based on his consideration of the *actual* document bearing the Plaintiff's signature.

36. In the manner touched on earlier, no issue whatsoever was taken with Mr Madden's qualifications, expertise, or experience. Furthermore, Mr Madden was the one and only handwriting expert who gave evidence to the Court.

The Family Home Declaration

37. The Court was furnished with a copy of a Family home declaration (the "FHD" or "declaration"). On the face of this document, it is the declaration of a husband and wife that the property is not a family home. The declaration contains 3 signatures (leaving aside the exhibited Marriage Certificate). On the face of the document, appear the signatures of the two parties who made the declaration, and the third signature is that of the Commissioner for Oaths / Practising solicitor, in front of whom the Plaintiff and her husband are said to have made the declaration on 22 March 2004.

38. I deliberately use the words 'on the face of' this document, because, even on the Defendants' account, this document is not what it purports to be. A troubling feature of this case is that the Defendants acknowledge that the relevant solicitor, or Commissioner for Oaths, completed the declaration *without* the Plaintiff being present. Therefore, in a very real sense, this is a document which 'tells a lie' about itself.

39. Contrary to its terms, *nothing* was declared *before* a Commissioner for Oaths/Practicing Solicitor on the 22nd March 2004.

15 - 22 March 2004

40. In terms of the relevant 'timeline', the Defendants' case is that the Plaintiff signed this declaration in Mr Keenan's office on 15 March 2004 and that, a week later, and without the Plaintiff being present, Mr Keenan procured the completion of the declaration by a third party solicitor in a different firm. I pause to observe that, in a case where the proper witnessing of the mortgage is a central issue, this declaration was most certainly *not* properly witnessed.

41. The Plaintiff gave clear and consistent evidence that the signature on this declaration is *not* hers. In the manner discussed in greater detail later in this judgment, the expert evidence of the single handwriting expert who assisted the Court is entirely supportive of the Plaintiff's position. Furthermore, Mr Madden also went to the trouble of examining the original FHD and it is upon the actual signed declaration which he bases his opinion.

Reasons to remember

42. The following objective facts have been established by way of the Plaintiff's sworn and uncontroverted evidence.

- the property was built by the parents of the *Plaintiff;*
- it was the *Plaintiff's* grandmother who spent time in the property;
- this was in the context of a reconciliation with the *Plaintiff's* family;
- the property was purchased by the *Plaintiff*;
- the sole owner for the last 30 years has been the *Plaintiff* and no other.

43. These objective facts seem to me to constitute a good reason why the Plaintiff would remember if she had *ever* been presented with a document which referred to mortgaging the property with which she had such a close connection, regardless of *when* she had been asked to sign such a document. These objective facts are consistent with the subjective evidence of the Plaintiff that she *never* signed a document mortgaging the property.

44. Indeed, the objective fact that the Plaintiff alone (not her husband) was at all material times "*Full owner*" of the property seems to me to constitute a second reason why the Plaintiff would remember if she had been asked to sign a mortgage document, especially such an unusual one (i.e. in which her husband, who had *no* title to the property, purported to charge it in favour of a bank) irrespective of how long ago she had been asked to sign such an unusual document.

45. Again, this is consistent with the subjective evidence of the Plaintiff that she did not sign the mortgage. It is also entirely consistent with the expert evidence that the signatures on the mortgage and FHD are not the Plaintiff's.

Routine

46. By contrast, there is no objective evidence that Mr Keenan's meeting on 15 March 2004 was in any way unusual or memorable for him. To say that a solicitor regularly attends meetings with their client, or clients, is entirely uncontroversial. Furthermore, the nature of the meeting (mortgaging a property) was wholly unremarkable, and entirely routine, for any solicitor in general practice, such as Mr Keenan. Nor is Mr. Keenan's evidence that he has *any* subjective

recollection of the particular meeting, which occurred almost 20 years ago. Nor, does he outline any reason for him to have a recollection of same.

A4 sheet of notes- interpreted

47. On the contrary, Mr Keenan's evidence to this Court (in November 2023) in relation to a 30-minute meeting which took place (on 15 March 2004) is exclusively based on a single A4 sheet which contains certain handwritten notes, in particular, his *interpretation* 20 years later of those notes, not any *memory* of the meeting prompted by those notes.

48. Whilst I will refer to the contents of these notes later in this judgment, it is sufficient for present purposes to say that nowhere in the note does it purport to *identify* those present at the meeting (in contrast to, say, an *"Attendance Note"* which would typically use terms such as "*Present were*…" or "*Attending on*…" and proceed to name the participants).

Client(s) Retainer and Authority

49. It is also an objective fact that the Plaintiff's signature does not appear as *client* in the document entitled "Client(s) Retainer and Authority", being another document retrieved by Mr Keenan from his file. Rather, it appears as *witness* to her husband's signature. This seems to me to be unusual to say the least, bearing in mind that, on the Defendants' case, the Plaintiff was present with her husband in Mr Keenan's office on 15 March 2004 when all relevant documents, including this one, were signed by both the Plaintiff and her husband, in the presence of Mr Keenan, and witnessed by him.

Plaintiff's signature in the wrong place

50. It is hardly controversial to suggest that when a client is in a solicitor's office to sign a document, the solicitor will ensure that they do not sign in the *wrong* place, yet the Plaintiff's signature on this important document is in the wrong place.

51. I say 'important' because, it was plainly important enough for Mr Keenan to require it to be signed by clients. Despite this, on the face of the document bearing the Plaintiff's signature, the Plaintiff did *not* retain Mr Keenan's firm and gave *no* authority whatsoever. This is remarkable on any analysis, as it defeats the very purpose for which the document exists.

52. The objective fact that the Plaintiff's signature appears in the wrong place seems to me to be inconsistent with the document having been signed by the Plaintiff in front of a solicitor who witnessed her signature at that time.

53. This remarkable situation is far more consistent with and is explained by (i) the Plaintiff's signature having been applied to the document at *different* point than the signature of the Plaintiff's husband (which appears in the *correct* place) on the same document; and (ii) the Plaintiff's signature *not* having been witnessed by Mr Keenan.

2004 Agreement

54. Two versions of the 2004 Credit Agreement were before the court. One was exhibited by the Plaintiff and her evidence was that she obtained this document from Ulster Bank, following a request she made by phone.

55. The other version was, on the Defendants' case, part of the 'pack' of documents furnished by the Bank to Mr Keenan for the purposes of security being taken over the property.

56. The only differences between the two versions is that the signature of the Plaintiff's husband and the signature of the relevant representative of the bank, appear to have been removed from, and do not appear on, the former.

57. The Plaintiff was firm in her testimony that she did not alter the document and that the document she exhibited is the document she received from the Bank. Her understanding of the reason for the difference between the versions is because of GDPR considerations.

58. There is no evidence to support the proposition that the Plaintiff altered the 2004 agreement. Nor is it at all clear what purpose any alleged alteration might have served, especially given the fact that, at all material times, the Plaintiff has openly acknowledged that the signature on the 2004 Credit Agreement *is* hers.

59. Of far more relevance is the clear and cogent evidence given by the Plaintiff that (and I quote) "*The words about a legal charge were not there*" when she signed the said Credit Agreement document. The Plaintiff could not have been clearer in her evidence, also stating, with reference to the words, in handwriting, which now appear in the document bearing her signature: *"No, definitely not, I would not have signed it if the words now on it were there".* The Plaintiff's testimony was to say *"I don't know"* who filled in the information on the version of the document before the Court.

60. The Plaintiff was cross-examined extensively and it was put to her that she had signed the 2004 credit agreement in its *complete* format (i.e. inclusive of the handwritten entries) knowing that a mortgage would be taken over the property. The Plaintiff refuted this in very clear terms adding, not unreasonably in my view: *"Surely, if I'd signed over my property, then everything else would have my correct signature".* That observation is entirely understandable and is consistent with the findings of fact which emerge from the evidence.

61. When cross-examined as to the basis for the Plaintiff's testimony that she did not sign the 2004 credit agreement in its completed form (i.e. containing the manuscript entries) the Plaintiff's evidence was: *"knowing I would never sign my house in Curracloe over".*

62. Plainly, 2004 is now approaching 2 decades ago. In that context, the proposition that the Plaintiff signed the mortgage, but can no longer *remember* doing so, was explored in cross-

examination. The Plaintiff made clear that this is not a situation where she did, or ever would, sign such a mortgage, stating inter-alia *"I think I would remember if I signed my house over".*

63. That evidence is, of course, entirely consistent with the findings referred to earlier, namely, that, although a modest property, it is one to which the Plaintiff has an enormous personal attachment, way beyond monetary value. This is further underlined by the fact that this is not a property which the Plaintiff rented out. It was, in short, a second family home and a repository of precious memories for the Plaintiff , who, as she also explained, used it as a refuge from stressful matters.

64. When cross-examined about the *nature* of this Credit Agreement document, the Plaintiff's evidence was that she understood it to be an *application.* In objective terms, the Plaintiff's evidence testimony is borne out by printed text in the document which states, inter alia: *"We may withdraw this offer at any time prior to acceptance".*

2008 Credit Agreement

65. In a supplemental affidavit sworn by the Plaintiff on 25 November 2019, she exhibits what she describes, at para. 8 of her affidavit, as "*a further alleged credit agreement dated the 1 October 2008".*

66. That document describes "*The Customer*" as being both the Plaintiff's husband and the Plaintiff. The amount of credit is stated to be € 158,000.00.

67. The third internal page of the document is headed "*Waiver*", under which appears signatures for both customers, opposite the date "*1/10/08*".

68. On the face of the document, the Plaintiff waived her rights under the Consumer Credit Act,1995, to withdraw from the Credit Agreement.

69. Below that, under the heading *"Contact at work*", the printed document refers the customer's consent for the Bank and its authorised agents to visit or telephone the customer at their place of work or at any other place at any time for the purposes of the credit agreement, opposite the phrase "*Customer's consent"* the word, *"yes*" has been deleted, leaving the word *"No"* opposite to which, in handwriting, is the signature "*E. Madigan".*

70. The Plaintiff's testimony included to say *"I am positive they are not my signatures".* The expert evidence of the handwriting expert is entirely consistent with the Plaintiff's testimony.

Mr Madden

71. The Court had the benefit of expert evidence from Mr Dave Madden, document Examiner. Mr Madden's specialist field is "*Questioned Handwriting and Document Examination*". He holds an honours Bachelor of Science degree; a diploma in forensic graphology; a certificate in

questioned handwriting and document examination; and he is a member of the UK 'Chartered Society of Forensic Sciences' and the 'Scientific Association of Forensic Examiners'. Appendix 1 to Mr Madden's 'Final Report', dated 9 May 2023, details his very extensive experience, including as an expert witness in legal proceedings.

72. It was made clear that the Defendants do not take issue with the qualifications or expertise of Mr Madden. Nor, as I have noted earlier, was there any handwriting expert proffered by the Defendants. Thus, the expert evidence of this scientist is entirely uncontroverted.

73. Mr Madden also confirmed under oath that, before preparing his reports, he had no previous dealings with either Mr or Mrs Madigan. Furthermore, his testimony is that he never even met Mr Madigan 'face-to-face', his only contact with Mr Madigan being by phone and email.

74. In addition, Mr Madden made clear that he accepts work from both companies and private individuals and his service is not limited to any particular category of client. He made equally clear that, so long as no conflict of interest arises, he will act for a financial institution or for an individual in dispute with a financial institution.

75. Thus, Mr Madden's evidence is not only that of an acknowledged expert, it is the expert evidence of a wholly-independent party, who has confirmed, *inter alia,* the following (at page 11 of his Final Report, to which I will presently refer):

> *"I confirm that my duty to the Circuit/High Court as an expert witness overrides any duty to those instructing or paying me, that I have understood this duty and complied with it in given my evidence impartially and objectively, and that I will continue to comply with that duty as required"*

76. Mr Madden's evidence included to state the following in relation to his work. Whilst he is provided with a particular page, "*what the document actually is, does not influence*" his work.

77. He went on to make clear that, irrespective of whether the signature has been witnessed or not, "*I cannot let that affect me, or it would influence my work*".

78. Mr Madden made clear that, regardless of whether the named witness was the most or least well-known or influential person, could not play any part in his analysis, also stating that "*I have to do my work independent of whether the signature is said to have been witnessed or not".*

3 reports

79. Mr Madden prepared a total of 3 reports. He was initially contacted by the Plaintiff's husband in May 2018. Mr Madigan gave him instructions to look at the Plaintiff's signatures on 3 documents, to which I will presently refer, and he provided Mr Madden with 6 known samples of the Plaintiff's genuine signature. With regard to the instructions given to him, Mr Madden

said that "*Richard Madigan asked me to look at the signatures of Elaine Madigan to verify if they were genuine or not".*

80. Mr Madden also confirmed in his oral evidence that he had not been furnished with samples of Mr Madigan's signature, nor had he been asked to provide any opinion on the genuineness of any signature of Mr Madigan.

Known examples

81. With respect to the known examples of the Plaintiff's signature, 4 of these comprised copies of the Plaintiff's Irish passports (of November 2003 and January 2014, respectively) and her Australian passports (of September 2005 and August 2016, respectively). The other 2 examples comprised a copy of the 2004 Credit Agreement, which has been referred to earlier in this decision; as well as a Guarantee dating from March 2016. No issue arises in relation to the foregoing. In other words, these, in fact, constitute examples of the Plaintiff's genuine signature.

82. Before proceeding further, it is appropriate to say that nothing turns on the fact that Mr Madigan plainly had access to (because he furnished Mr Madden with) a copy of the 2004 Credit Agreement in which Mr Madigan's signature and that of a Bank representative had *not* been redacted (whereas those redactions were made in the copy of the same document which, on the Plaintiff's uncontroverted evidence, she obtained directly from the Bank). This is in circumstances where the sole function of the 2004 Credit Agreement, insofar as Mr Madden is concerned, was to provide a known example (being 1 of 6) of the *Plaintiff's* signature, and the Plaintiff's signature had not been redacted.

Acceptable quality

83. Mr Madden also confirmed that the signature of the Plaintiff appearing on the copy Credit Agreement document furnished to him was of an acceptable quality for the purposes of his analysis.

Photocopies / Originals

84. In relation to the quality of documents required for the purpose of his analysis, Mr Madden's evidence was that "*It is absolutely acceptable to work with photocopies, as long as the quality is good enough for me to ascertain the fine detail and in this case it was".*

Verbal opinion

85. Mr Madden initially provided a verbal opinion to Mr Madigan, who came back to him in January 2019 to request a written report. This is the first of the reports by Mr Madden.

#1 Report (7 January 2019)

86. It is entitled "*Preliminary Report"* and is dated 7 January 2019. It states that it was provided on behalf of and on the instructions of Mr Richard Madigan. The 3 disputed or 'questioned' signatures were in the following documents:

Q1- Client(s) Authority and Retainer dated 15 March 2004;

Q2- Mortgage dated 22 March 2004;

Q3- Waiver dated 1 October 2008.

In respect of each questioned signature, Mr Madden came to the following opinion:

"I find it strongly probable that Elaine Madigan did not author the 'Elaine Madigan' signature in question" (emphasis in report)

#2 Report (29 March 2019)

87. The second of Mr Madden's reports is dated 29 March 2019. It was prepared for the Plaintiff and is entitled "*Preliminary Report".* It concerns the same 3 questioned documents and Mr Madden's expert opinion was the same in relation to all 3 signatures. At the risk of stating the obvious, Mr Madden does not suggest that matters are finely balanced. His view is not qualified or proffered tentatively. Nor does he frame his view as, for example, an opinion given 'on the balance of probabilities'. Rather, in his view it is *strongly probable* that the Plaintiff did *not* author the signatures (including, very obviously, the signature on the mortgage in question in these proceedings). I will presently return to this topic in the context of Mr Madden's evidence about his "*strongly probable*" opinion.

#3 Report (9 May 2023)

88. The third and 'Final' of Mr Madden's reports is dated 9 May 2023. It was prepared for the Plaintiff on the instructions of her solicitors. For the purposes of his Final Report, Mr Madden was also asked to provide an opinion in relation to the authenticity of the Plaintiff's signature on a fourth document, namely, the FHD, dated 22 October 2004.

Known signatures spanning 14 years

89. In his sworn testimony, Mr Madden explained that a very "*important part*" and the *"foundation"* of the examination process is with reference to known signatures. He went on to make clear that, in this case, Mr Madden had the benefit of 6 examples spanning a lengthy period of some 14 years.

90. His evidence is that some individuals will have a very "*wide"* range of variations, with respect to their signatures; whereas some will have a very "*narrow*" range; and others will have a range of variations falling between those 2 extremes. Mr Madden's evidence is that the Plaintiff has a "*very consistent*" signature with a very narrow or tight range of variations, as illustrated by the known signatures spanning such a long period. He went on to say that the fact the Plaintiff's signatures are so "*tight"* is one of the reasons he was able to offer such a "*strong opinion*".

Strongly probable

91. Mr Madden's evidence was that, for him to use the term *"strongly probable"* was the "*very strongest opinion*" he could have given on a questioned signature without seeing the original document. Again, this speaks to the uncontroverted expert evidence (that it is *not* the Plaintiff's signature on the mortgage) far exceeding the civil standard. Mr Madden's preliminary reports were prepared on the basis of examining a *copy* of the mortgage signature page. That was not, however, the end of his analysis.

Land Registry visit

92. Mr Madden went on to confirm in his sworn evidence that he was requested to visit the Dublin offices of the Land Registry to examine the *original* mortgage, which he did on 9 May 2023. During that visit, Mr Madden examined both (i) the original mortgage and (ii) the original Family Home Declaration.

Expert opinion - the Mortgage

93. As a result of examining the original mortgage, Mr Madden upgraded his opinion to the "*strongest*" he can give. He "*eliminated*" the Plaintiff as author of the signature on the mortgage.

94. With respect to the Plaintiff's signature on the mortgage, Mr Madden's Final Report states, inter alia:

> *"In my opinion I have <u>eliminated</u> Elaine Madigan as the author of the 'Elaine Madigan' signature in question.."* (emphasis in report)

95. I pause here to say that Mr Madden's opinion plainly goes far further than the civil standard of the 'balance of probabilities'. Indeed, it would seem to exceed the criminal standard, in that nowhere in his report does Mr Madden express any doubt, be that reasonable or unreasonable. Rather, he eliminates entirely the Plaintiff as being author of the signature on the mortgage. No evidence from any expert was proffered which takes issue with that view.

Expert opinion – the Family Home Declaration

96. Having inspected the original, Mr Madden came to a similar conclusion in respect of the Family Home Declaration.

Thorough and detailed analysis

97. For the purposes of this judgment, it is unnecessary to replicate the *entire* of Mr Madden's written reporting. However, it is important to make clear that, on any objective view, Mr Madden's analysis was both thorough and detailed. To better understand this, and the bases for his findings, it is appropriate to refer to the Appendices to Mr Madden's report, wherein he explains the various approaches to the task of in this case, and what he found.

Appendix 1 – magnification

98. Appendix 1 to Mr Madden's report comprises a comparison of the 'questioned' and 'known' signatures, all of which have been magnified, for ease of comparison. In Mr Madden's oral testimony, he confirmed that "*the very consistent signature habits"* of the Plaintiff in her genuine signatures are "*particularly clear*" from a comparison of these enlarged signatures.

99. Even to the untrained eye (and, again, this Court is not purporting to have *any* expertise) there is a notable consistency between the 6 known examples of the Plaintiff's signature, despite the fact that they span some 14 years, and this consistency is, in objective terms, very clear. By contrast, the questioned signatures have (i) obvious differences *inter se;* as well as (ii) being different to the known signatures, in ways that are obvious.

Appendix 2 – arrangement

100. In Appendix 2, Mr Madden analyses the *"arrangement"* habits in the questioned and known signatures. In his oral testimony, Mr Madden stated that the term "*arrangement"* refers to "*where a word is placed on a signature line",* explaining that genuine signatures will reflect the arrangement habits of the person signing.

101. He went on to say that this is not something obvious to a person seeking to reproduce another's signature. Hs evidence is that the Plaintiff's genuine signatures *"sit well <u>above</u> the signature line*". He went on to state in his oral testimony that, whilst there is some variation, the questioned signatures *"sit <u>on</u> the signature line",* not above.

102. Mr Madden's oral evidence reflects the written analysis in Appendix 2, where he confirms:

(i) all known signatures sit well *above* the signature line, whereas

(ii) questioned signatures Q1, Q2 and Q3 sit *on* the signature line, and

(iii) questioned signature Q4 *"sits initially through the baseline then well above it. This unevenness in the baseline is not seen in any of the known signatures".*

Appendix 3 – *"E"*

103. Appendix 3 comprises Mr Madden's analysis of the capital letter *"E"* and shows the consistent form of that letter in the genuine signatures, versus the materially different and inconsistent form in the questioned signatures.

104. Mr Madden states, in particular: "*The capital E in the known signatures has a small upper portion and a wide lower portion. In the questioned signatures the upper portion is noticeably larger…".* Again, whist this Court has no expertise in handwriting analysis, the differences identified by Mr Madden are objectively clear to the non-expert.

Appendix 4 – *"M"*

105. In Appendix 4, Mr Madden analysed the form of the capital letter "M" in the questioned and known signatures. In his oral testimony, Mr Madden explained that the Plaintiff "*uses a long 'lead-in' stroke for that letter form",* going on to state that there was *"no lead-in stroke"* in several of the questioned signatures.

106. Furthermore, he explained that, where it does appear in the questioned signatures "*it is much longer*" than in the known signatures. In addition, Mr Madden's evidence was that "*There is no curved finishing stroke in the genuine signatures, but they appear in the suspect signatures".*

107. Once more, these differences between the known and questioned signatures, as they appear in magnified form in Appendix 4, are readily apparent to the non-expert. Mr Madden's oral testimony reflects the narrative in his Final Report which includes, inter alia:

> "*The capital M in all the know signatures has a lead-in stroke. Q-2, Q-3-1 and Q-3-2 have no lead in stroke. Q-1 and Q-4 have lead in strokes but they are much longer than those in the known signatures…*
>
> *The capital M in the known signatures has a curved finishing stroke which touches the next letter a… This is a habit not seen in the questioned signatures".*

Appendix 5 – *"i-dots"*

108. Appendix 5 comprised Mr Madden's analysis of "*i-dots*" in the questioned and known signatures. In his oral testimony, Mr Madden explained that *"a type of habit which someone replicating a signature would not be aware of*" is the habit of "*i-dot formation".*

109. His oral evidence included to say that "*in the genuine signatures, the i-dots are placed high and to the right*", also explaining that in the known signatures these i-dots are "*horseshoe shaped*". By contrast, in the questioned signatures, the i-dots are "*placed low and resemble dots or dashes".* Again, this oral testimony reflects the contents of Mr Madden's written reporting. Once more, having been identified by Mr Madden, these differences are visible to the untrained eye.

Exhibit 6 – *"d"*

110. Exhibit 6 is a comparison of the letter *"d"* in the questioned and known signatures. In his oral testimony, Mr Madden confirmed that in the genuine signatures *"the form of 'd' is slanted to the right*", but not in the questioned signatures. In his written report, Mr Madden put the matter as follows:

> *"In the known signatures the middle letter d is created in the same manner and has a very similar form in every signature. The slant of the stem is rightward trending…*

In contrast the questioned *letter d's are much more upright and have a different form to those in the known signatures".*

Exhibit 7 – spacing

111. In his oral evidence, Mr Madden explained that "*The use of spacing is a very important aspect of handwriting"* going on to say that "*Anyone trying to copy a signature tends to focus on letter formation but not on the uses of spacing*".

112. Exhibit 7 comprises a comparison of letter 'spacing' in the questioned and known signatures. Mr Madden's oral evidence included to say that: *"the suspect signatures have a narrow letter spacing throughout, which is different to the genuine signatures".*

113. The relevant narrative in Mr Madden's report states:

"In the known signatures, there is a consistent habit with regards to letter spacing. The letter spacing is even throughout apart from narrow letter spacing between the letters g and a…

In contrast, Q-3-1 and Q-3-2 have extremely narrow letter spacing throughout.

In Q-1, Q-2 and Q-4 the letter spacing is wider, but it is uneven and there is no tighter spacing between the letters g and a."

Exhibit 8 – pen lifts

114. Exhibit 8 comprises Mr Madden's examination of pen-lifts in the questioned signature Q4 (being the Plaintiff's signature as it appears in the Family Home Declaration). His report states:

"Q-4 has unusual pen-lifts in three letters, a strong sign of non-spontaneous writing which is characteristic of a signature simulation.

The letters have been enlarged to approximately 24x with a digital microscope and enhanced using oblique lighting"

115. Mr Madden's oral testimony included to say "*There is no reason for someone to lift a pen in the middle of forming a letter 'm' "* and he went on to say that same *"is clearly visible where half the letter has been created and the pen is lifted*" in the questioned signature.

116. The pen lift identified by Mr Madden in respect of the letter *'m'* is apparent, even to the non-expert.

117. I will be recalled that Mr Madden's evidence is that, unless he examines the original document, the strongest possible opinion he can give is "*strongly probable*". It will also be recalled that he examined both the original of the mortgage and the original of the FHD.

118. Bearing the foregoing in mind, Mr Maddens' expert opinion in respect of the questioned signatures can be summarised as follows (beginning with the document of greatest significance for these proceedings):

- The **Mortgage**/Charge (i.e. Q-2, dated 22 March 2004, the original of which Mr Madden examined)

  "The questioned signature on Q-2 showed numerous and significant differences when compared to the known signatures. These differences include the use of space, individual letter forms, signature proportions, slant, i-dot form and placement" (para. 5.2.3.1);

  "The questioned signature on Q-2 bears no significant similarities to the known signatures on K1 to K6" (para. 5.2.3.2);

  "…I have eliminated Elaine Madigan as the author of the 'Elaine Madigan' signature in question on Q-2" (para. 6.2);

- The **Family Home Declaration** (i.e. Q-4, dated 22 March 2004, the original of which Mr Madden examined).

  "The questioned signature on Q-4 showed numerous and significant differences when compared to the known signatures. These differences include the use of space, individual letter forms, signature proportions, slant, arrangement, connecting strokes, i-dot form and placement" (para. 5.2.5.1);

  "The questioned signature on Q-4 bear no significant similarities to the known signatures on K1 to K6" (para. 5.2.3.2);

  "The questioned signature on Q-4 shows additional signs of non-spontaneous writing including unusual pen-lifts mid-letter within the letters M, d and g. These are particularly visible under the microscope and are shown in Exhibit 8…" (para. 5.2.5.3);

  "…I have eliminated Elaine Madigan as the author of the 'Elaine Madigan' signature in question on Q-4" (para. 6.4).

- The **Clients Authority and Retainer** (i.e. Q-1, dated 15 March 2004, a photocopy of which was examined by Mr Madden).

  "*The questioned signature on Q-1 showed numerous and significant differences when compared to the known signatures. These differences include the use of space, individual letter forms, signature proportions, slant, arrangement, i-dot form and placement"* (para. 5.2.2.1);

  "The questioned signature on Q-1 bears no significant similarities to the known signatures on K-1 to K-6" (para. 5.2.2.2);

"…I find it strongly probable that Elaine Madigan did not author the 'Elaine Madigan' signature in question on Q-1" (para. 6.1);

119. The **Waiver** (i.e. Q-3, dated 1 October 2008, which contains 2 signatures, a photocopy of which was examined by Mr Madden).

"*The questioned signatures on Q-3 showed numerous and significant differences when compared to the known signatures. These differences include the use of space, individual letter forms, signature proportions, slant, arrangement, connecting strokes, i-dot form and placement"* (para. 5.2.4.1);

"The questioned signatures on Q-3 bears no significant similarities to the known signatures on K-1 to K-6" (para. 5.2.4.2);

"…I find it strongly probable that Elaine Madigan did not author the 'Elaine Madigan' signatures in question on Q-3" (para. 6.3).

Eliminating the Plaintiff as author

120. With respect to eliminating the Plaintiff as author of the signature on the mortgage, Mr Madden made very clear in his oral testimony that this level of opinion is not something he gives out "*lightly or often*".

121. His evidence was that "*Usually there will be some limiting factors*". However, in this instance, there were none and Mr Madden's oral testimony included to say *"I would be doing a dis-service to Ms Madigan if I did not give this opinion*" eliminating her, repeating that "*It's not often that I'd give out as strong an opinion".*

Conclusive views

122. The conclusiveness of Mr Madden's independent views as an expert in the field was evident when, under cross-examination, it was put to him that, had the Plaintiff said under oath that she did sign the mortgage, he would have to accept that this was a fact. Mr Madden disagreed, emphasising that it would not undermine in any way the results of his analysis, making clear "*I would stand by my report*". Mr Madden's evidence included to say that there may be a number of reasons why someone would *say* that they authored something when they did *not* and he contrasted this with the results of objective scientific analysis.

123. When it was put to him that Mr Keenan would give evidence that he witnessed the Plaintiff signing the mortgage deed and the Retainer/Authority documents, Mr Madden was clear in his testimony*: "I stand by my opinion".* I now turn to Mr Keenan's evidence.

Mr Keenan

124. Mr Eamon Keenan's sworn evidence included the following. He is a solicitor who qualified in 1980 and remains in practice. He has been a Commissioner for Oaths since 1986 and became

a Notary Public in 2017. From 1986 onwards, he has practiced in Messrs. Sexton Keenan, solicitors, from an office in Dublin 12. His former partner, Mr. Harry Sexton retired some 22 years ago and Mr Keenan continued in practice thereafter.

125. With respect to retaining documents, he operates 2 systems. A case-management system has been operating since 1997, allowing for files to be archived electronically, and re-examined. In the early 2000s he started a process of recalling files, scanning the documents, and shredding the 'hard' copies.

126. The Madigans have been clients of his firm for many years. My Keenan did not deal, personally, with the transfer of the property to the Plaintiff from her parents. That was deal with by Mr Sexton. There were some other dealings with the Madigans in the 2000s.

Land Certificate

127. When asked about the copy of the 'old' form Folio in respect of the property, he stated that the manuscript entry in the margin of Part III (his firm's name, address, and a date) indicated that a Land Certificate had issued, stating *"If you saw it, you would be looking for the Land Certificate, which was a primary document of title at that stage",* going on to say that "*You couldn't sell a property with a missing Land Certificate*" at that time.

128. Mr Keenan explained that *"People took out Land Certificates as proof of title*" adding that "*It wasn't unusual at the time for Banks to ask for a Land Certificate to be taken out and lodged, as security, often for personal borrowings*" and he believed this is what had occurred in the present case.

129. I pause at this juncture to note that this case is not about any historic lending or security arrangements. Nor has the Bank, or the Plaintiff as its successor, asserted a lien of any sort. The central issue in the case is whether or not the Plaintiff signed a mortgage in 2004, years after the issue of the Land Certificate (*per* the manuscript note on the 'old' form Folio). Nothing whatsoever turns on that entry or what was or was not done with the old Folio.

12 March letter from Ulster Bank

130. Mr Keenan confirmed that, in March 2004, he received instructions regarding the creation of a mortgage over the property. He gave no evidence as to precisely *when,* and gave no evidence as to from *whom* he received those instructions. However, he made clear that the Bank wrote to him because a mortgage on the property was to be created. By letter dated 12 March 2004, Ulster Bank wrote to his firm.

Received on 15 March 2004

131. With reference to a copy letter of that letter, Mr Keenan confirmed that it was received on 15 March 2004. The copy certainly bears a 'date stamp' to that effect. Mr Keenan gave no evidence as to *when*, on 15 March 2000, his firm received that letter, or when *he* first saw it.

What was enclosed

132. The said letter gives notice that the bank understands Sexton Keenan were acting for Mr and Mrs Madigan in respect of a mortgage on the property, and encloses what might be called a 'mortgage pack', comprising of the following 6 items:

1. *list of instructions;*
2. *certificate of title;*
3. *mortgage deed in duplicate;* (emphasis added)
4. *acceptance of instructions;*
5. *accountable trust receipt (please attach copy professional indemnity cover);*
6. *copy facility letter*

What was not enclosed

133. The letter went on to specify a number of matters which had to be dealt with prior to drawdown, one of which was the completion of an appropriate Family Home Act Declaration (a draft of which was *not* enclosed with the letter received by Sexton Keenan on 15 March 2004). Later I will return to the contents of this letter and its place in the sequence of events.

Mr Madden's manuscript notes on item 6

134. Mr Madden confirmed that item 6 comprised a copy of the 2004 Credit Agreement which has been discussed earlier in this judgement (i.e. containing manuscript references to a mortgage over the property). He further confirmed that he made no changes to that document other than a number of 'ticks'. This, he explained, was reflective of 'checking off' items which, *per* the special conditions, the Bank required. Other than that, the only other manuscript note which he made on the Credit Agreement was to reflect the fact that certain funds were going to be used to discharge an overdraft. Noting turns on the foregoing.

15 March 2004 - 11:30 am meeting

135. Mr Keenan's evidence to the Court was clear. In relation to the core issue in this case, his testimony during his 'examination in chief' was to the following effect:

- the Plaintiff *was* present at the meeting in his office at 11:30am on 15 March 2004;
- she *did* sign the various documents (i.e. the questioned documents on which Mr Madden has opined);
- she did so in *his* presence;
- it *is* her signature on the mortgage; and, in particular,
- he *witnessed* the Plaintiff's signature on the mortgage.

No memory

136. Before proceeding further, it is appropriate to note that, during the course of cross-examination, Mr Keenan confirmed, repeatedly and very appropriately, that his evidence was based, *not* on any memory of the transaction (he has none) but, exclusively, on his review of documents on his file, in particular, his handwritten note dated 15 March 2004. Mr Keenan's candour was clear from his evidence, as follows:

I'm relying entirely on my file;

I don't remember, specifically, Mr and Mrs Madigan coming to the meeting;

It's 19 ½ years ago and I have dealt with very many clients since then;

I can't say I've a specific recollection of the transaction;

I have to rely on the note I made;

I don't have any memory of it;

I have no specific recollection.

Sources of evidence (re the signature on the mortgage)

137. Thus, in addition to the mortgage document itself (a copy of which was before the Court) the evidence in relation to the crucial issue of whether the Plaintiff signed the mortgage comes from 3 sources, summarised as follows:

(i) evidence by the Plaintiff who has objective reasons to remember if she ever signed such an unusual document (unusual because she, alone, was and is registered as full owner with absolute title yet, in the mortgage, her husband purports to mortgage/charge the property) and who gave clear and cogent evidence that she never did and never would have signed the mortgage;

(ii) the evidence of a wholly independent handwriting expert who rules out, entirely, the Plaintiff as being the author of the signature on the mortgage; and

(iii) the evidence of Mr Keenan who, very fairly, confirms that he has no memory, whatsoever, of relevant matters (i.e. has no memory of the meeting; no memory of seeing the Plaintiff at it; no memory of her signing anything; and no memory of witnessing her signature on anything) and who bases his testimony entirely on his interpretation (in 2023) of retrieved documents from his file (dating from 2004).

Authority

138. Earlier in this judgment I referred to a document entitled "CLIENTS AUTHORITY AND RETAINER, which is dated 15 March 2004 (the "Authority"). On any objective analysis, it is a

document of some importance and one which Mr Keenan and his firm would need to be in a position to rely upon. It contains signatures for both Mr and Mrs Madigan and, according to Mr Keenan, it was one of a number of documents signed in his presence. Before continuing with Mr Keenan's evidence, the following will be recalled about the Authority:

(i) it is described by Mr Madden as Q1;

(ii) the Plaintiff's testimony is that it is *"absolutely not my signature"* (also giving evidence that her husband's signature on this document *did* look like his);

(iii) Mr Madden has given the strongest possible opinion (absent examining the original) namely that it is "*strongly probable*" that the Plaintiff was *not* the author.

139. When questioned about this Authority, Mr Keenan described it as his "*pro-forma document*", which he gets clients to sign so that he can take up title deeds from the Bank and deal with title issues. The original of this document subsequently went to the Bank. There is no dispute in relation to the *purpose* of the document, the issue being whether the Plaintiff signed it.

Signature not witnessed

140. Mr Keenan accepts that the signature purporting to be the Plaintiff's is *not* witnessed and, in my view, the weight of evidence safely allows for a finding of fact that it is *not* the Plaintiff's signature on this document. The inevitable consequence of this finding is that, regardless of the sincerity with which Mr Keenan believes otherwise, this document cannot have been signed by the Plaintiff in Mr Keenan's office in his presence.

Retainer

141. Turning to the document entitled "CLIENT(S) RETAINER AND AUTHORITY", (the "Retainer"), Mr Keenan explained that this was from a pro forma document in his office (having been an "*ICS Building Society form*") which he "*had the clients sign for his own file*", explaining that "*Some Banks require the original to be sent, to them, of the Authority and Retainer".* Before proceeding further, it is appropriate to note the following in relation to the Retainer:

(i) again, it is a document of some importance which Mr Keenan's firm went to the trouble of getting signed by clients so that it could be *relied* upon;

(ii) the Plaintiff gave clear evidence that this is *not* her signature;

(iii) as a matter of fact, the Plaintiff's signature appears in the *wrong* place on this document (i.e. not as a client*,* but as a witness to her husband's signature).

"X"

142. There is an *"X"* on the document which appears after the signature of the Plaintiff's husband (which signature appears opposite the words "*Signed by the Borrower*"). When asked to

explain this, it is fair to say that Mr Keenan could not. Mr Keenan's evidence included to say "*Maybe the 'X' was there or maybe I put it there to indicate where Mr Madigan was to sign",* also stating: "*I don't quite categorically know what the 'X' is for*" and "*It's that long ago I can't have a full recollection".*

143. This testimony represents a very candid account of a witness assisting the Court by making clear that he has no memory of any relevant matters. In other words, Mr Keenan's evidence represents a *bona fide* attempt, almost 2 decades after the events, to interpret documents created then. He was unable to interpret, at this remove, what the "*X"* meant and that is entirely understandable.

144. It must also be said that nothing suggested by Mr Keenan explains why, if the Plaintiff signed the form in front of him, she did not sign in the *correct* place. Indeed, in his testimony, Mr Keenan confirmed the *fact* that the Plaintiff did sign in the "*wrong place*".

145. In short, this Court is faced with the objective fact that the Plaintiff did not sign *qua* "*Borrower*", but *qua* witness. This seems to me to be a matter of significance. I say so given that Mr Keenan's evidence was to the effect that this was an important form (constituting, for the purposes of his file, an original of an irrevocable authority for his firm to give an undertaking to the Bank). Not only that, he gave evidence that "*I would have indicated where the clients should have signed".*

146. The fact that the Plaintiff's signature appears merely as witness to her husband's seems to me to be consistent, not with the Plaintiff signing in the presence of Mr Keenan, but with that signature having been applied other than in the manner which (based on his file-review almost 2 decades after the event) Mr Keenan believes, no doubt sincerely. In short, a weighing up of the evidence supports the finding that the signature on this document is *not* the Plaintiff's, the inevitable consequence being that it was not signed in front of Mr Keenan.

'Print-out' of appointments

147. The papers produced by Mr Keenan included a 1-page 'print out' of his appointments for 15 March 2004. I asked Mr Keenan if there was anything on that document to indicate *when* the 11:30 meeting had been arranged. He confirmed that there was not, going on to make clear that he had "*no idea*" whatsoever as to when the appointment had been made. Nor did he know who arranged it. There are, however, a finite number of possibilities and it seems appropriate to engage with these, in the context of the evidence put before the court.

148. Although stating the obvious, an appointment to meet with Mr Keenan at 11:30 on 15 March 2004 cannot conceivably have been made *after* 11:30am that day.

149. Given that the Defendants' case is that it was during this meeting that the Plaintiff and her husband signed all relevant documents (in particular, the mortgage) and that Mr Keenan

witnessed the Plaintiff's signature, an obvious possibility is that arrangements for the meeting were made some days *prior* to 15 March. That scenario would also recognise the reality that solicitors are busy professionals and, as Mr Keenan made clear in his sworn evidence, he was very busy that particular week (indeed, his diary for 15 March had no less than 8 entries, beginning at 8:10 am, comprising of 7 appointments).

150. However, it will also be recalled that the letter from Ulster Bank, dated 12 March 2004 did not arrive in his office *until* 15 March 2004. Indeed, the copy which Mr Keenan furnished to the Court(as part of his print-out of scanned documents from old files) is 'date stamped' 15 March 2004.

151. It was this letter which gave notice that the Bank had been advised that Mr Keenan's firm was "*acting for Richard and Elaine Madigan in relation to the above property and the registration of the Bank's mortgage".* In the manner previously examined, the said letter enclosed, *inter alia*, a list of the Bank's instructions, including the "*Mortgage Deed in duplicate*".

152. There was no evidence given to the Court that Mr Keenan knew precisely *when* such a letter would be received by his office, still less that he knew in *advance* of the 15 March that it would arrive *on* 15 March. Thus, the very first time he received (i) the duplicate mortgage deed from the Bank; and (ii) the Bank's instructions, was *on* 15 March 2004.

153. That being so, the very earliest point when Mr Keenan could have known that he had a duplicate mortgage which required the Plaintiff's signature was when the post arrived *on* 15 March. There is simply no evidence as to when that letter arrived but the following analysis assumes that it arrived that morning (i.e. before the 11:30am meeting).

154. Even if the day's post arrived and was seen by Mr Keenan on the morning of 15 March 2004, it strains credibility that there would have been sufficient time to make arrangements for the Plaintiff to attend Mr Keenan's office that very morning for the purposes of signing the mortgage. I take this view in light of:-

(i) the Plaintiff's uncontested evidence that, in addition to her business, she was responsible for 3 young children; and

(ii) the Plaintiff was residing in Straffan, Co. Kildare, whereas the offices of Mr Keenan's firm were at Walkinstown Road, in Dublin 12.

155. There is also another aspect which merits comment. As well as enclosing half a dozen documents, the Bank's letter which arrived on 15 March 2015 goes on to state that "*Prior to drawdown of facilities the following is relevant*:" and this is followed by, inter alia: "*Please include relevant Family Protection Act Declarations and advise if applicable if the security owner has been in an arrangement to marry which has terminated in the last three years…".*

156. Thus, on the Defendants' case, not only was the morning of 15 March 2004, the first time Mr Keenan's office could have received the duplicate Mortgage Deed, during the 'window' between first seeing the Bank's letter on 15 March, and 11:30am that morning, Mr Keenan also prepared, or caused to be prepared, a Family Home Declaration in compliance with the instructions in the Bank's letter (notwithstanding the commitments in his diary that day at 8:10am and also at 10am).

157. Leaving to one side the expert's evidence which entirely *excludes* the Plaintiff as author of the signature on the FHD, a consideration of the evidence suggests that it was highly unlikely the FHD was even available to be signed on the same morning as the Bank's letter arrived, which refers to it for the first time.

158. It is a matter of objective fact that the Family Home Declaration in this case is a 'bespoke' document. I say this in light of the following: (i) it was not a template document enclosed in the Bank's letter, but had to be drafted, separately; (ii) it is in typed form; and (iii) in the body of that typed document, it refers to the Plaintiff and her husband by name; gives their address; and refers, inter alia, to the date of their marriage.

159. Furthermore, the FHD also had an exhibit, namely, a copy of the Madigans' marriage certificate. There was no evidence given by Mr Keenan of that Marriage Certificate already being to hand, yet it also bares a signature purporting to be the Plaintiff's.

Urgency

160. Even if I am entirely wrong in the foregoing views, the scenario put forward on behalf of the Defendants would involve uncommon speed and would reflect very real urgency i.e. if, within a few hours of first receiving the Bank's letter, arrangements were made to have the Plaintiff in Mr Keenan's office in order to sign, that same morning, a Retainer; Authority; the Mortgage and the Family Home Declaration (the latter being a document typed up in the 'window' between the Bank's letter arriving on 15 March and the meeting itself).

161. However, as well as Mr Keenan having no recollection: (i) of the meeting; or (ii) of the Plaintiff attending; or, for that matter (iii) having asked her or her husband to bring in a copy of their Marriage Certificate so that it could be appended to the Declaration, there was no evidence put before this Court that there was any urgency whatsoever. By that I mean, not only was there a complete absence of evidence that Mr Keenan, *subjectively,* believed that the matter was urgent, this is borne out by *objective* evidence which discloses a complete *absence* of urgency and a lack of speed.

162. Why do I say this? Because, on the Defendants' case, the Family Home Declaration (supposedly signed by the Plaintiff in the presence of Mr Keenan on the very morning of the receipt of the Bank's letter which required it, namely, at approx. 11:30 am on 15 March 2004)

then 'sat' in Mr Keenan's office for a full week until 'sworn' (and, given the facts, this is not an accurate description) before a solicitor/commissioner for oaths, on 22 March 2004.

163. This flurry of activity within hours of the Bank's letter arriving on 15 March (consistent with urgency) is in stark contrast to the days which passed without anything being done about the documents signed at such breakneck speed, undermining, in my view, that they were signed by the Plaintiff on the date and in the manner contended by the Defendants (even without reference to expert handwriting evidence which rules out the Plaintiff as author of the signature).

164. In short, there is simply no evidence whatsoever that there was ever any *need* for the Plaintiff to attend Mr Keenan's office on a 'drop everything' basis, on 15 March 2004, whereas the objective evidence supports the view that her presence in Mr Keenan's office on such an urgent basis was not necessary. Furthermore, had there been such urgency that the Plaintiff needed to be summoned to Mr Keenan's office within, at most, a few hours of the arrival of the Bank's letter containing the duplicate mortgage, it seems likely that Mr Keenan would have had some memory of a transaction conducted at such 'lightening' speed, particularly if his memory had been refreshed with reference to his file. He had no such memory and gave no such evidence.

Registration not processed

165. Far from there being urgency, Mr Keenan's evidence to this Court included to say "*For some reason I didn't process the registration"* and he went on to explain that it was not until receiving an email from Ulster Bank, dated 23 September 2009 (over 5 years after the mortgage was supposedly signed by the Plaintiff), asking about the whereabouts of the registered charge, that he was prompted to lodged papers for registration, on 2 October 2009.

Plaintiff not notified of registration of the charge

166. Mr Keenan also accepted that, following registration of the charge created by the mortgage, he did *not* write to the Plaintiff to inform her and he had no explanation for why he did not do so. This candour is to the credit of Mr Keenan and is entirely consistent with the balance of his oral testimony, including that he has no memory of any of the relevant events; he does not recall the meeting on 15 March 2004; he does not recall who attended; he does not recall seeing anyone sign any documents; and he does not recall witnessing the Plaintiff's signature on the mortgage.

The 'swearing' of the Family Home Declaration

167. In relation to the so-called 'swearing' of the FHD, Mr Keenan's evidence was that it was signed in his presence, in his office, on 15 March 2004, by Mr Richard Madigan *and* by Ms Elaine Madigan, who also signed a copy of their Marriage Certificate, by way of an exhibit (as noted, he gave no evidence as to how the Marriage Certificate came to be to hand on the very morning the Bank's letter requiring the Declaration was received).

An "arrangement"

168. Mr Keenan went on to say that, at that time, there was "*an arrangement*" between local solicitors to the effect that if Mr Madigan had clients who completed a declaration before him, he could bring the declaration to another solicitor for 'swearing' and vice versa. He readily accepted under cross-examination that this was "*an improper practice*", also saying "*I'm afraid it was very common and had been since the 1980s".*

The 22 March 2004 date on the mortgage

169. With regard to the fact that the mortgage (which he says the Plaintiff and her husband signed on 15 March in his presence) is dated 22 March 2004, Mr Keenan's evidence was "*I did that when I got the family home declaration back and I inadvertently dated it the 22nd of March, when it should have been the 15th of March".*

Averments made regarding the mortgage

170. In Mr Keenan's affidavit sworn on 9 February 2021 in opposition to the Plaintiff's claim he makes the following averments at paras. 5 and 6:

> *"5. On or about 22nd March 2004, I prepared a Statutory Declaration of Husband and Wife that the property is not a family home for Richard Madigan and the Plaintiff (the statutory declaration). I say that the statutory declaration was signed by the Plaintiff and Richard Madigan and sworn by John F Walsh practising solicitor of 1 Ballymount Road Dublin 12. I beg to refer to a true copy of the statutory declaration marked with the letters and number 'EK2' I have signed my name prior to the swearing hereof.*
>
> *6.On or about 22 March 2004, I prepared a deed of mortgage (the deed of mortgage) to be registered against the property and the Plaintiff and Mr Richard Madigan signed the deed of mortgage before me. I beg to refer to a true copy of the deed of mortgage marked with the letters and number 'EK3' I have signed my name prior to the swearing hereof."*
> (emphasis added)

171. Sworn averments to the effect that Mr Keenan only prepared the FHD and the Mortgage "*on or about 22 March 2004*" entirely rule out the possibility that he saw (or could have seen) the Plaintiff sign either document a week *earlier*, on 15 March 2004. Whilst Mr Keenan's evidence to this Court was based on his interpretation of documents on his file, he did not suggest that there was any change in his understanding of the position between the swearing of this affidavit, and the giving of his *viva voce* evidence to this court.

172. In an attempt to try and reconcile, under cross-examination, what are, in objective terms, irreconcilable statements, Mr Keenan pointed to the words "*on or about*", as if their use, in front of the specific dated "*22nd March*" rendered his affidavit accurate. It does not. When, under cross examination, it was put to Mr Keenan that he had been 'economic with the truth' in his affidavit, his evidence included to say "*it is a bit minimal*". That is certainly so.

173. Paras. 5 and 6 of Mr. Keenan's affidavit do not present the factual position, as it was understood it to be, with adequate clarity. In particular:

(i) based on his file review, Mr. Keenan believed that both of the mortgage and family home declaration were prepared and signed on 15 March 2004 (not on 22 March), yet the latter date is given in the affidavit; and

(ii) he knew that Mr Walsh had not witnessed the Plaintiff signing the Declaration, yet that is not made clear in the affidavit.

174. In fairness to Mr Keenan, his evidence was not only to describe the latter as a *"shoddy practice*" but to make clear the fact "*that it was common practice, is no excuse".* It seems fair to infer that it is because of what Mr Keenan knew, in relation to the involvement of his firm in the practice of solicitors/ commissioners for oaths *not* witnessing signatures, that his affidavit was drafted in a less than accurate manner. It should not have been.

175. There is no place in any sworn document for less than a setting out of relevant facts to the best of the knowledge, information and belief of the person who swears the affidavit. With reference to his affidavit, Mr Keenan's evidence to this Court included to say: "*I didn't draft this as such*" also saying "*I can't recall specifically why it says what it says*".

176. The responsibility to put accurate information before the court, *via* affidavit, is a responsibility which the party who swears the affidavit cannot dilute, avoid, or 'stand back' from, regardless of whether an affidavit was drafted by them or by a 3rd party, on their instructions.

177. I want to stress that it would be utterly unfair to hold Mr Keenan responsible for what may well have been a practice as widespread as it was improper. However, the fact Mr Keenan knew that the Family Home Declaration was *not* properly witnessed by the solicitor/commissioner for oaths in front of whom it was purported to be 'sworn' seems to me to speak to a laxness in terms of the proper approach to *witnessing* documents, even sworn documents (as well as being an issue which should have been made clear on affidavit). The participation of Mr Keenan's firm in the above practice, at that point in time, in relation to 'sworn' documents does not sit at all easily with Mr Keenan's evidence to the effect that mortgages (unsworn documents) were *always* properly witnessed within his office, at that point in time.

178. For the sake of clarity, I want to make clear that there was not a scintilla of evidence before this Court to suggest that the involvement of Mr Keenan's firm in this practice has continued. Furthermore, Mr Keenan is not a Defendant in these proceedings, he is a witness who, in the manner presently explained, has given very significant assistance to this Court in relation to the questions which it has to resolve.

179. Whilst his affidavit was sub-standard in the manner explained, I am satisfied that Mr Keenan's attempts to suggest that it was accurate (i.e. pointing to the words "*in or about"* and saying that it was not drafted by him) were more in the nature of 'in the moment' responses (given under the pressure of cross-examination) as opposed to reflecting Mr Keenan's considered views on the standards the Court is entitled to expect from an affidavit and one who swears same. In other words, it did not seem to me that Mr Keenan was seriously trying to suggest that his affidavit was not deficient. That is, of course, to his credit.

180. Furthermore, leaving aside the topic of his earlier affidavit, this Court found the balance of Mr Keenan's oral testimony to be that of a witness who gave a full account of matters, to the best of his recollection. This was provided frankly, without hesitation, and with the obvious aim of assisting the court, to the very fullest extent. In that respect, Mr Keenan assisted this Court in accordance with the highest standards of his profession and his personal duties as an officer of the Court.

181. In particular, whilst Mr Keenan advanced the views that the relevant signatures were the Plaintiff's and that he had witnessed them, he made clear, time and again, that this evidence was not based on any memory of matters, as opposed to being based on his interpretation of documents found on his file. This clarity, and consequent assistance to the court, was also to his credit. In other words, this was not a case of any concessions having to be 'extracted' from a witness. Rather, Mr Keenan readily and repeatedly confirmed that his was an account not based on memory, but on documents.

Handwritten note

182. I now turn to the most significant of those, namely, Mr Keenan's note (a copy of which was contained in Mr Keenan's book of copy documentation running to 70 pages entitled "*File 2004"*). I accept that it constitutes a contemporaneous note made at the time by Mr Keenan. However, it can fairly be said that it does not, in its terms, purport to record *who* was present at the meeting.

183. It does not, for example, state that it is an "*Attendance note"* and does not, for instance, state "*Present at the meeting were…*". Mr Keenan's interpretation, 19 ½ years after the meeting, is that both Mr and Mrs Madigan must have been present because his note begins: *"R. Madigan & E. Madigan Curracloe 15/03/04".* However, that is not the only possible interpretation. The foregoing could just as easily refer to the subject matter, namely, a mortgage which, insofar as the bank and Mr Keenan's firm were aware, *both* of the Madigans wished to obtain, with Curracloe being the property to be secured.

184. Similar comments apply in relation to the entry in Mr Keenan's electronic diary which (whilst giving no indication of when it was arranged) records an 11:30 AM meeting on 15 March 2004 and simply states: *"Richard & Elaine Madigan".*

185. In short, Mr Keenan's evidence that *both* of the Madigans were present with him at the meeting is exclusively based on the fact that he "*took notes*". However, as a matter of objective fact, the note which Mr Keenan has interpreted for the purposes of his evidence nowhere records who was *present* at that meeting. That is not, however, the end of the analysis.

"my a/c in Ulster Bank"

186. Mr Keenan went through the contents of his handwritten note stating "*it's slightly shorthand, the way I would have made the notes*". Half-way down this single A4 page is the following entry: *"These funds go into Ulster Bank to clear overdraft Balance to <u>my</u> a/c in Ulster" (*emphasis added). Mr Keenan's interpretation of the foregoing was to say: "*One of the parties must have said that, because that is almost a verbatim note."* It certainly appears to be. Furthermore, this is the one and only example in Mr Keenan's note of any *verbatim* record of instructions given to Mr Keenan.

187. It is common case that the foregoing was not a reference to Mr Keenan's overdraft or account. Thus, it is a record of an instruction given to Mr Keenan, recorded by him in a 'first-person' voice, wherein a single individual refers to their overdraft and their account in Ulster Bank.

188. Insofar as this is the only *verbatim* note of any client – instructions given during the 15 March 2004 meeting, it is not at all consistent with *two* clients being present. Had there been two clients present, a note which used the term "*<u>my</u> a/c in Ulster*" (without distinguishing between the clients) could, on any objective analysis, create potential confusion if relied on a later point. It is entirely consistent with one client being present, the obvious candidate being the Plaintiff's husband.

189. In short, the *verbatim* record of instructions made by Mr Keenan seems to me to be entirely consistent with the Plaintiff's testimony that she was *not* at the 15 March 2004 meeting.

Independent legal advice

190. The Plaintiff was, at all material times (including, as of 15 March 2004) the full owner and the sole person registered as such on the relevant folio. Given that a proposed mortgage of this property was the backdrop to the 15 March 2004 meeting, Mr Keenan confirmed in his evidence to this Court, that it would have been "*better practice*" for a sole owner in the Plaintiff's circumstances to be informed of the option of availing of independent legal advice. It seems to me that the fact there is no such mention on Mr Keenan's note is also consistent with the Plaintiff not having been at the meeting to which the note refers.

"Client"

191. This Court's finding of fact that the Plaintiff was *not* at the 15 March 2004 meeting is entirely consistent with the contents of a copy document which appears in Mr Keenan's book,

immediately after the 15 March 2004 note. That document is entitled: *"SEXTON KEENAN & COMPANY RESIDENTIAL CONVEYANCING INSTRUCTION FORM – REMORTGAGE"* and begins: *"Date of instruction: 15.03.04*". I pause her to note that this entry appears to be consistent with the meeting on 15.03.04 being the very *first* time that instructions were given (i.e. inconsistent with documents having already been prepared for signature). The very next entry on the documents begins:

> **"***2. CLIENT DETAILS*
>
> *Client: Richard Madigan Spouse: Elaine Madigan"* (emphasis added)

192. For Mr Keenan's firm to have identified the Plaintiff's husband (alone) as their *"client"* in respect of instructions said to have been given on 15 March 2004, also appears to be entirely consistent with Mr Madigan (alone) having attended the meeting with Mr Keenan on that date.

18 March request

193. The book of documents which Mr Keenan produced for the trial also included a copy letter sent by his firm to Ulster Bank, dated 18 March 2004, in response to the Bank's letter dated 12 March (which, in the manner examined) did not arrive until 15 March 2004. In the 18 March 2004 letter, Sexton Keenan & Co state inter alia:

> "*Please let us have the title deeds referred to in the accountable trust received at your earliest convenience so that we can prepare the mortgage documentation"* (emphasis added)

194. The foregoing statement in a letter dated 18 March fortifies me in the view that (even if one were to put the conclusive evidence of the handwriting expert to one side) on the balance of probabilities the Plaintiff did not sign mortgage documentation 3 days *earlier* on 15 March.

Our client / he has complied

195. The said letter of 18 March concludes as follows:

> *"Please note that we are instructed by our client that he has complied with the special conditions in the loan offer and wishes to drawdown the loan as soon as possible accordingly we look forward to hearing from you as soon as possible."* (emphasis added)

196. For Mr Keenan's firm to refer to "*our client"* (singular) and to say "*he"* (singular male pronoun) *has complied"* (rather than "*our clients*" and "*they have complied*") seems to me to be entirely consistent with Mr Madigan, alone, giving instructions and it fortifies me in the view that the Plaintiff neither attended the meeting on 15 March, nor signed the mortgage then, or at all.

197. It was clear that Mr Keenan's evidence about witnessing the Plaintiff's signature on the mortgage reflected his policy, rather than any specific recollection. For example, his evidence included to say *"Mortgage deeds are signed by the borrowers in front of me*", going on to

explain that, if he is not present, an assistant solicitor in his office will witness the signatures. As he put it; "*My practice is to have the clients sign first and then I witnessed their signatures"*.

198. It was clearly due to a genuine belief that he would not have departed from such a practice that Mr Keenan gave evidence that he "*did witness*" the Plaintiff signing the mortgage (but, in fairness to him, never claiming to have any memory of same and, as observed earlier in this judgment, giving very significant assistance to this Court via his clear and consistent testimony on this important issue).

199. Similar comments apply in relation to Mr Keenan's evidence that the mortgage "*deed never left my office until registration*" i.e. that testimony reflects a policy and a genuine belief that such a policy was adhered to, rather than any specific recollection.

Certain findings of fact

200. Having carefully considered all the evidence, and with particular reference to 15 March 2004, I am satisfied of the following:-

(i) a meeting took place in Mr Keenan's office;

(ii) it was pre-arranged by Mr Madigan and Mr Keenan's office;

(iii) it was attended by Mr Madigan and Mr Keenan;

(iv) the Plaintiff was not present at that meeting;

(v) the questioned signatures Q1, Q2, Q3 and Q4 were *not* made by the Plaintiff but by someone unknown (at a date, time, and place also unknown);

(vi) Mr Keenan's oral testimony was given to this Court by someone acting *bona fide* and believing his account to be accurate (which account relied exclusively, not on any memory of any relevant events or matters, but on his interpretation of documents retrieved from his file and reviewed by him, but dating back almost 2 decades);

(vii) Mr Keenan is sincere, but sincerely mistaken, in his view that the Plaintiff signed the mortgage at the 15 March 2004 meeting;

(viii) Mr Keenan is equally wrong, though no less sincere, in his view that he witnessed her signature on the mortgage;

(ix) The signature on the mortgage is a forgery, not the Plaintiff's.

201. The Defendants submit, inter alia, that "*the mortgage deed benefits from the presumption of due execution"* and "*the attestation of the signature of the Plaintiff is prima facie evidence of same"* (see para. 1.7(ii)(a) of the Defendants' written legal submissions).

202. The foregoing submissions are wholly undermined by findings of fact which flow from a consideration of the evidence in this case. Insofar as the question at the 'heart' of this case is whether the Plaintiff signed the mortgage, I am entirely satisfied that, as a matter of fact, she did *not.*

203. Whilst the evidence does not allow this Court to safely decide *who* forged the Plaintiff's signature on the mortgage (or, for that matter, whether the forged signatures, Q1 to Q4, inclusive, were forged by the same individual) the Plaintiff has comprehensively discharged the onus of proving that the mortgage deed was *not* signed by her (and, thus, her signature *cannot* have been witnessed by Mr Keenan).

204. It is common case that the relevant standard is the civil one, i.e. this Court must be satisfied of fraud on the balance of possibilities. It is. Nor is there any question of this decision coming down to 'fine margins'. As explained earlier in this judgment, the evidence of the sole handwriting expert was to entirely *exclude* the Plaintiff as author of the signature on the mortgage. The uncontested evidence of the sole handwriting expert was not couched in 'balance of probabilities' terms. Rather, his uncontested testimony spoke to the criminal standard being met. When one adds to that, the Plaintiff's testimony and adds to the foregoing the objective evidence analyses in this judgment, the outcome is overwhelmingly in favour of the Plaintiff's case.

205. In short, this Court has conducted a rigorous examination of the evidence and is entirely satisfied that, as a matter of fact, it is *not* the Plaintiff's signature on the mortgage (contrary to the pleas in the Defence that it *is*).

206. Sections 30 and 31 of the Registration of Title Act, 1964 ("the 1964 Act") provide the following

"Fraudulent dispositions and entries.

> ***30.****—(1) Subject to the provisions of this Act with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.*
>
> *(2) Any entry, erasure or alteration in the register made by fraud shall be void as between all parties or privies to the fraud.*
>
> ***Conclusiveness of register.***

31.—*(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any Court of competent jurisdiction based on the ground of actual fraud or mistake, and the Court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just.*

(2) The validity of registration of ownership of unregistered land shall not be affected by reason that the person thereby shown to be registered as owner was then dead and any person who proves to the satisfaction of the Authority that he is entitled to the land may be registered as owner thereof." (emphasis added)

207. The Defendants rely on the conclusiveness of the Register (per s.31 of the 1964 Act) in respect of the mortgage which is registered as a burden on the relevant folio. However, the signature on the mortgage instrument is, as a matter of fact, a forgery and this Court can safely hold that the mortgage is a fraudulent instrument. The fact that the perpetrator of that fraud has not been identified does not render the mortgage deed anything other than a fraudulent instrument, or alter the reality that it was as a result of fraud that the mortgage came to be registered as a burden.

Purchaser for value

208. In the Defendants written legal submissions which were provided some weeks after the trial, it is contended, inter alia, that:

"*As a purchaser for value"* the first named Defendant "*was not required to look behind the conclusiveness of the register*" (para. 1.7 (ii) (e));

"Where a third party, not privy to the fraud, in the present case, Promontoria, acquires the mortgage for value, that third party can rely on the mortgage, even though it is a fraudulent instrument. The conclusiveness of the Register trumps the Plaintiff's right to ownership free of the burden" (para. 1.7(ii) (h));

"The Plaintiff in turn has recourse to compensation under section 120 of the Registration of Title Act, 1964 and otherwise can pursue such action in damages as against any party who procured the fraud" (para. 1.7(ii)(i)).

209. These submissions do not seem to me to reflect the manner in which the case was defended as *per* the pleas in the Defence dated 31 March 2021. As I observed earlier in this judgment, nowhere did the Defendants plead that they were third party purchasers without notice who could simply rely on the contents of the Register, irrespective of whether the burden had been registered as a result of fraud.

210. Rather, the case was defended squarely on the basis of two fundamental propositions, namely (i) that the signature on the mortgage *is* the Plaintiff's; and (ii) that her signature *was* witnessed by Mr Keenan.

211. In this regard, it is appropriate to recall the "*Preliminary Plea*" in the Defence, wherein, by way of a "*full defence*" it is pleaded that the Plaintiff's "*…proceedings are frivolous, misconceived and bound to fail…*" because "*…the Plaintiff and her husband Mr Richard Madigan executed said documents by way of their then retained solicitors Sexton Keenan & Co on or about the 15th of March 2004 in connection with the mortgage of the property…*" (emphasis added).

212. In short, the Plaintiff's claim was opposed, not on the basis that the second Defendants was a purchaser without notice of fraud, but squarely on the basis that (as repeatedly pleaded in the Defence) "*…the Plaintiff and her husband Richard Madigan executed a full legal mortgage in favour of the Second Named Defendant's successor in title, Ulster Bank…* (para. 4 of Defence)

213. At no stage have the Defendants even acknowledged the *possibility* of the signature on the mortgage *not* being the Plaintiff's. In other words, this is not a situation where the Defendants ever engaged with the potential that the mortgage is a fraudulent instrument and, against that backdrop, asserted an entitlement to rely on the conclusiveness of the Register, be that qua bona fide purchaser without notice, or otherwise.

Register entry 'trumps' ownership rights

214. On the contrary, it was only in legal submissions, as opposed to the pleadings, that the Defendants claim "*The conclusiveness of the Register trumps the Plaintiff's right to ownership free of the burden".* As well as not being the pleaded Defence, at the heart of the foregoing submission is that this Court should ignore the fraud perpetrated on the Plaintiff and the fact that a fraudulent instrument has been registered as burden on her folio. Notwithstanding how skilfully put, it is to suggest that this Court should ignore (i) the words "*in the absence of actual fraud"* which appear in s. 31 of the 1964 Act; and should also ignore (ii) that s. 31 explicitly provides that "*…nothing in this Act shall interfere with the jurisdiction of any Court of competent jurisdiction based on the ground of actual fraud or mistake…"*.

215. Irrespective of who forged the Plaintiff's signature, the mortgage is beyond doubt a fraudulent instrument and the registration of a fraudulent mortgage should not have occurred.

216. Fraud has been found. A 'burden' on the relevant folio represents the registration of a fraudulent instrument. The appropriate response by this Court to the facts as found must be to direct the rectification of the Register.

217. In the manner examined earlier, one of the documents which accompanied the mortgage and was material to the registration of the fraudulent instrument was a falsely-sworn family home declaration. It was known to be falsely-sworn when it, and the mortgage, were lodged for registration. This fortifies me in the view that the Plaintiff must succeed with respect to the reliefs sought and the registration must be set aside, as it was procured through fraud.

Omnia praesumuntur contra spoliatorem

218. With reliance on the principle *omnia praesumuntur contra spoliatorem* the Plaintiff submits that this Court should reject the evidence of the Defendants' sole witness. Satisfied that it better meets the interests of justice, I have, instead, assessed the entirety of Mr Keenan's evidence (both his written averments and his *viva voce* testimony) as part of the court's consideration of the totality of the evidence before the court. The outcome of that exercise has produced the findings detailed in this judgment. Those findings (in particular, that the signature on the mortgage is not the Plaintiff's) whilst reflecting the outcome of a balance of probabilities assessment, did not come down to fine margins. Rather, the evidence that the Plaintiff did not sign this mortgage overwhelmingly outweighs any evidence to suggest that she did.

Higher standard

219. Insofar as the Defendants rely on *Banco Ambrosiano SPA and Ansbacher & Co.* [1987] ILRM 699 (*"Banco Ambrosiano")* the balance of probabilities standard applies in the present case, being civil proceedings with the civil standard of proof. Nothing in *Banco Ambrosiano* suggests that a *higher* standard of proof applies and, insofar as the Defendants argue for a higher standard, I feel bound to reject that submission. On the question of the appropriate standard in civil proceedings, Henchy J. stated the following in *Banco Ambrosiano* (at 700 – 702):-

> "*If, as has been suggested, the degree of proof of fraud in civil cases is higher than the balance of probabilities but not as high as to be (as is required in criminal cases) beyond reasonable doubt, it is difficult to see how that higher degree of proof is to be gauged or expressed. To require some such intermediately high degree of probability would, in my opinion, introduce a vague and uncertain element, just as if, for example, negligence were required to be proved in certain cases to the level of gross negligence…..*
>
> ……
>
> *Proof of fraud is frequently not so much a matter of establishing primary facts as of raising an inference from the facts admitted or proved. The required inference must, of course, not be drawn lightly or without due regard to all the relevant circumstances, including the consequences of a finding of fraud. But that finding should not be shirked because it is not a conclusion of absolute certainty. If the Court is satisfied, on balancing the possible inferences open on the facts, that fraud is the rational and cogent conclusion to be drawn, it should so find".*

"Either it did or did not happen"

220. In circumstances where the Defendants/appellants submit that there is a single issue to be determined by this Court, namely, the validity of the mortgage (in particular, whether or not the signature on it is the Plaintiff's) the UK House of Lords' decision in *Davies v. Taylor* [1974] AC 207 (*per* Lord Reid at 215) as quoted with approval by Fennelly J. in the Supreme Court's decision in *Philp v. Ryan* [2004] 4 IR 241 (at 250) is particularly helpful:-

> "*When the question is whether a certain thing is or is not true- whether a certain event did or did not happen - the Court must decide one way or the other. There is no question of chance or probability. Either it did or did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened, then it is proved that it did in fact happen"*.

221. The evidence before the Court shows, conclusively, a balance in favour of the signature on the mortgage not being the Plaintiff s. It is proved that, in fact, she did not sign it. It is proved that, in fact, Mr. Keenan did not witness her signature on the mortgage. Moreover, it is proved that she did not, in fact, sign the family home declaration. Her signature on that document is also a forgery and it is acknowledged that it was not properly witnessed.

222. The onus of proof rested on the Plaintiff , who has discharged that burden on the civil standard. Whilst no inferences have been drawn by this Court "*lightly or without due regard to all the relevant circumstances, including the consequences of a finding of fraud",* (see *Banco Ambrosiano,* p.702), the burden of proof, to civil standard, has been met by the Plaintiff and, in my view, has been met very comfortably.

Innocent explanation

223. Furthermore, and with respect to the Defendants' reliance on *Superwood Holdings plc v. Sun Alliance* [1995] 3 IR 303 ("*Superwood*") there is no question of this Court reaching a finding of fraud where the relevant circumstances are consistent with innocence. There is no innocent explanation for the forgery of the Plaintiff's signature.

Omnia praesumuntur rite esse acta

224. In written submissions, the Defendants rely on the principle "*omnia praesumuntur rite esse acta*" of which the learned author stated the following in Wiley: Irish Conveyancing Law (4th Ed. Para. 17.25):-

> "*This rule, that everything should be presumed to have been done properly, is frequently invoked in cases of doubt as to whether, e.g., a deed has been properly executed"*.

225. No common law or statutory presumptions as to due execution can set aside this Court's findings of fact. This Court has found that, as a matter of fact, everything was *not* done properly. The mortgage was *not* properly executed. The Plaintiff's signature is a forgery.

226. The Defendants opposed the Plaintiff's claim on the basis that the mortgage was, and is, a genuine document and, in written submissions, state (at para. 4.3) that:-

> "*A party relying on a deed can first of all rely on an attestation clause as prima facie evidence of due execution and secondly call upon an attesting witness to give evidence of due execution".*

Attestation clause

227. Reliance on the attestation clause cannot "*trump*" the fact, as found by this Court, that the attestation clause tells a lie about itself. It says to the world that the Plaintiff's genuine signature was witnessed at the time she applied it to the document. The facts which emerge from a careful consideration of the evidence, including that of the attesting witness, paint an entirely different picture.

Subscribing witness

228. Given the facts found by this court, no reliance by the Defendants on the *dicta* of Pennefather J.J. in *Gosford v. Robbe* [1845] 8 IR LR 217 (i.e. "*No rule is better settled than this, that to prove the execution of a deed, you must produce the subscribing witness…."*) can avail the Defendants. That principle simply cannot set at naught the established facts. In other words, whilst the analysis begins with the presumption that the mortgage was duly executed by the mortgagor and properly attested, a consideration of the entirety of the evidence establishes that, as a matter of fact, the Plaintiff's signature was forged and, thus, 'her' signature was *not* properly attested. Whilst it is conceivable that the Plaintiff could have attended Mr. Keenan's offices on 15 March 2004, established facts suggest otherwise. However, the central point is that the signature on the mortgage, irrespective of when it was applied, is a forgery.

The Plaintiff's husband

229. From the evidence given by the Plaintiff, including her demeanour when giving it, it would appear that, whilst the Plaintiff is still married to and resides with Mr. Richard Madigan, their relationship may well be 'strained' as a consequence of the subject matter of these proceedings. The Plaintiff neither named her husband as a Defendant in these proceedings, nor called him as a witness. However, it does not seem fair to criticise the Plaintiff for that, in circumstances where the evidence tendered by and on her behalf very decidedly establishes the Plaintiff's entitlement to relief. With respect to Mr. Madigan, the Defendants' written legal submissions contain inter alia the following:-

> "*7.5 The parties, whilst estranged, are not divorced and on the evidence of the Plaintiff continue to reside in the same family home. The only inference to be drawn, is that Richard Madigan would not give evidence supportive of the contention that Eamonn Keenan was not present when the parties signed the Deed or alternatively, the contention that Eamonn Keenan released the Deed to Richard Madigan to obtain the signature of Elaine Madigan".*

Inferences

230. I do not accept that the foregoing are the *only* inferences to be drawn. On the contrary, it seems to me that there are obvious alternative explanations as to why a wife would not sue a husband, nor request/compel him to give evidence. As to the first inference to which the Defendants refer, even if Mr. Madigan had appeared as a witness and even if his evidence was supportive of Mr. Keenan's interpretation of his manuscript note, the evidence on the Plaintiff side, including the uncontroverted expert evidence of Mr. Madden, overwhelmingly establishes that it is *not* the Plaintiff's signature on the mortgage. As to the second inference referred to by the Defendants, there is insufficient evidence before the Court to allow it, safely, to reach findings of fact as to precisely (i) when the Plaintiff's signature was forged; (ii) where it was forged; and (iii) by whom it was forged. Nor is it necessary for those facts to be established in order for this court to hold that the plaintiff's signature on the mortgage *is* a forgery. That being so, it does not appear appropriate to speculate, particularly because such speculation neither adds nor detracts from the fundamentally-important finding that a fraudulent instrument has been registered as a burden on the Plaintiff's folio.

3 scenarios

231. During the cross–examination of Mr. Keenan, three scenarios were put to him in respect of possible explanations as to *how* the forgery came to be, namely: (i) that Mr. Keenan applied the Plaintiff's signature; (ii) that a secretary, executive or employee in Mr. Keenan's office signed the mortgage; or (iii) that he permitted the mortgage deed to leave his office, Mr. Keenan denied all three. I want to make perfectly clear that the evidence before the Court certainly does *not* point to, still less establish, either of scenarios (i) or (ii). That said, and whilst nothing turns on the question for the purposes of deciding the Plaintiff's claim, it is difficult to understand how the forgery occurred without scenario (iii). I make this observation bearing in mind that the (unexecuted) mortgage deed only arrived in Mr. Keenan's office on the morning of 15 March 2004 and operating on the basis that Mr. Madigan and Mr. Keenan did meet on that date, when both applied their signatures to the mortgage (*qua* mortgagor and witness, respectively). Whilst it is merely an observation, the foregoing points to the Plaintiff's signature having been forged at some point *after* Mr. Keenan witnessed Mr. Madigan's signature, which, in turn, suggests that that the mortgage deed may well have left Mr. Keenan's control at some point. I make these observations purely because the 3 scenarios, aforesaid, were raised in cross-examination and, in fairness to those who gave evidence, it needs to be made clear what the evidence before this court established and what it did not.

The Defence pleaded

232. It must be emphasised, once more, that nowhere in the Defence delivered by the Defendants is it pleaded that if the mortgage deed was found by this Court to be a fraudulent instrument, the first named Defendants, as a *bona fide* purchaser for value, without notice, was entitled to rely on the fraudulent mortgage. Despite never having pleaded this defence, the written legal submissions of the Defendants contain inter alia the following:-

"*8.4 The Defendants acquired the security for value from Ulster Bank. It was a transfer for value. Accordingly, the transfer of that burden, being the mortgage, was subject only to those burdens that were registered or those unregistered burdens under Section 72. 8.15 Assuming that the mortgage deed is a fraudulent instrument, any interest that the Plaintiff has to set aside that deed, is not an interest within s. 72 of the 1964 Act".*

233. The foregoing forms no part of the pleaded case. Rather, at all material times up to and including the 2-day trial before me, the Defendants' have opposed the Plaintiff's claim squarely on the basis that (i) it *is* the Plaintiff's signature on the mortgage (when it is not); and (ii) that Mr. Keenan properly *witnessed* her signature (which he did not). Insofar as the Defendants refer to para. 49.03 from Deeney "Registration of Deeds and Title in Ireland", the relevant paragraph concludes by stating inter alia:-

"*However, the question as to whether a Court can in an appropriate case, rectify the register as against the registered owner who has acquired land for valuable consideration, remains yet to be considered by the court".*

234. Given that it formed no part of the Defendants' pleaded case, the foregoing question does not arise for determination in these proceedings. However, in light of the facts which emerge from a careful consideration of the evidence, the Plaintiff has established an entitlement to have the register rectified given that the burden registered on her folio reflects the registration of a fraudulent instrument in the form of the mortgage (accompanied by an improperly "sworn" and wholly defective family home declaration upon which her signature was also forged).

235. It cannot be disputed that forgery of a signature is a type of fraud and it seems to me self-evident that it is a type of fraud contemplated by ss. 30 and 31 of the 1964 Act wherein the Oireachtas conferred on this Court the jurisdiction to direct rectification of the register.

Damages

236. With respect to the Plaintiff's claim for damages arising from trespass/wrongful appointment of a receiver, I have had regard to the *dicta* of Finlay C.J. in *Conway v. INTO* [1991] 2 IR 305, to which authority counsel for the Plaintiff directed the court's attention. The Plaintiff's written submission also refer inter alia to the decision of this Court (Cregan J.) in *McCleary v. McPhillips* [2015] IEHC 591, wherein it was held that the wrongful appointment of a receiver constitutes a trespass which would entitle a borrower to damages.

237. In *Harrington v. Gulland Property Finance Limited (no. 2)* [2018] IEHC 445, ("*Harrington*") Baker J. awarded each of the two Plaintiffs the sum of €20,000 following the appointment of the second named Defendants as receiver. As to the facts, in *Harrington,* the Plaintiff s owned industrial units which they charged in favour of Anglo Irish Bank ("Anglo") which security was transferred to IBRC and its special liquidators and, subsequently, to the first named Defendants ("Gulland"). Prior to the charge in favour of Gulland being registered, it

appointment the second Defendants as receiver. The Plaintiff s brought proceedings to challenge the appointment of and restrain the receiver, who was unilaterally discharged when the error was discovered. Gulland was subsequently registered as owner of the charge and a fresh receiver appointed.

238. In the context of the Plaintiff's claim for damages arising from the wrongful appointment of the first receiver, Baker J. acknowledged that the relevant receiver had been appointed in error. Of relevance, also, is the fact that the effective length of the receiver's appointment in that case was held to be five weeks in duration. Furthermore, the receiver was 'stood down' as soon as the error was discovered. At para. 58 of the court's decision Baker J. stated the following with respect to the award of damages:-

> "*In the light of the helpful observation of Binder J. in Haggart Construction Ltd. v. The Canadian Imperial Bank of Commerce, and there being no useful Irish case on point, I am satisfied that the Plaintiffs are entitled to damages for trespass, and having regard to the fact the receiver was in practical terms able to operate as receiver for a period of approximately five weeks, I am satisfied that the correct measure of damages to express my disapproval of the careless actions of Gulland is to award the Plaintiffs each the sum of €20,000"*.

When the Plaintiff learned of the 'burden'

239. It will be recalled that, in his evidence, Mr. Keenan acknowledged that his firm had not written to the Plaintiff to notify her of the registration of the mortgage as a burden on her folio. Nor could he explain the reason why no such notification was given. Thus, it was only after the appointment of the Second Named Defendant as receiver that the Plaintiff became aware of the matter.

What the Defendants were told in 2019

240. The affidavit sworn by the Plaintiff, on 21 October 2019, in the context of seeking, *inter alia,* an injunction to restrain the Defendants from selling the Plaintiff's property, contained, not only the explicit averment that the signature on the mortgage was a forgery, but exhibited Mr. Madden's report dated 29 March 2019. In my view, this is of considerable significance, as follows.

241. Mr Madden's report highlighted numerous and significant differences between the known signatures of the Plaintiff and the signature on the mortgage. In the said report, Mr. Madden found it to be *"strongly probable"* that the Plaintiff did *not* author the signature on the mortgage. It is also noteworthy that the Plaintiff's solicitor brought the foregoing, including a copy of the report itself, to the attention of the Defendants (by emails dated 27 September 2019; 1 October 2019 and 3 October 2019; and a letter to the second Defendants dated 25 September 2019).

242. Despite the foregoing, the Second Named Defendant insisted that he was properly appointed and went on to request vacant possession. In circumstances where the Defendants have never proffered any evidence from a handwriting expert, nor ever challenged the expertise of Mr. Madden, the latter's views have been uncontroverted at all material times since the Defendants were made aware of them in 2019.

243. Furthermore, at all material times from October 2019 onwards, the Defendants knew or ought to have known that Mr. Keenan's views were based exclusively on his interpretation of his file, rather than on any recollection of the events of 2004. This was the state of the evidence when the Equity Civil Bill was issued on 21 October 2019. Given that, by 21 October 2019, the Defendants were on notice that (i) the Plaintiff's signature was a forgery and (ii) independent expert evidence confirmed that it was a forgery, it seems to me that October 2019 is the appropriate 'starting point' in respect of the calculation of damages.

244. At para. 4 of the second named Defendant's affidavit, sworn on 4 September 2020, he made inter alia the following averments:-

> "*….at all material times herein, your humble deponent has been satisfied as to the fact of the registration and validity of said charge and my appointment on foot thereof….*"
> (emphasis added)

245. If the basis for the second named Defendant being so "*satisfied*" was the views expressed by Mr. Keenan, it was, or ought to have been, known to both Defendants that those views did not reflect any recollection of matters whatsoever. The evidence before this Court discloses that the Second Named Defendant did not have and could not have had any *valid* basis for being "*satisfied as to the…. validity of*" the charge created by the mortgage. Despite this, the Defendants insisted on proceeding with the receivership.

246. In the manner touched on earlier, Mr. Keenan swore an affidavit on 9 February 2021. This was sworn in circumstances where the Defendants furnished him with the Plaintiff's application for interlocutory injunctive relief in respect of the receivership. It must be recalled that, had the Court below *not* granted injunctive relief, the Plaintiff might well have found herself entirely deprived of the property, given the receiver's intention to sell same.

247. In this context and in support of the Defendants' position, Mr. Keenan averred inter alia that the Plaintiff's assertions of fraud in the proceedings were "*misconceived and ill founded*" (para. 19). The contrary is true.

248. Moreover, in the same affidavit sworn on 9 February 2021, Mr. Keenan averred inter alia that he "*witnessed the signature of both the Plaintiff and her husband, Richard Madigan*" on the mortgage, without, it has to be said, making clear that he had no specific recollection of the matter whatsoever and was relying entirely on his interpretation of documents from his file.

249. Given that Mr. Keenan was, at all material times, the Defendants' witness both in the Court below and before this Court, I am entitled to take it that, at all material times, the Defendants knew, or ought to have known, that Mr. Keenan's averments were not made on the basis of any recollection whatsoever.

250. In the manner touched on earlier in this judgment, the Plaintiff found herself in the wholly unsatisfactory position of having seeking injunctive relief to prevent the sale of a modest, but much loved, property closely connected to generations of her family by a receiver who insisted on the validity of a charge in a fraudulent instrument.

251. Not only that, her application for injunctive relief was met with averments, which the Defendants relied upon, which did not fully and accurately reflect matters at the time of swearing. I am referring, of course, to the averments made at paras. 5 and 6 of the 9 February 2021 affidavit, which have been discussed earlier in this judgment. In short, it was averred that "*on or about 22nd March 2004"* the family home declaration was prepared and was signed by the Plaintiff and her husband and sworn by Mr. John F. Walsh, whereas nothing whatsoever was sworn in front of Mr Walsh (as was known at all material times, by the deponent who swore the 9 February 2021 affidavit upon which the defendants relied). The outcome of these proceedings must include a mark of this court's displeasure with regard to the forgoing.

252. Similarly, the impression was created in the same affidavit that the mortgage deed was also prepared "*on or about 22nd March 2004"* and signed by the Plaintiff and her husband in Mr. Keenan's presence. It was not (as was known at all material times by the deponent). The reference to 22 March 2014 appears to have been made so that it would be consistent with the date on the Family Home Declaration (which was defectively witnessed and improperly sworn). Whilst the analysis of this affidavit was necessary when considering the entirety of Mr Keenan's evidence in the context of reaching finding of fact, the reliance by the Defendants on an affidavit of this nature is also relevant to this court's assessment of damages, which must reflect this court's displeasure at the defendants' reliance on the aforesaid averments.

253. It must also be said that whilst Mr Keenan rejected the findings of Mr. Madden, in the context of the Plaintiff's Law Society complaint against him, it has never been the case that either Mr. Keenan or the first or second named Defendants ever furnished any contrary view by a handwriting expert which disputed Mr. Madden's findings and expert views.

254. In addition to the Plaintiff's property being at risk of sale (despite the Defendants having been put 'squarely' on notice, from October 2019 at the latest, of evidence including uncontroverted independent expert evidence that the mortgage was a fraudulent instrument) even when an interlocutory injunction was granted to restrain the sale pending trial, the Defendants failed to comply with the 17 June 2022 order made by the learned Circuit Court judge with respect to maintenance and management of the property, which order provided: "*Maintenance and management of the property to be left to the Defendants, noting that it*

should be properly maintained and managed. Garden and curtilage to be maintained". That, too, needs to be recognised by way of an appropriate award.

Architect's report

255. In relation to the defendants'' failure to maintain the property, a report, dated 8 June 2023, by Mr. John Doolin, Dip. Arch., was admitted into evidence without formal proof. This report, prepared at the request of the Plaintiff, states the following:-

> "*I conducted a visual inspection of the property on the 19th May 2023 and I reviewed online the relevant planning applications, materials & documents pertaining to the property, which were available to me.*
>
> *The property is a single storey detached residential bungalow located on a flat, level, rectangular site on a local rural access road. The bungalow is situated set back from the front boundary and facing on to the public road and the property access driveway is through recessed double wood paddock gates to a rough finished tarmac driveway leading to the front of the bungalow & driveway private parking.*
>
> *The bungalow is a single storey construction and accommodation comprises 3 bedrooms, a living room, an open plan kitchen/dining room and a bathroom.*
>
> *The construction is precast pebbledash finished concrete slab walls with a gable end A – line pitched roof detail running from left to right and finished with concrete roof tiles. There is a single chimney on the RH front roof plane at ridge level and both gable triangular shaped end elements are finished with uPVC sheeting panels, fitted vertically. All the windows and external doors are dated, cast metal coated throughout, finished white.*
>
> *The property has a floor area of c. 68 sq. metres and is located on a Land Registry stated site of c. 0.15 hectares. The bungalow was constructed in 1970 and there are no extensions or renovations to the property which would have required planning permission, in my opinion. The property is service with a mains water connection and foul services are provided by an on–site wastewater treatment septic tanks.*
>
> *The property has been neglected and unmaintained for a considerable length of time and consequently requires immediate remedial repairs to facilitate occupation and to prevent any re-occurrence of weeds/roots ingress and to manage and avoid re–occurrence of the overgrown condition of the garden, driveway base plinth and parking areas and hedgerow boundaries. The following is a list of immediate works/repairs required to facilitate reoccupation of the property".* (emphasis added)

256. I pause here to say that the foregoing, in addition to the Plaintiff's sworn testimony, allows for a finding that the Defendants did not maintain the property as ordered by the Circuit Court. Such was the failure that, in her evidence, the Plaintiff confirmed that, since getting back possession of her property, she has had to do a great deal of work, as have family and friends, to try and restore it to its previous condition. This has involved working on the property nearly every weekend and has included getting in tradesmen to assist. The Plaintiff referred to, inter alia, on the garden; digging up weeds; cutting back what has become overgrown; clearing up the back patio; with painting still to be done. In addition to her labour and that of family and

friends, the Plaintiff has also had to pay others on a casual basis. In short, the Defendants' attitude and actions, from October 2019 onwards, not only deprived the Plaintiff of the use of her property, but resulted in a deterioration in the condition of the property and the consequential need for works to restore it to its prior condition. As to the list of immediate works needed, Mr. Doolin's June 2023 report goes on to state the following:-

"*Issues requiring immediate attention:*

- *All the property hedgerow/treelines requires extensive trimming.*
- *The front lawn requires rotavating and reseeding.*
- *The driveway and parking space in front of the house requires aggressive removal of invading weeds/grass and treatment of same.*
- *The base plinth of the bungalow requires removal of weeds, treatment to prevent re–occurrence of ingress and to prevent any new ingress of roots to subfloor/foundations.*
- *The damp staining at the base of the RH side gable end house front corner requires preventative repairs to avoid rainwater ingress.*
- *The gutters, all around, require cleaning and making good.*
- *The rear patio is completely overgrown with weeds and requires immediate clearing and treatment works.*
- *The entrance wood gates require some remedial works and repainting.*
- *The facias, soffits and all barge boards require cleaning.*
- *The uPVC sheeting on both gable ends requires cleaning.*
- *The barna garden wood shed is in very poor condition.*
- *The oil fired central heating boiler requires a full professional service before use recommences.*
- *The interior would benefit from a complete decorative upgrade treatment.*
- *The chimney requires sweeping/cleaning.*
- *The septic tank requires a service and clean out.*
- *There is a plaster movement crack, in the front double bedroom ceiling plaster slab which requires making good".*

257. In her evidence to the court, the Plaintiff handed in a number of photographs taken by her during the course of the receivership some weeks before the hearing in the Circuit Court. These photographs starkly contrasted with those taken by the Plaintiff in 2019 which showed, as she put it "*how it would have been kept".* The 29 photographs plainly show a very well-maintained property. Indeed, there was no evidence given by the Defendants which took issue with the Plaintiff's testimony that "*there was absolutely nothing done"* as regards maintenance. Nor was issue taken with the Plaintiff describing the property as "*week by week going to rack and ruin"*.

A second family home

258. The Plaintiff also gave uncontested evidence with respect to her use of the property, in particular, that as a consequence of the Defendants' actions, she was unable to use the property from 2019 onwards. This included the entire "*Covid–19"* period.

259. In the context of giving uncontested evidence with regard to the strain her husband's financial difficulties put on their marriage, the Plaintiff's testimony included to say: "*That was where I really did miss having the house to have as an escape to go down to for a weekend or two".*

260. As the Plaintiff made clear, there was never any question of her renting out the property. Thus, her damages claim does not include any element of lost rent. Rather, her damages claim is for the loss of use of what is a modest, but cherished, family property which, in light of the facts which emerge from the evidence before the court, can fairly be described as a second family home, insofar as the Plaintiff is concerned. In other words, it was never a commercial property, but it was regularly used and its availability was of huge benefit to the Plaintiff and her family.

The relevant period

261. In the manner examined in this judgment, as of October 2019 the Defendants were on notice of Mr Madden's uncontroverted expert view that the signature on the mortgage was not the Plaintiffs Furthermore, the Plaintiff's uncontroverted evidence is that it was not until the end of May 2023 that she got back possession of her property. Thus, the relevant period, insofar as the calculation of damages is concerned, seems to me to be as follows:-

- 2019 – November, December (2 months);
- 2020 – (12 months);
- 2021 - (12 months;
- 2022 - (12 months);
- 2023, January to May (5 months);
- Total: 43 months (3 years 7 months).

262. The evidence establishes that this was a property used periodically throughout the year, as well as regularly during the summer months. The evidence also establishes that the Plaintiff's inability to use the property was felt acutely and that actual loss was occasioned arising out of the Defendants' failure to properly maintain the property during the lengthy period when the Plaintiff was in effect denied access to her own property.

263. For the reasons set out in this judgment, this Court must mark its disapproval of the conduct of the Defendants. At all material times, from at least October 2019, they were in receipt of expert evidence that the respondent was not the author of the signature on the mortgage. This was also averred to by the Plaintiff. By contrast, the Defendants never proffered any contrary view by a handwriting expert, moreover they relied on averments by a solicitor who had no

recollection whatsoever of seeing the Plaintiff sign anything. In addition, the Defendants relied on the 9 February 2021 affidavit which included paras. 5 and 6, discussed earlier in this judgment.

Exemplary damages

264. Among the submissions made on behalf of the plaintiff is that persisting with the receivership, despite having received the expert views of Mr Madden, which the defendants never refuted, constituted an aggravating factor. The plaintiff submits that in addition to damages, this court should award aggravated/exemplary damages [paras. 12-19; and paras. 1 and 8 of the plaintiff's written submissions]. As well as submitting that the plaintiff has failed to discharge the onus of proof, the defendants' submit, inter alia, that, even if this court finds the instrument to be fraudulent, no damages whatsoever should be awarded because *"no actual damage has arisen by reason of the registration of the mortgage*" [see p. 17, para. iv of the defendants' written submissions]. For the reasons set out in this judgment, I disagree.

265. This Court's jurisdiction to make an award of exemplary damages is not in doubt (see, for example, *Hade v. Bank of Ireland* [2022] IEHC 645; and *Donlon v. Burns* [2022] IECA 159). In *Hade,* this Court (Barr J.) awarded damages of €150,000 for each of three properties sold by a receiver who had been wrongfully appointed. Furthermore, the Court awarded €50,000 in respect of exemplary damages concerning unsold properties. *Hade* was plainly a case which involved a great number of properties. This is clear from para. 27 of the learned judge's decision, where he found it necessary to set out a list of the various properties; details of the relevant mortgages; details of the relevant affidavit by the receiver; and the date of sale of the relevant property (or details where the sale remained "on hold"). That schedule, at para. 27 of the judgment, refers to 7 properties being "on hold". The Court of Appeal in *Donlon* awarded €30,000 in damages for the wrongful interference with the appellant's exclusive possession of agricultural land following a receivership which lasted six years.

266. Whilst the foregoing decisions, to which the Plaintiff draws this Court's attention, are certainly useful in terms of principle, neither would appear to offer specific guidance in terms of quantum. Trespass is, however, actionable *per se.*

267. Guided by the authorities, considering all of the evidence including (i) the duration the Plaintiff was deprived of her property; (ii) the damage occasioned by the Defendants' failure to maintain it; (iii) the significance of the property to the Plaintiff *qua* second family home, (iv) and the loss of access to that property including as a refuge, in particular during the Covid – 19 pandemic, I am satisfied that the Plaintiff is entitled to damages, including exemplary damages, in the sum of €53,000, which can be 'broken down' as follows.

268. Whilst I have taken account of the reality that the property would be far more heavily used in the summer months than at other times, I have calculated damages in the sum of €12,000 per annum, averaged out to €1,000 per month. This represents the sum of €43,000 in respect of

the 43-month period in question. To this I have added the sum of €10,000 with respect to exemplary damages.

269. Whilst slander of title was pleaded, little or no time was devoted to that issue during the hearing. Even in the written submissions furnished by the respective parties, it barely featured i.e., it comprised of just 3 paragraphs in each side's written submissions (which ran to 14 pages insofar as the Plaintiff is concerned, and 17 pages for the Defendants). Given the manner in which the case was run, i.e., the central issue being whether the mortgage was valid or not and having regard to the findings outlined in this judgment, it did not seem necessary to make any decision in respect of the slander of title plea, which, as I say, hardly featured in the case.

270. Whilst the award in favour of the Plaintiff, therefore, does not include any damages for slander of title, I want to emphasise that the issue did not contribute to the length of the trial before me and this Court's approach to the plea is certainly not a factor which would merit departure from the 'normal rule' with respect to the question of costs.

271. The parties are invited to submit an agreed draft order reflecting the finding in this Judgment, within 14 days of the start of Hilary Term, 2024. In the event of disagreement on any issue, including costs, short written submissions should be furnished by the same deadline (5pm on 25th January 2024).