THE COURT OF APPEAL

CIVIL

Court of Appeal Record Number: 2023/32 & 2023/45

High Court Record Number: 2014/1416S
Neutral Citation Number [2023] IECA 293

Costello J.
Noonan J.
Butler J.

BETWEEN/

BANK OF IRELAND MORTGAGE BANK U.C.

PLAINTIFF/
RESPONDENT

- AND –

NIALL HADE AND JOYCE HADE

DEFENDANTS/
APPELLANTS

- AND -

Court of Appeal Record Number: 2023/31 & 2023/46

High Court Record Number: 2014/4328P

BETWEEN/

NIALL HADE

PLAINTIFF/
RESPONDENT

- AND –

BANK OF IRELAND MORTGAGE BANK UC AND MICHAEL McATEER

DEFENDANTS/
APPELLANTS

JUDGMENT of Ms. Justice Costello delivered on the 7th day of December 2023

Introduction

1. On 21 December 2022 in proceedings entitled Bank of Ireland Mortgage Bank UC v. Niall Hade and Joyce Hade, Record No. 2014/1416S ("*the summary proceedings*") the High Court (Barr J.) granted judgment against the defendants (*"the Hades"* or *"Mr. Hade"* or *"Mrs. Hade"* as appropriate) jointly and severally in the sum of €2,026,640.09 and awarded judgment against Mr. Hade in the sum of €1,412,210.09. He dismissed the Hades' counterclaim against the plaintiff (*"the bank"*) and made no order as to costs on the claim or the counterclaim. The Hades appealed in respect of the dismissal of their counterclaim and the judgment sums entered against them and the bank appealed against the order for costs.

2. The summary proceedings were heard together with plenary proceedings entitled Niall Hade v. Bank of Ireland Mortgage Bank U.C. & Michael McAteer, Record No. 2014/4328P ("*the plenary proceedings*"). The High Court rejected Mr. Hade's claim against the bank. The trial judge held that the second named defendant, (*"the Receiver"*) had acted unlawfully in repossessing and then selling certain properties. He held that it was appropriate to award exemplary damages against the Receiver to mark the court's displeasure at his behaviour in the sum of €550,000. He granted Mr. Hade a declaration that the Receiver was not entitled to possession of two properties without an order of the Circuit Court whilst placing a stay on the declaration for six months to enable the Receiver to bring the necessary application before the Circuit Court. He made no order as to costs in respect of the plenary proceedings. The Receiver appealed against the award of exemplary damages and the refusal to award him any costs in respect of the action. The bank appealed the order for costs in circumstances where Mr. Hade's action against the bank

was dismissed and Mr. Hade appealed against the refusal of his claims against the bank and the Receiver.

3. The various appeals and cross appeals were heard together and, as in the High Court, will be dealt with in one judgment.

Background

4. The disputes have their origin in two loan agreements entered into in 2006 and 2007. By letter dated 6 June 2006 the bank offered Mr. Hade a loan of €2,700,000 for a period of 25 years. The first 60 instalments were to be interest only. Thereafter the repayments were of capital and interest. The loan was described as a repayment loan. The loan was to be secured over 8 properties: 4 and 5, Taobh Na Coille, Firhouse; 24, Kingswood[1], Tallaght; 107, Jervis Place, Dublin 1, 92, Moy House, IFSC, 72 and 72A, Virginia Heights, Tallaght and 51D, Belgard Square, Tallaght. Clause 4(b) of the General and Special Conditions provided that in the event of any repayment not being paid on the due dates that the bank may demand an early repayment of the loan. The letter stated that it was *"regulated by the Consumer Credit Act 1995"* and included Consumer Credit Act Notices and a statement that the payment rates *"on this housing loan"* may be adjusted by the lender from time to time. Mr. Hade accepted the offer on 9 June 2006.

5. On 22 June 2006 the bank issued a second letter to Mr. and Mrs. Hade in identical terms save that the addresses of three of the properties to be mortgaged were amended to read 752 and 752A, Virginia Heights and 51E, Belgard Square, Tallaght. Mrs Hade was added as a coborrower because she was a co-owner of some of the properties. The letter of offer was accepted by the Hades on 26 June 2006. Thus, the first offer to Mr. Hade was replaced by an offer to Mr. and Mrs. Hade jointly. The loan was drawn down in August 2006. The second loan offer was made on 7 September 2007 and was also described as a

[1] As will appear later in this judgment, this is an error and the property referred to is 29 Kingswood Heights.

mortgage loan offer. This was to Mr. Hade alone and offered him the sum of €1,237,000 to be repaid over 25 years. The first 60 instalments were interest only repayments and the remaining 240 instalments were capital and interest repayments. The property to be mortgaged comprised four units at 24, St. Maelruns Park, Old Bawn in Tallaght. The letter of offer included the same Clause 4(b) quoted above and also stated that the offer letter is regulated by the Consumer Credit Act, 1995 and included the identical Consumer Credit Act notices. The letter of offer was accepted by Mr. Hade on 11 September 2007 and the monies were duly advanced thereafter.

6. The purpose of the 2006 loan was stated to be to enable the Hades to refinance certain borrowings on their family home and a number of other properties and to purchase some additional properties. The purpose of the 2007 loan was to purchase four properties in the name of Mr. Hade.

7. The bank's internal documents referred to the purpose of the 2006 loan as including the purchase of investment properties. In an internal bank memorandum described as a Business Link Credit Application – Commercial/Mid-corporate Mr. Hade's main activities as described as *"Property Investment and Refugee Accommodation".*

8. As a condition of the 2006 loan the Hades were required to mortgage the properties set out in the letter of 22 June 2006 in favour of the bank. On 8 June 2006 Mr. and Mrs. Hade executed a mortgage and charge in favour of the bank in respect of 752A, Virginia Heights and 752, Virginia Heights. On 24 August 2006 the Hades executed a mortgage and charge in favour of the bank over Apartment 51E, Belgard Square, Tallaght. For reasons which are not explained in the judgment, the Hades did not execute mortgages over 4 and 5, Taobh na Coille; 29 Kingswood Heights; 107, Jervis Place or 92, Moy House as they had agreed when they accepted the 2006 loan until December 2009.

9. As required by the 2007 loan, on 30 October 2007 Mr. Hade executed a mortgage and charge in favour of the bank in respect of the premises formerly known as 24 St. Maelruns Park and now known as 24, 24A, 24B and 24C, St. Maelruns Park.

10. On 17 December 2009 the Hades remedied their default and executed documents described as housing loan mortgages in favour of the bank in respect of 92, Moy House; 4 and 5, Taobh Na Coille. On the same day Mr. Hade executed a document in identical terms in favour of the bank in respect of Apartment 107, Jervis Place and 29, Kingswood Heights, Tallaght. The terms of these charges will be considered below.

11. The Hades and Mr. Hade fell into arrears in respect of their repayments on both the 2006 and the 2007 loans before the interest only repayment period had elapsed. The bank statements for the 2006 account shows arrears in excess of €40,000 had accrued in late 2008 and that the account was in arrears from September 2008, though the arrears were significantly reduced in 2010 when they were brought below €5,000. By June 2010 they started to increase and on 4 August 2011 they stood at €13,647.77. Mr. Hade's sole account went into arrears also and by 2008 they stood at just under €15,000. As of 30 June 2011 they amounted to €33,801.80.

12. There were various contacts between the parties seeking to address the arrears situation but by August 2011 there were significant arrears owing on both accounts and this had been the case for a number of years. As the trial judge held, this coincided with the end of the interest only period on the 2006 account.

13. The bank decided to call in the two loans and letters of demand were sent to the Hades in respect of each of the accounts on 1 September 2011 demanding immediate repayment of principal and interest due in respect of each account. The letter in respect of the 2006 account was addressed to Mr. and Mrs. Hade. It called for immediate payment of the principal and interest due on the account in the sum of €2,727,165.09. The letter

referred to Clause 4(b) of the General Conditions of the Letter of Offer and stated that it constituted a demand under Clause 4(b). The Hades were informed that:

> *"In the event that you fail to pay the amount demanded in accordance with this letter within the next 10 days, the Bank will proceed to enforce its security including by way of exercising its powers to sell the properties as specified above and to take any other legal action against you, as the Bank deems to be expedient."*

14. A letter of demand also dated 1 September 2011 in similar terms was sent to Mr. Hade in respect of the 2007 account calling for the immediate payment of the sum of €1,285,466.47 and referring to Clause 4(b) and giving notice that the bank would proceed to enforce its security.

15. The Hades were unable to repay the sums claimed by the bank and the bank proceeded to appoint Mr. McAteer as Receiver over all twelve properties which had been provided as security for the loans. He was appointed as Receiver over the properties on diverse dates between 17 November 2011 and 22 February 2013.

16. The Receiver experienced difficulties with this receivership. While some tenants delivered up possession voluntarily, in other instances he was required to go through the PTRB procedure to obtain orders enabling him to repossess the premises. Sometimes the Hades sought to collect the rent directly from tenants or purported to create tenancies over properties in respect of which he had been appointed receiver. He asserted that they changed the locks on some of the properties. At one point, Mr. Hade purported to transfer title to some of the properties into the so-called Rodolphus Allen Family Trust in an effort to defeat or interfere with the ongoing receivership and it purported to enter into a lease with tenants in respect of some of the properties. Ultimately, he obtained possession of all twelve secured properties. Those which the Receiver repossessed which were charged in 2009 are referred to as the Repossessed Properties in this judgment for convenience as the

Hades advanced arguments in relation to these properties which did not apply to the properties charged prior to 1 December 2009.

17. Matters came to a head in 2014. The bank issued further letters of demand which were not met. On 29 May 2014 the bank issued a summary summons while on the 9 May 2014 Mr. Hade issued his plenary summons against the bank and the Receiver seeking *"(i) Damages, (ii) Injunctive relief, (iii) Such Further or other relif [sic] as the Court deems meet, (iv) Costs, Breach of Contract"*. In addition, the Receiver issued plenary proceedings against the Hades sometime prior to 28 July 2014. The Receiver issued a notice of motion on 28 July 2014 seeking an injunction restraining the Hades from interfering with the conduct of the receivership. On 10 September 2014 the High Court restrained the Hades, their servants or agents and all persons having notice of the making of the order pending the final determination of the proceedings:

> *"1. From attempting to carry on manage or otherwise interfere with the exercise by the plaintiff of his function as Receiver over each of the properties the subject matter of the within proceedings described in the schedule hereto or any portion thereof.*
>
> *2. From taking possession of getting in and collecting the rents and the licence fees associated with each property and marketing each property for sale.*
>
> *3. From registering a lis pendens against any of the properties."*

18. The properties listed in the schedule are those which were offered as security to the bank in the loan agreements of 2006 and 2007 save for No. 5, Taobh Na Coille and 752, Virginia Heights, which were not referred to in the schedule to the order of the High Court, as they had previously been sold by the Receiver.

19. Ultimately the summary proceedings were remitted to plenary hearing and on 19 May 2017 the High Court (Faherty J.) made an order directing that the summary proceedings and the plenary proceedings be heard together.

20. Meanwhile the receiver proceeded to sell five of the properties which had been provided as security for the loans. As two of these had been secured by mortgages executed in 2006 before the commencement of the Land and Conveyancing Law Reform Act 2009 ("*the Act of 2009*") no issue arose as to the entitlement of the Receiver to sell these properties. However, the Hades raised an issue in the case as to the entitlement of the Receiver to take possession of and to sell the Repossessed Properties without obtaining an order from the Court. The Receiver sold three of the Repossessed Properties in 2014 without obtaining a court order for sale. He sold 5 Taobh Na Coille for €220,000 on 5 March 2014 and title was transferred on 24 March 2014. He sold 92 Moy House on 30 May 2014 for €335,000 and closed the sale on 13 June 2014. 107 Jervis Place was sold for the sum of €180,000 at a date which was not clarified but the transfer occurred on 13 November 2014. On the bank's instructions, the Receiver placed 4 Taobh Na Coille and 24, 24A, 24B, and 24C St. Maelruns *"on hold"*. In respect of 29 Kingswood Heights the Receiver and the bank issued a Civil Bill on 21 April 2016 seeking an order for sale in respect of the property under s.100(3) of the Act of 2009 as the property *"is subject to a housing loan mortgage created on or after 1 December 2009"*. The Circuit Court declined to deal with the application until the issues in these two proceedings were resolved and therefore the sale of 29 Kingswood Heights remains on hold also.

The decision of the High Court

21. Barr J. identified the issues in the two proceedings and noted that it was agreed at the hearing that, given the overlap between the counterclaim that was put forward by the Hades to the summary proceedings and the issues that arose for determination in the

plenary proceedings brought by Mr. Hade against the bank and the Receiver, that the evidence given in the summary proceedings and the evidence giving in the plenary proceedings would apply *mutatis mutandis* to the issues that arose for determination in each action. He noted that the bank sought joint and several judgment against the Hades in the sum of €2,026,640.09 together with continuing interest thereon from 28 September 2022 until the date of judgment and judgment against Mr. Hade alone in the sum €1,412,210.09 on foot of the 2007 loan together with the continuing interest from 28 September 2022 until date of judgment. He summarised the grounds of defence and counterclaims raised by the Hades in para. 25 of his judgment as follows:

"25. ...

(1) The defendants maintain that they had an agreement with the bank through Mr. Naughton that the interest only period on the [2006 loan] would extend beyond the initial five year period; meaning that the bank was not entitled to call in the loan in September 2011.

(2) The defendants acted as consumers when taking out the loans in 2006 and 2007.

(3) The five mortgages created after 1st December, 2009 were housing loan mortgages in respect of housing loans, within the meaning of the 2009 Act. As the receiver had not obtained either an order for possession or an order for sale in respect of those of the properties sold by him, which were covered by mortgages created after 1st December, 2009, he had acted unlawfully in taking possession of the properties and in selling three of them.

(4) The five mortgages executed on 17th December, 2009, were executed under duress and are therefore unenforceable at law.

(5) The bank was not entitled to appoint a receiver over the properties.

(6) The receiver acted negligently and in breach of duty in selling five of the properties at a gross undervalue.

(7) The receiver acted negligently and in breach of duty in his management of the remaining properties, by allowing them to become vacant and in some cases to become derelict, when he ought to have rented them out, pending conclusion of the present actions; as a result of which negligence and mismanagement of the properties, the defendants have suffered loss and damage.

(8) Some of the mortgages created were invalid because a consent form was not signed by the second defendant, as spouse of the first defendant, in respect of two of the properties in respect of which mortgages were executed on 17th December, 2009.

(9) The letters of demand were deficient as they did not state the amount of arrears owing on each account at the date of the said letters.

(10) Irrespective of the agreement with Mr. Naughton, the interest only period on the [2006 loan] had not expired at the date alleged by the bank, being 30th August, 2011; the bank had applied capital and interest one month early, so as to contrive a default on the repayment of the loan by the defendants, thereby entitling the bank to call in the loan.

(11) A notice was placed on the door of one of the properties, which the bank was not entitled to serve on the defendants in that manner and as a result of which, the defendants' reputations were diminished in the area."

22. During the course of the hearing the Hades abandoned Issue No. 8. The trial judge did not refer to any motion issued by the Hades as a matter which he was required to resolve and he made no reference to the sale of the parking space associated with 752/752A Virginia Heights, two matters which were raised by Mr Hade in his appeals.

23. From paras. 28-46 Barr J. set out the evidence in relation to the first ground of defence, the contention that Mr. Hade reached an agreement with Mr. Naughton on behalf of the bank for an extension of the interest only period on the 2006 account. In paras. 47-72 the trial judge set out his conclusions on the issue. He explained why he preferred the evidence of Mr. Naughton, an employee of Bank of Ireland with whom Mr. Hade also had dealings, to that of Mr. Hade. He was impressed by the evidence given by Mr. Naughton which was given *"in a clear and straightforward manner"*. Mr. Naughton's evidence that he never reached any such agreement as alleged by Mr. Hade was entirely consistent with the documentary evidence from the period. The documentation supported Mr. Naughton's contention that at all times he was acting as a liaison person between the mortgage section of the bank and Mr. Hade in relation to Mr. Hade's mortgage debt with the bank and that he did not have authority to bind the bank. Barr J. referred to the content of a variety of documents. It was clear from the terms of a letter of 3 February 2011 that there was no agreement in relation to the extension of the interest only period at that point in time. He then referred to a letter sent by the bank dated 26 July 2011 expressly advising the Hades that the interest only period on the 2006 loan would shortly expire and that as and from 25 August 2011 it would be necessary for them to make repayments in respect of both capital and interest. Mr. Hade replied by letter dated 8 August 2011 stating that *"The current level of interest only would have to be extended in order for me to continue to service the debt. Is there any paperwork for me to fill in, if so could you post it to me."*.

24. The trial judge concluded that it was clear from this letter that as of 8 August 2011 no agreement had been reached between Mr. Hade and Mr. Naughton in relation to an extension of the interest only period. He held that this ran counter to the evidence given by Mr. Hade that he had concluded such an oral agreement with Mr. Naughton in the spring/summer of 2011. The trial judge considered the further correspondence between the

parties from 10 August 2011 up to 7 September 2011 *"when the issue of moving to capital and interest repayments was sharply in focus and when the bank was alleging that he had defaulted in making the repayments due, [Mr. Hade]did not explicitly allege that he had an agreement with Mr. Naughton on behalf of the bank that the interest only period would continue."*

25. The trial judge analysed the correspondence upon which Mr. Hade relied, two letters from Mr. Hade to Mr. Naughton, dated 2 December 2011 and 7 March 2012, and he rejected the contention that these supported the allegation that an agreement had been reached with Mr. Naughton that the interest only period would be continued. The court considered the oral evidence of Mr. Hade and noted that he *"shifted his evidence a number of times in relation to a number of aspects of the alleged oral agreement"*.

26. The trial judge concluded *"His evidence on this aspect was not clear or persuasive"* and for these reasons the court found as a fact that there was no concluded oral agreement between Mr. Naughton and Mr. Hade to the effect that the interest only repayment period on the 2006 account would continue beyond the expiry of the initially agreed five-year period.

27. The trial judge then considered whether the Hades acted as consumers when taking out the two loans. He noted that Mr. Hade owned two plant hire companies which he operated from approximately 1985 to 1999. Between 1999 and 2016 he operated a hostel under contract for the Government, initially for asylum seekers and subsequently as a hostel catering for homeless people. The trial judge noted that Mr. and Mrs. Hade are husband and wife and that they have five children, two of whom are profoundly disabled. He accepted that these two children will never be in a position to earn a living in the workplace. It had been the intention of the Hades that the purchase and renting of these properties would provide for them in their retirement and also for their children, and in

particular, their two disabled children. Mr. Hade hoped that if the value of the properties increased it might be possible to sell part of the portfolio to generate enough profits to enable Mr. and Mrs. Hade to clear the mortgage on their family home and to provide for the purchase of two properties to be used by their two disabled children. In the interim, the intention was that the rental income generated by the properties would be sufficient to cover the mortgage repayments on the properties, both during the initial five year interest only period and the capital and interest repayments, when they began. The trial judge noted that the Hades submitted that, as their object in taking out the loans and purchasing the properties had been to provide for the long-term future of themselves and their children, they had acted as consumers, rather than engaged in an activity as part of any trade, business or profession. Accordingly, they submitted that they were consumers for the purposes of the contracts of loan.

28. The trial judge commenced his consideration of this argument by examining the meaning of *"consumer"* under the Consumer Credit Act, 1995. The term was defined by the CJEU in *Benincasa v. Dental Kit* [Case C-269/95] as follows:

> *"15. As far as the concept of 'consumer' is concerned, the first paragraph of Article 13 of the Convention defines a 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities (Shearson Lehman Hutton, paragraphs 20 and 22).*
>
> *16. It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having*

regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. As the Advocate General rightly observed in point 38 of his Opinion, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.

17. Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character." (My emphasis).

29. The trial judge referred to the decision of Kelly J. (as he then was) in *AIB plc v. Higgins & Ors.* [2010] IEHC 219 where he held that there was nothing in the Consumer Credit Act, 1995 to suggest that the legislature here sought to go further than the Directive, *"still less to confine the interpretation of the term 'business' in the definition of 'consumer' to a single business activity".*

30. Barr J. cited the decision of *Gruber v. Bay Wa AG* [Case C-464/01] where the CJEU held that a contract could only be regarded as being a consumer contract, if the contract was only intended to meet the business needs of the person to a negligible extent and was primarily concerned with his private needs. Barr J. cited para. 47 of the decision as follows:

"In the light of the evidence which has thus been submitted to it, it is therefore for the court seised to decide whether the contract was intended, to a non-negligible

extent, to meet the needs of the trade or profession of the person concerned or whether, on the contrary, the business use was merely negligible. For that purpose, the national court should take into consideration not only the content, nature and purpose of the contract, but also the objective circumstances in which it was concluded."

31. The trial judge also noted the decision of the CJEU in *Milivojevic v. Raiffeisen Bank* (C-630/17) where the court held that where a contract was concluded for a dual purpose, a person could only rely on the consumer protection provisions in the regulation if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and therefore had only a negligible role in the context of the transaction.

32. The trial judge set out the arguments of the Hades based on the decisions in *Ulster Bank v. Healy* [2014] IEHC 96 and *Stapleford Finance Limited v. Lavelle* [2016] IEHC 385. Each of these judgments related to applications to enter summary judgment which were resisted by the defendants concerned on the basis that they had raised an arguable defence that they had acted as a consumer in relation to the relevant transaction. As such, they did not determine that the defendants in those cases were acting as consumers, merely that they had raised an arguable case that they did.

33. Barr J. was satisfied that the Hades did not act as consumers in relation to the loans of 2006 or 2007. He held:

"96. It is common case that [Mrs. Hade] had participated in the loan taken out in 2006, because this was a venture being undertaken by her husband. She left all relevant negotiations and decisions to him. She was only included in the loan because it transpired that some of the properties that were being given as security for the loan, were held in their joint names. Accordingly, the determining factor that has to be looked at, is the position of [Mr. Hade] in relation to both loans.

97. I am satisfied that [Mr. Hade], in taking out the loans to purchase or refinance his existing loans in respect of this large portfolio of twelve properties, was engaged in a business activity. The fact that he may have had another business activity at that time, namely running the hostel in Tallaght, does not mean that any other activity carried out by him, had to be done as a consumer. The case law makes it clear that a person can carry on more than one business or trade activity at the same time.

98. The court is satisfied that this was a business activity and was not merely an investment opportunity similar to that in the Lavelle case…. It is important to note that in that decision Baker J. did not hold that the defendant was a consumer within the meaning of that term at law, but rather, that he had an arguable case that he had acted as a consumer, and allowed the matter to go to plenary hearing.

99. The circumstances of the present case are quite different to those that pertained in the Lavelle case. In the present case, [Mr. Hade] had actively purchased the twelve properties. He also actively managed the properties by renting them out. It was he who was responsible for taking in the rents from the tenants. He also looked after all the necessary outgoings in relation to the management and maintenance of the properties. In these circumstances, the court finds that he was engaged in a business activity of acquiring and renting a portfolio of properties.

…

101. In the present case, [Mr. Hade] has argued that because he had the ultimate intention of earning enough profit from the management and sale of his property portfolio to eventually buy out the debt owing on his family home and also to

purchase two properties for the use of his children, does not mean that the acquisition of those properties, was not a commercial transaction. The fact that he may have had some ultimate goal, which might have been achieved many years later, if the property market continued to increase in the way that he expected, did not mean that he acted as a consumer in entering into the loans to purchase, or refinance the purchase, of the twelve properties.

…

104. The court is satisfied that in putting together this portfolio of properties, [the Hades] were engaged in a business enterprise, which they hoped would be profitable and would ultimately enable them to buy out any loan outstanding on their family home and provide properties for their two disabled children. That was a perfectly legitimate aim to have. However, it does not deprive the activity of its character as being a business, or trade carried on by the [Hades] for that purpose. Accordingly, I find as a fact that the [Hades] did not act as consumers when taking out the loans in 2006 or 2007."

34. Thus, he rejected the argument that the Hades were consumers within the meaning of the 1995 Act when they entered into the loans at issue in these cases.

35. The trial judge next considered whether the loans were *"housing loans"*. He concluded that the loans did not come within the definition of a housing loan as set out in Part 12 of Schedule 3 of the Central Bank and Financial Services Authority of Ireland Act 2004 because the loans of 2006 and 2007 were to either purchase or refinance the purchase of the properties that were not bought as the principal residence of the Hades or their dependants. Furthermore, the were not acting as consumers in taking out the loans and accordingly they did not come within the statutory definition.

36. He then considered the documents prepared by the bank and accepted by the Hades. At para. 119 he concluded that, having regard to the provisions of the documents which created the mortgages on 17 December 2009 and the general conditions of the 2006 loan, that *"there was an agreement between the bank and [the Hades], that the properties, which were covered by the mortgages created on that date, would be treated as housing loans and housing loan mortgages, even though they did not strictly come within the qualifying criteria set out in the 2009 Act."*

37. In light of that finding, he looked at the provisions of Chapter 3 of the Act of 2009 which deals with the obligations, powers and rights of a mortgagee. I shall consider the details later in this judgment. He also considered the fact that in respect of 29 Kingswood House the Receiver and the bank regarded the mortgage as being a *"housing loan"* within the meaning of the Act of 2009 and in 2016 they applied to the Circuit Court for an order for sale, but that they did not adopt this approach in relation to any of the other four properties the subject of mortgages executed on 17 December 2009. He rejected the explanation advanced by counsel that this had been "*a belt and braces*" approach on the part of the bank on the basis that no witness on behalf of either the bank or the Receiver gave such evidence. He concluded as follows:

> *"137. The court is satisfied that having regard to the terms of the mortgage deed and the documents incorporated therewith, the bank had agreed that the mortgages executed on 17th December, 2009 would be treated as housing loan mortgages. As such, the defendants were entitled to the protections afforded by the 2009 Act in respect of housing loans. This meant that orders for possession of the mortgaged properties ought to have been obtained pursuant to s.97 of the 2009 Act and orders for sale should have been obtained prior to the sale of any of the properties pursuant to s.100 of the 2009 Act. No explanation has been forthcoming from the bank, or the*

receiver, as to why it sought an order for sale in respect of one of the properties, being number 29 Kingswood Heights, when it did not seek such an order in respect of the other properties sold by the receiver, which were covered by identical mortgages created on 17th December, 2009.

138. The court holds that in taking possession of the properties which were subject to the mortgages created on 17th December, 2009, without an order for possession and in selling three of those properties without an order for sale, the receiver acted without lawful authority."

38. He then addressed the consequences of the Receiver's unlawful actions. In anticipation of findings made later in his judgment, he held that the Receiver did not sell the Sold Properties at an under value nor did he mismanage any of the properties over which he had been appointed. He was also satisfied that the Hades had not suffered any direct financial loss arising from the Receiver's possession of the Repossessed Properties or his sale of the Sold Properties in the course of the receivership.

39. He then proceeded to consider whether he could and/or should award exemplary damages in the circumstances to mark the court's condemnation of the Receiver's unlawful actions. He noted that they had not been specifically pleaded by the Hades in either their counterclaim or in the plenary proceedings and that this, potentially, gave rise to a difficulty. He held it was not necessary to decide the issue as:

"142. …in his pleadings, [Mr. Hade] claimed damages in the sum of €4m in respect of what he perceived were the wrongful actions on the part of the Receiver. The court is satisfied that [Mr. Hade]must be given some latitude in relation to the manner in which his claim was pleaded; the court is satisfied that while the term "exemplary damages" was not specifically used, it was obvious to the plaintiff from the nature of

the claim made by [Mr. Hade] in his pleadings, that he was including a de facto claim to exemplary damages for the alleged wrongful actions of the Receiver."

40. Having reached this conclusion, the trial judge examined two recent cases where exemplary damages were awarded in cases where a receiver had been wrongfully appointed and wrongfully taken possession of a mortgagor's property. In *Harrington v. Gulland Property Finance Limited (No. 2)* [2018] IEHC 445, Baker J. held that the defendant had wrongfully called in the loans and had wrongfully appointed a receiver who had taken possession of the mortgagor's lands. Despite the fact that the receiver in that case had been in possession of the lands for a period of approximately five weeks before the mortgagor obtained an interim injunction restraining the continuation of the receivership, Baker J. was satisfied that it was an appropriate case in which to award exemplary damages to mark the court's disapproval of the fact that the plaintiffs were wrongfully kept out of possession of their property for those five weeks. She awarded each of the plaintiffs the sum of €20,000.

41. Barr J. referred to the decision of the Court of Appeal in *Donlon v. Burns* [2022] IECA 159 where this Court reaffirmed that a receiver who had been invalidly appointed and had wrongfully taken possession of the land was a trespasser. In *Donlon's* case this continued for a period of almost six years and the court awarded the plaintiff exemplary damages of €30,000 against the three respondents, one of whom was the Receiver in these proceedings.

42. At para. 146 the trial judge held as follows:

"The purpose of an award of exemplary damages is to mark the court's disapproval of the conduct of the party who commits the wrongful act. The court is satisfied that it is appropriate to make such an award of damages in this case in respect of the wrongful action of the receiver in taking possession of the five properties, which

were the subject of the mortgages executed on 17th December, 2009, without first obtaining an order of the Circuit Court and for selling three of those properties, without obtaining an order for sale from the Circuit Court."

43. The High Court awarded Mr. Hade exemplary damages of €50,000 in respect of each of the two Repossessed Properties which were not sold and €150,000 in respect of each of the three Sold Properties, making a total award of €550,000.

44. The trial judge next examined the argument that the Hades acted under duress when executing the mortgages on 17 December 2009 and he concluded that any pressure experienced by Mr. Hade was as a result of the gravity of the situation he found himself in rather than any economic duress on the part of the bank and he accordingly found that the mortgages were not executed under duress in the legal sense of the term.

45. Next he addressed the Hades' arguments that the letters of demand were invalid. The Hades argued that the letters were invalid on two grounds. Firstly, it was alleged that the bank had deliberately applied the capital repayment obligation a month early so as to contrive a default on the part of the Hades, thereby giving the bank a purported right to issue a letter of demand calling in the entire loans. Alternatively, they argued that the letters of demand issued on 1 September 2011 were defective because they did not specify what arrears had occurred at the time nor the amount of interest that had been paid since the inception of the loan. The trial judge was satisfied that there was no substance to either of these arguments. He held at para. 159:

"…The initial interest only period was stated to have been five years, which was to comprise sixty monthly instalments. The court is satisfied that the first of those instalments arose in August 2006, meaning that the repayments would revert to capital and interest in respect of the payment that was due in August 2011. This is

evident from the statements of account that were proved in evidence by Mr. Downes."

46. The court continued that even if it was in error in that regard, the Hades were still in arrears in respect of the interest only payments at the time the letters of demand were issued and so the bank was entitled to issue the letters of demand regardless of the question of whether or not the requirement to repay capital had arisen.

47. He rejected the argument that the letters of demand were defective because they failed to specify the arrears which had arisen as of the date of the letter or the amount of interest that had been paid up to that time. This was not a requirement of a valid demand and no term in the loan documentation or mortgage deeds made it so. He held that the essential object of a letter of demand is that it makes an unequivocal demand for payment of the loan under the terms of the loan agreement and that this was done in this case.

48. The court turned to the question whether the bank had power to appoint a receiver over any of the properties on the basis, it was said, that there had been no enforcement event. The court rejected the argument in relation to the mortgages created prior to 1 December 2009 on the basis that Mr. Hade did not adduce any evidence or argument as to why the bank did not have power to appoint a receiver in respect of the mortgages executed prior to that date. In relation to the mortgages created after 1 December 2009, the court was satisfied that:

"164. …having regard to the provisions of s.108(1)(b) of the 2009 Act, the bank did have the power to appoint a receiver over the five properties covered by the mortgages executed on 17th December, 2009, due to the fact that there were instalments of interest and/or capital and interest, that had been unpaid for in excess of two months prior to the date that the receiver was actually appointed over those properties." Thus, there is no substance in this ground of defence or counterclaim."

49. He rejected the argument that the properties were sold at an undervalue by the Receiver on the ground that Mr. Hade did not call any independent expert evidence in relation to the sale prices achieved by the Receiver. In the absence of any independent expert evidence to the effect that that Receiver acted negligently in effecting any of the sales, he could not find that the properties were sold at an undervalue as alleged by Mr. Hade.

50. He then turned to the argument that the Receiver acted negligently in his management of the properties in paras. 171-188 of his judgment. He described what can only be characterised as an extremely difficult receivership beset by a series of difficulties, some of which were attributable to the actions of the Hades. At para. 189 he concluded that:

> *"189…The court is satisfied that, having regard to the oral and documentary evidence tendered in relation to the management of the properties by the receiver, he did not act negligently in his management of the receivership properties.*
>
> *190. A number of things emerge very clearly from the evidence. First, [Mr. Hade], as the borrower and mortgagor of the properties, was adamant that they should not be sold pending the determination of his plenary proceedings against the bank and the receiver. He had stated that quite clearly in the documentation that he put before the Circuit Court and also in correspondence that he had sent to the bank and its solicitors. The court was informed that he had applied unsuccessfully to the High Court for an injunction preventing the receiver from selling the properties. He tried to appeal that refusal to the Court of Appeal, but was out of time to do so.*

191. Secondly, the court accepts the evidence of Ms. McCarthy that it was in fact very difficult to effect sales of the properties. The court accepts her evidence in relation to the efforts that were made to sell the four units in St. Maelruns Park and of the difficulties that were encountered, when two purchasers each insisted on the insertion of clauses guaranteeing that the litigation between [Mr. Hade] and the bank and the receiver, would be concluded within a specified period of time. The court accepts that the receiver was not in a position to give any such assurance or agree to any such special condition, and for that reason the sales fell through.

192. Thirdly, the court is satisfied that the receiver encountered substantial difficulties with tenants in the properties and had to bring applications before the PRTB to have them evicted from the properties. In addition, he faced difficulties posed by the activities of the so called Rodulphus Allen Family Trust in connection with the properties. Fourthly, the court accepts that the proceedings herein were originally scheduled to be heard in October 2018 and again in April 2019. They were adjourned on both occasions. The court accepts that it was a reasonable decision to make to place the properties "on hold" in the months and years leading up to the first hearing date in 2018, on the basis that the conclusion of these proceedings would determine all questions that would arise in relation to the underlying debt, the appointment of the receiver and his management of the receivership.

193. Taking all of these matters into consideration, the court finds that while the receiver acted unlawfully in taking possession of the properties and in selling some of them without first obtaining authorisation from the Circuit Court, he did not act

negligently in his management of the properties, once he had taken them into his possession."

51. The trial judge concluded his judgment by briefly addressing the other issues raised by the Hades. He rejected the argument that the bank and the Receiver had acted unlawfully and negligently by placing a notice on one of the properties stating that Mr. Hade had been indebted to the bank in a given sum of money and that a receiver had been appointed. He noted that this method of service was expressly authorised by s.4 of the Act of 2009. Secondly, insofar as Mr. Hade alleged that his reputation was adversely affected by the placing of the notice on the property due to the (allegedly) incorrect amount of his indebtedness being stated in the notice, if he had a cause of action arising out of that event, it was an action in defamation and he was long out of time to bring such a claim. The trial judge held it was not appropriate to attempt to raise such a claim in the present proceedings.

52. The court rejected the argument that the mortgages created on 17 December 2009 were invalid because the bank had not obtained the consent of Mrs. Hade. Her consent was unnecessary where she was the co-owner of the properties and, where the properties were in the sole name of Mr. Hade, her consent was unnecessary because none of the properties the subject of the mortgages created on 17 December 2009 were the family home of the Hades.

53. The last point addressed was the fact that 29 Kingswood Heights was misdescribed as 24 Kingswood Heights in some of the documentation and that accordingly, it was said, the Receiver was invalidly appointed. Barr J. held that the Hades knew at all times that the mortgage was to be created over 29 Kingswood Heights which was owned by Mr. Hade. PD Gardner & Co., solicitors acting for the Hades at the time, confirmed in a letter dated

10 December 2012 that the property to be purchased and to be mortgaged was 29 Kingswood Heights. They wrote:

> *"We note what you say in relation to the premises known as 29 Kingswood Heights and can only advise that there must have been a typographical either on the Loan offer or on our undertaking because the property to be mortgaged to the bank was always known as 29 Kingswood Heights.*
>
> *We apologise if there was any error on our end with this."*

54. The trial judge therefore rejected all of the grounds of defence to the bank's claim for judgment put forward by the Hades and Mr Hade and their counterclaim against the bank. He entered judgment against the Hades and Mr. Hade in favour of the bank as I have set out. He held that conduct of the Receiver was such that he ought to pay exemplary damages. The High Court awarded Mr. Hade the sum of €550,000 by way of exemplary damages against the Receiver and dismissed his action against the bank. He made no order as to costs in favour of any party in either action.

Application to re-open the case and final orders

55. The receiver brought an application to reopen the case on the basis that exemplary damages had never been sought in the proceedings and he had not been afforded an opportunity to address the issue. Mr. Hade also sought to reopen certain conclusions on the basis that there were factual and/or legal errors contained in the judgment. The trial judge concluded that it was not appropriate to reopen the hearing of either of the cases. He said that the matters raised by the bank and the Receiver are matters that are more properly raised in a Notice of Appeal and similarly the perceived errors in the judgment identified by Mr. Hade should be raised by him in his Notice of Appeal. He expressed the view that it was inappropriate to reopen the hearing of the case as two of the parties in the actions were acting as lay litigants. He was conscious of the fact that if the matter was reopened at

the behest of the bank and the Receiver, the court would have to allow Mr. and Mrs. Hade to reopen matters that may be of concern to them. He concluded that this would effectively mean reopening, if not the entirety of the two cases, certainly a very large proportion of them and that it was not in the interests of justice that they should be effectively rerun almost in their entirety.

56. In relation to costs, the trial judge held that the justice of the case was best served if there was no order for costs in either case and he so ordered.

The appeals

57. As set out at the commencement of this judgment, the bank appealed the refusal of the trial judge to award it its costs despite the fact that it has been *"entirely successful"* in both the summary proceedings and the plenary proceedings.

58. The Receiver appealed all the findings in relation to exemplary damages. He contended that the trial judge erred in awarding exemplary damages where they had not been sought by Mr. Hade or by the Hades and where the Receiver had not been afforded any opportunity to address the court in relation to the principles governing the award of exemplary damages and whether they applied in the circumstances of this case or to address the quantum of damages awarded by the trial judge. At the hearing of the appeal he conceded that he was required under the terms of the security documents to obtain orders from the Circuit Court prior to selling any of the Repossessed Properties and that he ought not to have sold the Sold Properties without such authorisation.

59. Mr. and Mrs. Hade appealed the High Court's rejection of most of their arguments (there was no appeal in relation to the issue of duress) and raised a number of arguments which had not featured in the High Court. The details of the arguments of the parties on appeal are set out more fully below.

The Receiver's Appeal

60. Counsel submitted that the Receiver's appeal turned on two issues:

- Whether the Receiver had unlawfully taken possession of the Repossessed Properties and
- Whether the trial judge erred in awarding exemplary damages and the quantum of the exemplary damages awarded in the circumstances.

Did the Receiver unlawfully take possession of the Repossessed Properties?

61. The starting point is to analyse the Mortgage Deed. The first thing to note is that it is described as a housing mortgage loan. It incorporates the Irish Banking Federation's General Housing Loan Mortgage Conditions v. 1.0, 2009. The general conditions define certain terms. *"Act"* means the Land and Conveyancing Law Reform Act 2009. *"Enforcement Event"* is defined as *"any of the events or circumstances specified in clause 12.2"*. *"Secured Party"* is defined as *"the financial institution or other person to which or to whom the Mortgagor has given the Mortgage and includes the personal representatives, successors and assigns (whether immediate or derivative) of such financial institution or person who shall be entitled to enforce and proceed upon the Mortgage and these Conditions and exercise all powers and discretions of the Secured Party as if named in the Mortgage in place of or, in accordance with its interest, alongside the Secured Party.* This does not include a receiver appointed under the Mortgage Deed.

Clause 12 deals with enforcement and Clause 12.1 provides:

> *"**Time for Enforcement***
>
> *The security constituted by the Mortgage and these Conditions shall become enforceable and any of the Secured Liabilities not already payable on demand shall become due and payable on demand immediately upon and at any time after the occurrence, for any reason, whether within or beyond the control of the Mortgagor, of an Enforcement Event. At any time after the security constituted by the Mortgage*

and these Conditions has become enforceable, but subject to compliance with the Act, the Secured Party may enter into possession of the Secured Assets and exercise the power of sale and the other powers conferred on mortgagees by the Act." (Emphasis added)

62. The security shall become enforceable at any time after the occurrence of an enforcement event and any secured liabilities not already payable on demand shall become due and payable on demand immediately upon and at any time after the occurrence of an enforcement event. The clause continues to provide that any time after the security has become enforceable, the secured party may enter into possession of the secured assets and exercise the power of sale, but this is subject to compliance with the Act. It is therefore crucial to determine what this requires and the limits on the requirement.

63. The limitation on the rights of the secured party is underscored by Clause 12.3 which provides:

*"**Discretion as to enforcement***

After the security constituted by the Mortgage and these Conditions has become enforceable, the Secured Party may in its absolute discretion, but subject to the provisions of the Act, enforce all or any part of the security in any manner it sees fit." (Emphasis added)

64. General condition 12 refers to the secured party alone up until clause 12.5. Thereafter, it refers to both the secured party and the receiver. The distinction is deliberate, and it is important to maintain the distinction between their respective positions and not to elide or conflate them.

65. Clause 12.6 provides that neither the secured party nor any receiver will be liable by reason of *"entering into possession of a Secured Asset, to account as mortgagee in*

possession or for any loss on realisation or for any default or omission for which a mortgagee in possession might be liable"

66. Clause 12.7 provides:

> *"Save as provided for in section 103 of the Act, neither the Secured Party nor any Receiver will be liable for any loss upon a realisation of the security constituted by the Mortgage and these Conditions or upon the exercise of any power, authority, right or discretion of the Secured Party or any Receiver arising under the Mortgage or these Conditions.*

Section 103 of the Act relates to the exercise of the power of sale and is not relevant to the taking of possession of the secured assets.

67. Clause 12.9 provides that *"[e]ach Receiver and the Secured Party is entitled to all the rights, powers, privileges and immunities conferred by the Act."*

68. Clause 13 deals with the position of the receiver. Clause 13.1 provides the power to appoint a receiver may only be exercised if the security has become enforceable. The power of a secured party to appoint a receiver is subject to compliance with the Act. No particular section of the Act is identified, and I shall consider this requirement later in this judgment.

69. Clause 13.2 of the general conditions provides:

> *"**Powers of a Receiver***
>
> *A Receiver so appointed shall have and be entitled to exercise all powers conferred by the Act. In addition, pursuant to section 108(3)(c) of the Act, the Mortgagor and the Secured Party hereby delegate the following additional powers to any Receiver*."

Thus, a receiver appointed by a secured party, as in this case, enjoys the powers set out in clause 13.2 of the general conditions, which are the powers conferred by the Act of 2009. The clause further provides that the secured party (and the mortgagor) delegates additional

powers to the receiver including the power *"to take possession of, collect and get in the property in respect of which he is appointed or any part thereof;"* and a power of sale. Where a power is delegated to a receiver by a mortgagee under s.108(3)(c), subs.(4) provides that any power delegated to a receiver *"shall"* be exercised in accordance with this Chapter. Thus, pursuant to s.108(3) of the Act and clause 13.2 of the general conditions, a receiver appointed under the Mortgage Deed has the power to take possession of the property in respect of which he is appointed. Finally, in the usual way, Clause 13.5 provides that the receiver is the agent of the mortgagor:

> *"13.5* ***Receiver is agent of the Mortgagor***
>
> *Each Receiver is deemed to be the agent of the Mortgagor for all purposes and the Mortgagor alone shall be responsible for his remuneration, contracts, engagements, acts, omissions, defaults and losses and for liabilities incurred by him and the Secured Party shall not incur any liability (either to the Mortgagor or to any other person) by reason of the Secured Party making his appointment as a Receiver or for any other reason.*

70. The High Court found as a fact that the Hades had missed more than two instalments due under the mortgages and thus an enforcement event within the meaning of the Mortgage Deed had occurred. Further, that default entitled the bank under s.108(1)(b) of the Act of 2009 to appoint a receiver. The Hades have appealed this finding in their appeals, and their arguments in respect of this finding will be considered later in this judgment. For the purposes of the Receiver's appeal, I am proceeding on the basis that this finding of fact is supported by the evidence and thus one which it was open to the trial judge to make. Following *Hay v. O'Grady* [1992] 1 I.R. 210 this finding is not one with which this Court can interfere. It follows that the secured party, the bank, was entitled to appoint the Receiver over the Repossessed Properties.

71. The trial judge further held that the Receiver was validly appointed over each of the Repossessed Properties. In my judgment, the High Court was correct to so hold, and I will explain my reasons for so concluding when I discuss the appeals of the Hades later in this judgment.

72. Under the Mortgage Deed and the Act of 2009, a validly appointed receiver is entitled to possession of the secured assets. The Receiver obtained possession of the Repossessed Properties either by direct negotiations with the tenants or by obtaining rulings from the Private Residence Tenancies Board (the "PRTB"). He did not obtain an order of the court granting him possession of the Repossessed Properties.

73. The High Court held that he was in fact required to obtain orders for possession prior to taking possession of any of the Repossessed Properties, stating that:

> *"137. The court is satisfied that having regard to the terms of the mortgage deed and the documents incorporated therewith, the bank had agreed that the mortgages executed on 17 December 2009 would be treated as housing loan mortgages. As such, the defendants were entitled to the protections afforded by the 2009 Act in respect of housing loans. This meant that orders for possession of the mortgaged properties ought to have been obtained pursuant to s.97 of the 2009 Act and orders for sale should have been obtained prior to the sale of any of the properties pursuant to s.100 of the 2009 Act."*

74. In para. 138 the Court held that in taking possession of the properties without an order for possession and in selling three of those properties without an order for sale, the Receiver acted without lawful authority.

75. In my judgment it is not quite correct to state that the bank had agreed that the mortgages executed on 17 December 2009 would be treated as housing loan mortgages. As is clear from the above, the Irish Banking Federation's General Housing Loan

Mortgage conditions, which were incorporated into the mortgages, provided that in certain instances the powers of the Secured Party and the Receiver were *"subject to compliance with the Act"*. In my view, accepting that the exercise of certain powers is subject to compliance with the Act does not mean that the agreement was to treat the loans as housing loans and the mortgages as housing loan mortgages. This begs the questions as to what effect, if any, the Act has on the Receiver's right to possession of Secured Properties.

76. The trial judge held that s.97 of the Act applied to the Receiver -and not just the mortgagee-and that the Receiver ought to have obtained orders for possession prior to going into possession of any of the Secured Properties. Section 97(1) of the Act provides:-

> *"Subject to section 98, a mortgagee shall not take possession of the mortgaged property without a court order granted under this section, unless the mortgagor consents in writing to such taking not more than 7 days prior to such taking."*

77. Section 98 relates to abandoned property and is not relevant to the issues in this case. Section 97 refers exclusively to a mortgagee taking possession. Subsection (2) obliges a mortgagee to obtain a court order for possession of property. The section does not refer to a receiver and does not require a receiver to obtain an order for possession prior to repossessing secured property. No other section requires a receiver to obtain a court order prior to repossessing the secured property over which a receiver has been appointed. It follows, in my view, that the Receiver was not in breach of the Act when he obtained possession of the Repossessed Properties, notwithstanding the fact that he had not first obtained court orders for possession, as he was under no obligation so to do. He repossessed the Repossessed Properties in one of two lawful ways: either consensually from the tenants or following the appropriate applications to the PRTB. It also follows, on the facts of this case, that there was no basis for holding that the Receiver acted unlawfully in repossessing the Repossessed Properties. At all material times he was lawfully in

possession of the Repossessed Properties in my view, and he was not a trespasser. In holding otherwise, in my judgment, the trial judge fell into error.

Exemplary Damages for repossessing the Repossessed Properties

78. Insofar as the High Court awarded exemplary damages based upon the Receiver's alleged unlawful possession of the Repossessed Properties, the appeal must be allowed as the Receiver did not act unlawfully. Thus, his actions in relation to possession of the properties could never be the basis for an award of exemplary damages.

Exemplary Damages for sale of the Sold Properties without an order for sale

79. Different considerations arise in relation to the sale of the Sold Properties. The High Court concluded that the Receiver was required to obtain an order of court under s.100 of the Act of 2009 prior to selling the Repossessed Properties. The Receiver does not challenge that conclusion. It is, therefore, not necessary to analyse the power of the Receiver to sell the Sold Properties under the Act of 2009.

Want of Fair Procedures

80. In the appeal, the Receiver says, and says most emphatically, that the High Court erred in awarding Mr. Hade exemplary damages in the circumstances of this case.

81. He says he was never on notice that such damages were sought or could be awarded against him. They were not pleaded. They were not sought by way of submissions. The trial judge did not advert to the possibility of awarding such damages. The Receiver was not afforded the opportunity to address the court on the authorities governing the granting of exemplary damages. He was not afforded the opportunity to address the court on whether they applied to the facts in this case, or, if the court was minded to award exemplary damages, the appropriate level of such damages in circumstances where the High Court had rejected the Hades' counterclaim for damages and Mr. Hade could point to

no loss flowing from the Receiver's failure to obtain orders for sale prior to selling the Sold Properties.

82. In my view, a party who seeks exemplary damages must do so clearly and at a stage in the proceedings which affords the party against whom they are sought sufficient opportunity to meet the claim. By definition, exemplary damages are different from compensatory damages. The basis for their award is separate and distinct from the award of compensatory damages. The facts relevant to the award of exemplary damages are different to those relating to a claim for compensatory damages. Normally claims for damages are compensatory or, as they are sometimes described, restitutionary, and the question of aggravated or exemplary damages simply does not arise unless a party in addition expressly seeks such damages. In other words, if aggravated or exemplary damages are not expressly sought, either in pleadings or, in some circumstances, during the course of the trial, the case proceeds on the basis that the plaintiff is not seeking such damages and their claim for damages is confined to restitutionary damages.

83. Where exemplary damages are sought, the party from whom they are sought must have the opportunity to lead any evidence he or she chooses in relation to the issues presenting and to address the court on all issues relevant to the possible award of exemplary damages. It is therefore essential that a party be put on notice where exemplary damages are being sought, and that notice must be sufficient as to enable that party properly to meet the claim. There should be no ambush.

84. In *McIntyre v. Lewis* [1991] 1 I.R. 121, the Supreme Court considered an appeal from an award of exemplary damages. In that case the defendants were members of An Garda Síochána who had assaulted the plaintiff, forced him into their patrol car and brought him to the garda station and thereafter charged him with assault. The plaintiff was acquitted, and he sued the defendants for assault, false imprisonment and malicious

prosecution. On appeal by the defendants to the Supreme Court the issue arose as to whether exemplary damages could be awarded where they had not been claimed in the pleadings-although it appears from the judgment of McCarthy J. that reference was made to the right of the jury to award exemplary damages in both the opening and closing speeches for the plaintiff. Hederman J. held at pp. 133-4 of the report:-

> *"It is true that exemplary damages were not claimed in the pleadings but they do not have to be expressly claimed in the pleadings under the rules of court. I believe it might be desirable if the plaintiff did indicate in advance (even if it does not form part of the formal pleadings) that he does intend to claim exemplary damages. This is to afford a defendant an opportunity to meet such a case. We were assured by counsel for the plaintiff that they did ask for damages over and above the ordinary general damages but whether what they were seeking were aggravated damages or exemplary damages may not have been altogether clear and, certainly, was not dealt with in any great detail by the learned trial judge…"*

85. As the trial judge observed in this case, a court nowadays may not be so tolerant of the approach to the pleading point, and I agree. I am re-enforced in this view by observations of Finlay C.J. in *Conway v. INTO* [1991] 2 IR 305, a judgment delivered a few weeks after *McIntyre*, where he considered whether the failure of the plaintiff to make a specific claim for exemplary damages in the Statement of Claim constituted a good reason to set aside the award made by the trial judge under that heading. At p.321 of the report the Chief Justice stated:

> *"First principles would appear to suggest that the general purpose of pleading, as far as the plaintiff is concerned, is the giving of fair notice to the defendant of the issues which are to be tried and the allegations which are to be made against him and this would make it desirable that any claim being made for damages over and*

above ordinary compensatory damages should be notified, and the facts upon which reliance might be placed in support of it, should be indicated to the defendant. To such a general principle there would, of course, be exceptions: for example, in relation to aggravated damages in respect of matters which might only arise at the trial or at a stage of the preliminary proceedings subsequent to the filing of the statement of claim, but in general there would appear to be no sound principle for excluding from the general proposition that the claim should be fairly make known to the defendant the question of a reliance or proposed reliance upon a right to exemplary damages."

86. In that case, exemplary damages were not pleaded but a substantial claim for an award of exemplary damages was made in the course of the hearing. The defendant had the opportunity to oppose the application and did so on various grounds. The defendant did not require the plaintiff to amend her pleadings, nor did it seek an adjournment of the application. In those circumstances the Chief Justice held that the High Court was entitled to consider the question of exemplary damages and therefore to make an award.

87. The facts in *Conway* can be contrasted with the facts in this case. It is clear that the Receiver had no opportunity whatsoever to address any of the questions arising in relation to an award of exemplary damages as it simply was not an issue in the case. No party believed Mr. Hade was seeking exemplary damages and no one, including the Hades, addressed the point. Notwithstanding this, the trial judge held at para. 142 of his judgment:

"142. …in his pleadings, [Mr. Hade] claimed damages in the sum of €4m in respect of what he perceived were the wrongful actions on the part of the receiver. The court is satisfied that as [Mr. Hade] must be given some latitude in relation to the manner in which his claim was pleaded; the court is satisfied that while the term "exemplary damages" was not specifically used, it was obvious to [the bank] from the nature of

the claim made by [Mr. Hade] in his pleadings, that he was including a de facto claim to exemplary damages for the alleged wrongful actions of the receiver."

88. With the greatest of respect to the trial judge I cannot agree. A scrutiny of the pleadings and the replies to particulars shows that Mr. Hade was claiming €4 million as *compensatory* damages and there was no basis for inferring it was a claim for *exemplary* damages simply because of the quantum placed by Mr. Hade on his claim for damages. This is particularly so in circumstances where the value of the loans extended to the Hades, and by implication the value of the security provided by them for those loans, was close to €3.5m. The bank and the Receiver raised particulars of Mr. Hade's claim as follows:

"...[Mr Hade] claims that the sum of €4 million in damages is due and owing. Please provide full and detailed particulars of the basis upon which [Mr. Hade] alleges that the said sum of €4 million is due by [the bank and the Receiver] to [Mr. Hade] including all receipts, vouching documentation, calculations and reports."

89. Mr. Hade replied as follows:

"This is the estimated damages I feel I have lost as a result of my portfolio being taken from me".

90. Mr. Hade then provided further replies to particulars in February 2016 as follows:

"In my reply of May 1st, 2015 of particulars raised in paragraph 13, I stated that I have lost my portfolio due to the bank calling in the loans on Sept. 1st 2011, and thereby breaching the agreement which we had of interest only payments and payment plans on the aforementioned "facilities". I had an agreement with Paschal Naughton of the Defendant bank that the loans would continue on an interest only basis for a period, subject to review. The defendant, in breach of this agreement contrived a situation where I was in arrears and used this to call in the loans. I claim the expectation loss from this breach of contract. The exact quantum will be

subject to an expert report by an accountant and is in the region of €4 million. This loss arises through the forced sale at less than market value of 4 of the properties and the effective abandonment and dereliction of the others in the care of the receiver. Furthermore, I claim damages for fraudulent misrepresentation in that Paschal Naughton represented to me that the loans would continue on interest only basis subject to review..."

91. The pleadings claim restitutionary damages as compensation for alleged breach of contract which Mr Hade has quantified at €4 million. They do not, by inference, include or encompass a claim for exemplary damages.

92. The position in the pleadings is reinforced by Mr. Hade's evidence under cross examination. When he was asked to explain the constituent elements of his claim, he never mentioned exemplary damages. Furthermore, on appeal, Mr. Hade did not contend that he had sought exemplary damages or point to any pleading, letter or excerpt in the transcript where he had raised the question of exemplary damages.

93. The Rules of Court, and the rules in relation to fair procedures, apply equally to all litigants whether legally represented or not. It is inescapably the case that the Receiver was never on notice of a claim for exemplary damages and that he never had the opportunity to adduce evidence relevant to the factual basis for such a claim. He never had the opportunity to address the court on whether his unlawful conduct was of such gravity or was so outrageous as to warrant the marking of the court's disapproval of such conduct by an award of exemplary damages or the appropriate level of any such damages.

94. After the High Court had delivered judgment, the Receiver sought to reopen the judgment and address these issues and he was refused on the basis that these were issues for an appeal.

95. To my mind, the awarding of exemplary damages in the circumstances amounted to a failure to afford the Receiver fair procedures and for this reason I would allow the Receiver's appeal against the award of exemplary damages.

Did the conduct of the Receiver warrant an award of exemplary damages?

96. Even had the Receiver been on notice of the claim that his conduct in selling the Sold Properties without obtaining an order of the court in advance was such as should be marked by an award of exemplary damages, in my judgment his conduct fell well short of the threshold which would attract an award of exemplary damages, which, it must be recalled, are exceptional and which mark the court's disapproval of exceptionally egregious conduct. I have reached this conclusion for the following reasons.

97. First, contrary to the conclusion of the High Court, the Receiver was lawfully in possession of the Repossessed Properties, and he was not a trespasser. So, the only wrongdoing which potentially could have attracted an order of exemplary damages, related to the sale of the Sold Properties by a receiver who was lawfully appointed and whose function was to realise the security to discharge the secured debt.

98. Second, the issue for the Court is whether a breach of the Hades' contractual right that the Receiver obtain an order from the Circuit Court prior to selling any secured property should be marked by an award of exemplary damages. It is admitted that in breach of contract the Receiver sold the Sold Properties in 2014. While it is not disputed that this was wrongful conduct, it did not occasion the Hades any loss because the High Court held that the Receiver did not sell the Sold Properties at an undervalue. It follows that the Hades did not suffer any direct financial loss either from his possession of the Repossessed Properties or his sale of the Sold Properties. This is not to minimise or detract from the Court's strong disapproval of the actions of the Receiver, but it is relevant

to the question of whether it attracts such opprobrium as to justify an award of exemplary damages.

99. Third, the Receiver under cross examination said that he sought and acted upon legal advice that he was entitled to sell the properties prior to acting.[2] This evidence was binding upon Mr. Hade and was not controverted. It was not referred to or considered by the trial judge.

100. The High Court was required to assess the moral turpitude of the Receiver. In this regard there was evidence that he had sought to deal with a troublesome receivership in a lawful manner. Many of the difficulties he faced were created by the conduct of Mr Hade and the Receiver ultimately required a High Court injunction to restraint the Hades from interfering with the conduct of the receivership. Where he could, he took possession of properties over which he was appointed peacefully from tenants. Where this was not possible, he invoked the appropriate procedures through the PRTB. He sold the properties having taken the appropriate step of obtaining legal advice.

101. It was not suggested that he required an order of the Circuit Court before he could sell because of the terms of the Deed of Mortgage until Mr. Hade amended his Statement of Claim in April 2017, long after the Receiver had sold the Sold Properties in 2014, and more than six years after his appointment.

102. The trial judge relied on the fact that the Receiver made an application to the Circuit Court for an order for sale in respect of one of the Repossessed Properties in 2016 when no such application was made in respect of the Sold Properties despite the fact they were secured by identical mortgages executed on the same date. He deprecated the fact that in legal submissions this was explained as *"a belt and braces approach by the bank"* and at para. 136 of his judgment he held:

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[2] Day 7, Question 136 and 180.

"While the Receiver's conduct in seeking such an order might be seen as being consistent with him adopting a "belt and braces" approach; it is equally consistent with his realising that he was legally obliged to obtain a court order before proceedings to sell the property the subject matter of this mortgage. The content of the civil bill and Ms. Leonard's affidavit tend to favour the latter interpretation of this motivation in seeking the court order."

103. While the Receiver and the witnesses for the bank gave no explanation why an order for sale was sought in respect of one secured property but not in respect of the Sold Properties, the Receiver did give evidence that he sought and acted upon legal advice that he was entitled to sell those properties. This evidence was not addressed by the High Court. At the very least it showed that the Receiver acted with an appropriate degree of care in first seeking legal advice in relation to the proposed sale of the Sold Properties and proceeding only after he had been informed (erroneously as is now accepted) that he was entitled to sell without a court order for sale. While in certain circumstances, that might not be sufficient to disentitle a party to exemplary damages, in my judgment, at the very least it would be necessary to consider what weight, if any, should be afforded to that evidence. In any event, it shows a far greater degree of care than was illustrated in *Harrington* or *Donlon* where no such steps were taken by the receivers in each of those cases. In the former case, Baker J. was highly critical of *"unprofessional and wholly careless"* manner in which both the charge holder and the receiver acted in appointing the receiver without checking the underlying documents which revealed that the relevant deed by which the charge was purported to be assured was not effective and did not include the plaintiff's lands in the parcel's clause. This is very far indeed from the circumstances in this case.

104. Further, s.105(2) of the Act of 2009 provides that any person who suffers loss as a consequence of an unauthorised or improper exercise of the power of sale *"has a remedy in damages against the person exercising the power."* This provision should be considered and weighed when a court is determining whether a breach of a contractual (or statutory) obligation to obtain an order for sale should attract an award of exemplary damages in circumstances where the Oireachtas has provided a statutory remedy for the particular wrongdoing condemned by the court.

105. It is important to bear in mind the observations of Finlay C.J. in *Conway* at p.320 of the report:

> *"This does not mean that every wrong which constitutes the breach of a constitutional right in any sense automatically attracts exemplary damages. It does not, in my view, even mean that in every such case, irrespective of the facts or circumstances surrounding it, the court should specifically concern itself with the question of exemplary damages. Many torts, such as assault and defamation, constitute of necessity a breach of constitutional rights, but there are many types of assault and many types of defamation as well in which no conceivable question of the awarding of exemplary damages could arise."*

106. It is not necessary in the circumstances of this case to analyse where the threshold for an award of exemplary damages lies. In my judgment, the facts in this case are very far below that indicated by the Chief Justice in *Conway* or those found in *Harrington* and *Donlon* and the trial judge erred in principle in concluding that this was a case in which it was appropriate to award exemplary damages in respect of the conduct of the Receiver in selling the Secured Properties without first obtaining orders for sale.

The quantum of exemplary damages

107. In addition, I should observe that the level of damages awarded by the High Court, a total €550,000, in my judgment was wholly disproportionate in relation to the wrongdoing of the Receiver and was unprecedented. The High Court awarded Mr Hade, who was one of two joint owners and thus had a moiety interest in the properties, damages of €50,000 per property for the alleged wrongful repossession of the Repossessed Properties, giving a total of €250,000, and an additional €100,000 per property for the sale of the Sold Properties in breach of contract without obtaining a prior Court Order authorising same.

108. It is to be borne in mind that the Receiver was realising secured assets for the benefit of the bank. On the facts as accepted by the High Court, there was no value in the Hades' equity of redemption. The Receiver had proceeded lawfully in obtaining an injunction restraining interference by the Hades in his conduct of the receivership, obtained peaceful possession of some properties and possession of others following the PRTB process. He was not a trespasser. Section 101 of the Act entitles the court to adjourn an application for the sale of a secured property to afford the mortgagor the opportunity to clear the arrears due on the secured borrowings. In this case the Hades were not in a position to clear the arrears in accordance with s.101 of the Act. As this is a precondition to the court adjourning the proceedings or staying, postponing or suspending any order for sale, any application for the sale of the Repossessed Properties ought, on the facts before this Court, to have been granted, and the court hearing such application would not appear to have any discretion to adjourn the application or otherwise stay, postpone or suspend any order for sale.

109. As I have already indicated, the Receiver was not trespassing on the Repossessed Properties and therefore the reliance by the trial judge on the decisions in *Harrington* and *Donlon* are misplaced.

110. Furthermore, the order of wrongdoing (even if it reached the threshold of warranting an award of exemplary damages) is far below the conscious and deliberate violation of the plaintiff's constitutional rights in *Conway* or the assault, false imprisonment and malicious prosecution by the gardaí defendants in *McIntyre*. Had I been satisfied that this was a case in which it was appropriate to award exemplary damages – which I am not – I would allow the appeal on the basis of quantum alone as the award is utterly disproportionate in all the circumstances in my judgment.

The appeal of the bank

111. The High Court awarded the bank the relief it sought in its summary proceedings and gave judgment against Mr. and Mrs. Hade in the sum of €2,026,640.09 on a joint and several basis and €1,412,210.09 against Mr. Hade alone. The High Court rejected the counterclaim raised by the Hades against the bank. Thus, the bank was entirely successful in its proceedings. The High Court rejected Mr. Hade's case against the bank in his plenary proceedings and thus it was entirely successful in its defence of Mr Hade's case against it.

112. In its appeal the bank says that under s.168 and 169 of the Legal Services Regulation Act 2015 the High Court ought to have awarded it its costs against Mr. and Mrs. Hade in the summary proceedings and against Mr. Hade in his plenary proceedings. The bank argued that it was entirely successful in its case and in defence of the counterclaim in the summary proceedings and in its defence of Mr. Hade's claim and accordingly, applying the provisions of s.168 and 169 of the Legal Services Regulation Act 2015 and O.99 of the Rules of the Superior Court, the High Court ought to have awarded it its costs against Mr. and Mrs. Hade and that it erred in making no order as to costs in respect of the bank's costs in either the summary or the plenary proceedings.

113. This court affords the High Court considerable deference in relation to awards of costs. In this case an experienced High Court judge heard the two cases over a period of seven days and concluded that the fair outcome was to make no order in respect of any party's costs. In reaching that decision the High Court identified no reason why a wholly successful party should not have its costs. At para. 205 of the principal judgment the trial judge said in relation to costs:

> *"As these two sets of proceedings were effectively heard together, although they were not consolidated into a single action, and* ***as both parties have been substantially successful on various aspects of their claim, but equally have been unsuccessful in other aspects of the case,*** *the Court proposes to make no order as to costs in either action."* (Emphasis added).

114. But this paragraph ignores the fact that there were in effect three parties (technically four) to the two actions: the bank, the Receiver and Mr. and Mrs. Hade. The fact that the bank and the Receiver were jointly represented does not alter this fact and indeed the High Court was careful otherwise to maintain the distinction between them. In his review judgment the High Court judge simply said that the justice of the case is best served if there is no order as to costs in either case. No reason at all is identified why the bank, a wholly successful party, should not have its costs.

115. It is impermissible to align the interests of the Receiver with that of the bank *a fortiori* where the High Court has held that the Receiver was guilty of conduct which justified the award of a very substantial sum by way of exemplary damages but that no such exemplary damages should be awarded against the bank. In my judgment, this is a case where this Court ought to intervene in relation to the High Court's order in relation to costs.

116. No real reason was advanced why, having been entirely successful both in the High Court and on appeal, the bank should not have the costs of both of the actions in the High Court, by either the Hades or the trial judge. I would allow the bank's appeal and award the bank its costs, to be adjudicated in default of agreement, of the summary proceedings and the plenary proceedings.

The appeals of Mr. and Mrs. Hade

117. There is a considerable overlap in the issues raised in the appeals by Mr. and Mrs. Hade in the bank's summary proceedings and the appeal by Mr. Hade in his plenary proceedings. To add to the potential duplication, is the fact that Mr. and Mrs. Hade, instead of cross-appealing in relation to the bank's and the Receiver's appeals, filed respondent's notices in relation to those appeals and then separately filed their own Notices of Appeal (contrary to the provisions of the Rules of the Superior Courts) in relation to matters where the High Court judge had held against them.

118. I propose to deal with the issues in their appeals/cross appeals in the summary proceedings and the plenary proceedings as they are identified in the written submissions filed by the bank and the Receiver. In his oral submissions to this Court Mr Hade adopted this approach and therefore by proceeding in this way I shall follow more closely his and Mrs Hade's submissions on their appeals.

1. The correct name of the bank

119. It is common case that the correct name of the bank is Bank of Ireland Mortgage Bank Unlimited Company. Pursuant to an order of the Court of Appeal dated 11 July 2022 the name of the bank was amended in both sets of proceedings. The orders drawn in the High Court omitted the words "Unlimited Company" or the letters "UC" after the name of the bank in the title of the orders. Both the bank and the Receiver indicated that they have no objection to the orders being amended. The appropriate course therefore was to apply

to the High Court to amend the bank's name on the orders as drafted under the slip rule and an appeal to the Court of Appeal was not necessary. The amendment of the words 'Unlimited Company' in no way is relevant to the substantive judgment in favour of the bank or the other operative parts of the order of the High Court. I would dismiss this ground of appeal and direct that the orders of the High Court be amended by the insertion of the words "Unlimited Company" into the name of the bank.

2. That the cases were heard together

120. The summary proceedings and the plenary proceedings were listed together but were not consolidated. This followed the order of Faherty J. in April 2017 which was not appealed. The cases were heard consecutively. This is completely normal and a sensible use of the court's time. In each case, in ease of the parties, the trial judge directed that evidence adduced in one case would be admissible in the other case and vice versa. This was to avoid unnecessary duplication and the risk of inconsistent judgments arising from possible differences in the evidence. It obviously impacted all parties equally. In my judgment the Hades have not shown that the manner in which the trial proceeded resulted in any unfairness or prejudice to either of them. They were permitted to cross examine the Receiver in the summary proceedings when he was not in fact a party to those proceedings. In ease of the Hades, the High Court allowed evidence in the summary proceedings, including evidence arising out of the cross examination of the Receiver, to be evidence in the plenary proceedings. There is no suggestion in the High Court judgment that the trial judge was only hearing the bank's case. Furthermore, having concluded the evidence in the summary summons case, the trial judge then proceeded to try Mr. Hade's plenary proceedings and he afforded Mr. Hade a second opportunity to give evidence lest there be matters relevant to his plenary proceedings which he had not dealt with when defending the summary proceedings. This is apparent from the transcript.

121. For these reasons I am satisfied that the trial judge did not err in hearing the two cases together and I would reject this ground of appeal.

3. The treatment of Mr. Hade's motion in the plenary proceedings seeking to strike out the defence for alleged failure to make discovery.

122. Mr. Hade issued a motion on 9 August 2022 in the plenary proceedings seeking to strike out the defence of the bank and the Receiver for alleged failure to make a discovery. The motion was given a return date of 21 November 2022. The summary proceedings and the plenary proceedings were listed for hearing together on 19 October 2022. The bank and the Receiver applied to have the motion to strike out their defence listed on the 19 October 2022, at the same time the proceedings were to be heard and ahead of the return date for the motion. When the cases were transferred to Barr J. for trial, the motion was also transferred. Prior to the court sitting, Mr. Hade indicted to the registrar that he was not proceeding with the motion. The High Court system records the motion as withdrawn. Critically, it is apparent from the transcript, that Mr. Hade never mentioned the motion to Barr J. during the course of the seven day trial and did not seek to move it before his case commenced. Logically, there is no point in hearing a motion to strike out a defence for failure to make discovery after the trial has concluded. The motion is not referred to in the judgment of the High Court nor in either of the orders perfected following the delivery of the judgment.

123. In the circumstances, I have no hesitation in holding there is no merit to this appeal and I would reject same.

4. Whether a binding agreement was reached with the bank through Mr. Naughton to continue interest only repayment in respect of the 2006 loan?

124. The trial judge dealt with this issue very extensively between paras. 28 and 73 of his judgment. Mr. Hade stated that he had an oral agreement with Mr. Naughton acting on

behalf of the bank which he concluded in the spring/summer of 2011 that the interest only repayment period on the 2006 account would continue beyond the initial five year period. The trial judge set out in detail the oral evidence of Mr. Naughton and Mr. Hade and he considered the contemporaneous documents. He set out the reasons why he accepted the evidence of Mr. Naughton where it conflicted with that of Mr. Hade and he found as a fact that there was no agreement between either Mr. Naughton or the bank and Mr. Hade that the interest only repayment period on the 2006 loan account would extend beyond the initial five year period.

125. While the Hades appealed against this finding of the High Court, the point was hardly touched on in submissions. In their written submissions they simply stated:

> *"The bank varied the loan in (sic) and this is recorded by letter dated 1/10/2009. Pascal was aware of this contract."*

The matter was not pursued further in oral submission to this Court.

126. In the circumstances, it is not necessary to set out in detail the trial judge's findings of fact or his reasons for preferring the evidence of Mr. Naughton over that of Mr. Hade. Suffice it to say that there was credible evidence upon which he was entitled to reach this conclusion and he explained his reasons for arriving at this conclusion. It was a conclusion which was open to him on the evidence. Therefore, there is no basis for this Court to intervene or overturn this finding of fact.

5. Were Mr. or Mrs. Hade consumers?

127. The High Court made the following findings of fact relevant to this issue. Mr. Hade owned two plant hire companies which he operated between 1985 and 1999. Between 1999 and 2016 he operated a hostel under contract with the government, initially for asylum seekers and later for homeless people. Mr. and Mrs. Hade owned a portfolio of twelve

"buy to let" properties, eight of which were security for the 2006 loan and four of which were security for the 2007 loan.

128. The intention of Mr. and Mrs. Hade in acquiring the properties was to provide for the long term future of both the Hades themselves and their children, two of whom are profoundly disabled and will never to be in a position to earn a living in the workplace.

129. He considered the definition of the term *"consumer"* given by CJEU which is quoted in para. 28 above.

130. He noted that the word consumer is term of EU law and must be given an autonomous meaning which must be applied by national courts of the member states. This definition has been applied in a number of cases by Irish courts. In *AIB Plc v. Higgins & Ors.* Kelly J. (as he then was) rejected the submission that an individual could only be engaged in one *"business"* and therefore any contract external to that business must be personal to the individual such that the person necessarily acted as a consumer in respect of that contract.

131. He underlined the fact that only contracts concluded for the purpose of satisfying an individual's needs in terms of private consumption benefit from the protection afforded to consumers under EU law. Barr J. referred to In *Gruber v. Bay Wa AG* [Case C-464/01] where the CJEU held that the burden of proof rests on the person asserting they are a consumer and, where there were both private and business aspects to a transaction, it could only be regarded as attracting the protection of the Directive where *"the business use was merely negligible"*.

132. The trial judge set out his conclusions on this issue as follows:

> *"96. It is common case that [Mrs. Hade] had participated in the loan taken out in 2006, because this was a venture being undertaken by her husband. She left all relevant negotiations and decisions to him. She was only included in the loan*

because it transpired that some of the properties that had been given as security for the loan, were held in their joint names. Accordingly, the determining factor that has to be looked at, is the position of [Mr. Hade] in relation to both loans.

97. I am satisfied that [Mr. Hade], in taking out the loans to purchase or refinance his existing loans in respect of his large portfolio of twelve properties, was engaged in a business activity. The fact that he may have had another business activity at that time, namely running the hostel in Tallaght, does not mean that any other activity carried out by him, had to be done as a consumer. The case law makes it clear that a person can carry on more than one business or trade activity at the same time.

…

99. … In the present case, [Mr. Hade] had actively purchased the twelve properties. He also actively managed the properties by renting them out. It was he who was responsible for taking in the rents from the tenants. He also looked after all the necessary outgoings in relation to the management and maintenance of the properties. In the circumstances, the court finds that he was engaged in a business activity of acquiring and renting a portfolio of properties.

…

102. The court is further supported in this conclusion by the statements made by [Mr. Hade] in the course of his correspondence…. In each of these letters, [Mr. Hade] complained about the way he had been treated by the bank in relation to the service upon him of the letters of demand. In each of those letters he stated " I am a fulltime landlord". This clearly supports the proposition that [Mr. Hade] was not acting as a consumer, nor did he believe himself to be.

103. In his plenary proceedings, [Mr. Hade] sought damages against the bank and the Receiver, for inter alia, breach of his right to earn a living: see para. 19 and relief (ii) in his amended statement of claim. Given that he was complaining about the seizure and maintenance of the properties by the Receiver, it is clear that [Mr. Hade] was alleging that he was earning his living from them. This further supports the proposition that he was acting as part of his business or trade in this regard."

133. In their notices of appeal/cross appeals, the Hades asserted that they were consumers. They should have the benefit of the Consumer Credit Act, 1995 because the bank had agreed to treat them as consumers. They also said that the trial judge erred in his assessment of Mrs. Hade's position at para. 96 of his judgment. It was asserted that she had little involvement in the applications for the loans. It was said that the trial judge erred in his assessment of Mrs. Hade's position as he failed properly to assess her position in her own right.

134. In response the bank and the Receiver said that the fact that the loans agreements referred to the Consumer Credit Act on the acceptance page did not mean that Mr. or Mrs. Hade were consumers within the meaning of that term. The court must look at the substance of the transaction rather than any label the parties themselves attributed to the contract. They asserted that:

"…the loan taken out by Mr. and Mrs. Hade and by Mr. Hade were not to refinance or buy properties for their personal use (as a home or a holiday home) but were to refinance and buy properties to let the same for a profit. The Court below was correct to conclude that this was not a consumer purpose but a business purpose.

71. The Credit Application for the first loan made specific reference to Mr. Hade's activities in renting properties and Mr. Hade himself repeatedly described himself in

correspondence with the bank as a landlord, fulltime landlord or professional landlord. It is irrelevant that he might have had other occupations or business activities. It is also irrelevant that the Hades claim that they subjectively intended to provide for themselves and their children by engaging in this activity. The activity remains an economic one and thus the Consumer Credit Act does not apply."

135. I would agree with these submissions, and I agree with the conclusion of the High Court that neither Mr. nor Mrs. Hade were acting as consumers within the meaning of the Consumer Credit Act 1995 in relation to the loans the subject of these proceedings. Mrs. Hade was party to one of the two loans. The fact that she took little active involvement and left Mr. Hade to conduct the negotiations on their behalf's does not alter the purpose for which the loans were sought or the monies advanced. She does not, and cannot, contend that the monies were not advanced to refinance and buy properties which were intended to be let for a profit. The subjective intention to provide for themselves and their children is irrelevant as, in some sense, all economic activity may be said to be for such a purpose.

6. Should the Hades have been compensated for a notice fixed to a door of one of the Repossessed Properties?

136. Mr. Hade contended that the bank had acted unlawfully in posting a notice to one of the Repossessed Properties. He said that while s.4(1)(d) of the Act of 2009 permitted service of a notice by affixing it to the door of the property, this was not open to the bank in the circumstances of this case because it had also attempted to serve the notice on the Hades' home address. Mr. and Mrs. Hade objected to the service of Circuit Court proceedings which was effected by attaching a notice to the front door of 29 Kingswood Heights rather than 24 Kingswood Heights even though they were the owners of 29 Kingswood Heights and had no interest in No. 24. Further, they assert that the information

posted set out their home address, wrongly stated that a certain sum was due to the bank and that a receiver had been appointed. They submitted that the bank and the Receiver had acted unlawfully and negligently by affixing the notice on the door of 29 Kingswood Heights. Mr. Hade submitted that while that was a method of serving documentation provided for under the Act of 2009, it was not lawful for the bank or the Receiver to have adopted this method of service because they had elected to serve the documents directly upon him at his place of residence and, having elected to adopt one method of service, it was not open to them to adopt an alternative method in addition.

137. The trial judge held that there was no substance to this ground of defence or counterclaim

> *"due to the fact that it is a method of service that was expressly authorised. Secondly, insofar as [Mr. Hade] alleges that his reputation was adversely affected by the placing of the notice on the property due to the incorrect amount of his indebtedness being stated in the notice; if he has any cause of action arising out of that, it is an action in defamation. He is long out of time to bring such a claim. It is not appropriate to attempt to raise such a claim in the present proceedings."*

138. Section 4 of the Act of 2009 provides as follows:

> *"4.(1) A notice authorised or required to be given or served by or under this Act shall, subject to subsection (2), be addressed to the person concerned by name and may be given to or served on the person in one of the following ways:*
>
> *(a) by delivering it to the person; or*
>
> *(b) by leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, at that address; or*

(c) by sending it by post in a prepaid letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address; or

d) where the notice relates to a building with which the person is associated, and it appears that no person is in actual occupation of the building, by affixing it in a conspicuous position on the outside of the building or the property containing the building; or

(e) if the person concerned has agreed to service of notices by means of an electronic communication (within the meaning given to it by section 2 of the Electronic Commerce Act 2000) to that person (being an addressee within the meaning given to it by that section) and provided that there is a facility to confirm receipt of electronic mail and that such receipt has been confirmed, then by that means; or

(f) by sending it by means of a facsimile machine to a device or facility for the reception of facsimiles located at the address at which the person ordinarily resides or carries on business or, if an address for the service of notices has been furnished by the person, that address, provided that the sender's facsimile machine generates a message confirming successful transmission of the total number of pages of the notice; or

(g) by any other means that may be prescribed." (Emphasis added)

139. In my view the trial judge was correct to reject Mr. Hade's claim and this ground of appeal is unstateable in my judgment. The bank was entitled to proceed in accordance with the provisions of s.4 of the Act of 2009 and there is no basis for contending that a party is required to elect between the alternatives given and is confined to one such

alternative. There is no basis for asserting that the bank and Receiver acted unlawfully in serving a notice in accordance with s.4 of the Act of 2009 in this case.

7. Did the bank seek the repayment of capital prematurely?

140. Mr. and Mrs. Hade contended that the bank was not entitled to issue letters of demand on 1 September 2011 because the initial five year interest only period was not due to expire until later in September 2011 in respect of the 2006 loan. Mr. Hade alleged that the bank had deliberately applied the capital repayment obligation a month early so as to contrive a default on their part thereby giving the bank a 'purported' right to issue the letter of demand calling in the entirety of the 2006 and 2007 loans. This argument is made notwithstanding the fact that, as set out at paragraph 11 of this judgment, the Hades were already in arrears (i.e., itself a default event) regarding the interest-only payments before the interest-only period expired.

141. The trial judge construed the loan offers. The initial interest only period was stated to be five years comprising 60 monthly instalments. The court concluded that the first of those instalments arose in August 2006, meaning that the repayments would revert to capital and interest in respect of the payment that was due in late August 2011. The trial judge held that this was evident from the statements of account that were proved in evidence by Mr. Downes, a witness from the bank and the evidence of Mr. Healy. On that basis, the court held as a fact that the bank did not apply the capital repayment obligation one month early as asserted by Mr. Hade.

142. On appeal, Mr. Hade asserted that the trial judge erred in that in fact the first instalment was on 25 September 2006 and accordingly the bank applied capital to the repayment sum one month early in August 2011, as it was not due until September 2011. This meant that the letter of demand issued on 1 September 2011 was defective because it

wrongly claimed that the Hades had failed to make a capital repayment which was never rightly due.

143. In his submissions to this Court, Mr. Hade sought to persuade the court that the trial judge had misunderstood the meaning and effect of the bank statements by taking the court through the entries on the statements of account. This did not assist him in any way in his appeal. The High Court heard the evidence of the bank officials, Mr. Downes and Mr. Healy, who gave evidence as I have outlined. The trial judge was thus entitled to reach the conclusion on the basis of credible evidence, both written and oral, and there is no basis upon which this Court can overturn his finding of fact in this regard. Simply pointing to evidence which might lead to a different conclusion is not a basis for this Court to overturn a finding of fact grounded on the evidence of witnesses heard by the trial judge and which it was clearly open to him to reach. Accordingly, I would reject this ground of appeal.

8. Were the letters of demand deficient?

144. In the High Court the Hades argued that the letters of demand that issued on 1 September 2011 were defective because they did not specify the arrears that had accrued at the time nor the amount of interest that had been paid since the inception of the loan. The High Court rejected this argument on the grounds that there was no term in the loan documentation or mortgage deeds requiring that a letter of demand specify these matters. Barr J. held that the essential object of a letter of demand is that it makes an unequivocal demand for repayment of the loan under the terms of the loan agreement. He held that this was done in this case. At para. 20 of the judgment he identified that the letter of 1 September 2011 in respect of the 2006 loan was addressed to both Mr. and Mrs. Hade; that it called for immediate payment of the principal and interest due on the account in the sum of €2,727,165.09. The letter referred to clause 4(b) of the conditions attached to the facility letter of 22 June 2006 and the letter stated that it constituted a demand under clause 4(b) of

the facility. They were informed that if they failed to pay the amount demanded within ten days the bank would proceed to enforce its securities, including by way of exercising its powers to sell the properties and to take any other legal action which the bank may deem expedient. The trial judge said that a similar letter also dated 1 September 2011 was sent to Mr. Hade in respect of the 2007 loan.

145. In para. 163 of his judgment the trial judge held that the letters made an unequivocal demand for repayment of the loan under the terms of the loan agreement; that the relevant clause giving the right to call in the loan was identified in the letter, which was clear in its terms. Barr J. held that Mr. Hade was under no misapprehension about the content or effect of the letters of demand and on this basis the court found that the letters of demand were valid in all respects.

146. On appeal, the Hades complained that the letter of demand was defective because it did not set out a separate figure for arrears in respect of each facility. They said that this was what was required, arising from the decision of Simons J. in *Bank of Ireland Mortgage Bank v. Neary and McDonald* [2019 IEHC 169**.** In their written submissions, Mr. and Mrs. Hade quoted from the judgment of Simons J. where he held that the letters of demand in that case *were* valid demands for the early repayment of the outstanding loan. Mr. Hade then referred to the letter at issue in that case and said that neither he nor Mrs. Hade received a letter in those terms. He then jumped, without any explanation, to assert that *"the demands we received were not in accordance with the contract as outlined to the court."* Quite what was intended by this submission was a little unclear. Insofar as he sought to suggest that the letters of demand proved in evidence in the High Court were different to the letters received by the Hades, this is a matter which ought to have been raised in the High Court during the trial. The bank's witnesses should have been cross-

examined. This was not done. It is not permissible to raise this point for the first time on appeal.

147. As regards the letters proved by the bank, it is true that the letters of demand did not separately identify arrears but demanded the sums actually due. This does not mean that they were not valid demands. The Hades were in no doubt as to the meaning of the letters of demand and this was made abundantly clear from the correspondence sent by Mr. Hade to the bank after the letters of demand were received. The decision of Simons J. is not authority for the proposition that a letter of demand must set out separate arrears figures in order to be a valid letter of demand and Mr. Hade has advanced no other authority in support of this somewhat surprising assertion. Accordingly, I am not satisfied that the Hades have a valid ground of appeal that the trial judge erred in concluding that the letters of demand were valid. For these reasons, I would reject this ground of appeal also.

9. Was the bank entitled to appoint a receiver?

148. The Hades said that the bank was not entitled to appoint a receiver because it was not entitled to call in the loans firstly because the sixty months interest free period was wrongfully calculated and therefore the bank prematurely called in the loans when there was no default by the Hades in September 2011. Secondly, they said that the loans were repayable on demand and accordingly the bank was precluded from relying upon the provisions of s.108(1)(b) of the Act of 2009.

149. I have already set out the reasons why it was open to the High Court to conclude that the interest only period of repayments provided in the 2006 loan had expired and that the bank was entitled to commence demanding repayments of capital and interest from 25 August 2011 and why this Court is bound by this finding of fact. It follows that this argument cannot support the Hades' contention that the bank was not entitled to appoint a receiver over the secured properties on the basis that they-the Hades- were not in

default/the bank had wrongfully contrived a default. This means, in my judgment, that this ground of appeal must be dismissed.

150. The trial judge held, in the alternative, that the bank was entitled to rely upon s.108(1)(b) of the Act of 2009 because arrears of more than two months had accrued on the two loans and thus this was an alternative lawful basis for terminating the loans. Insofar as the trial judge had relied upon this section in the alternative, the Hades asserted that he erred in law.

151. Section 108(1) provides:

> *"(a) following service of notice on the mortgagor requiring payment of the mortgage debt, default has been made in payment of that debt, or part of it, for 3 months after such service, or*
>
> *(b) some interest under the mortgage or, in the case of a mortgage debt payable by instalments, some instalment representing interest or part interest and part capital is in arrears and unpaid for 2 months after becoming due, or*
>
> *(c) there has been a breach by the mortgagor, or some person concurring in the mortgage, of some other provision contained in the mortgage or any statutory provision, including this Act, other than a covenant for payment of the mortgage debt or interest,*
>
> *the mortgagee or any other person for the time being entitled to receive, and give a discharge for, the mortgage debt, may appoint, by writing, such person as the mortgagee or that other person thinks fit to be a Receiver of —*
>
> *(i) the income of the mortgaged property, or*
>
> *(ii) if the mortgaged property comprises an interest in income, or a rent charge or other annual or other periodical sum, that property."*

152. The Hades argued that because the loan was repayable on demand the bank could only rely on the provisions of s.108(1)(a) and it was therefore precluded from relying on the provisions of s.1008(1)(b). It followed that the trial judge erred in concluding that the bank was entitled to call in the loans on 1 September 2011 in reliance on s.108(1)(b) and the arrears which had arisen in respect of both loans. Therefore, they contended, the bank was not entitled to appoint a receiver.

153. I do not accept that this is what the section provides and therefore I would reject the alternative argument that the bank was precluded from relying on the accumulated arrears as satisfying the provisions of subs.(1) (b) simply because the loan was a demand loan. The use of the word "or" in subsection (1) clearly indicates that there are three options available to a mortgagee and it is not precluded from relying on either option (b) or (c) simply because the loan might come within the parameters of (a). Given that the bank was entitled to rely on the provisions of s.108(1)(b), in my judgment there was ample evidence that the Hades had been in considerable arrears in respect of the interest only payments due under both loans. This entitled the bank – and the trial judge – to conclude that an enforcement event had occurred by August 2011. Thus, the bank was entitled to call in the loans and, in default of repayment, to appoint a receiver over, *inter alia*, the repossessed properties.

154. The High Court's finding of fact is based upon credible evidence and was open to him in all the circumstances. No basis upon which this court could overturn this finding has been made out. The bank was entitled to rely on the provisions of s.108(1)(b) and, in default of repayment, to enforce its security by appointing the Receiver. It follows that the bank was not required to wait three months from the service of a valid letter of demand before appointing a receiver (in reliance on (1)(a)) as no such limitation applies where the mortgagee, in this case the bank, relies on s.108(1)(b).

155. In addition, the Hades argued that the Deeds of Appointment of the Receiver over the Repossessed Properties were technically invalid, even if the bank was entitled to appoint a receiver. They submitted that the security was *granted* after the commencement of the Act of 2009 at a time when it was no longer possible to create a mortgage by convening an estate to the secured creditor; thus they could not *grant* a mortgage at the time and instead the properties ought to have been-but were not- *charged*. As a result, according to the Hades, the security is invalid and therefore the Receiver is not validly appointed.

156. The Deed of Appointment in respect of 107 Jervis Place reads as follows:

> *"In pursuance of the powers contained in a Deed of Mortgage and Charge dated 17th December 2009 (the "Mortgage and Charge") in respect of the property therein described as…*
>
> *[107, Jervis Place]…*
>
> *(the "property")…*
>
> *granted by Niall Hade…to Bank of Ireland Mortgage Bank…*
>
> *Bank of Ireland Mortgage Bank hereby appoint*
>
> *Michael McAteer*
>
> *of Grant Thornton, 24-26 City Quay, Dublin 2*
>
> *to be Receiver of all the property (as set out above) referred to, comprised in and mortgaged, charged and or secured by the Mortgage and Charge, to enter upon and take possession of the same in the manner specified in the Mortgage and Charge and the Receiver shall be entitled to exercise all of the powers conferred on the Receiver by the Mortgage and Charge and by law."*

157. The Deed of Appointment in respect of 4 and 5 Taobh Na Coille was in similar terms save that it was granted by Niall Hade and Joyce Hade. The Deed of Appointment in respect of 92, Moy House was in similar terms save that instead of a Deed of Mortgage and

Charge, it was made pursuant to powers contained in a housing loan mortgage and references to mortgage and charge were replaced by housing loan mortgage. The housing loan mortgage in respect of 92, Moy House was granted by Niall Hade and Joyce Hade. The security over 29, Kingswood Heights was contained in a housing loan mortgage dated 17 December 2009 granted by Niall Hade.

158. The Hades argued that these five Deeds of Appointment of the Receiver were incorrect as the Hades did not *grant* a mortgage or housing loan mortgage to the bank, as they could only *charge* the properties in favour of the bank.

159. The Hades also said that the Deeds of Appointment were not witnessed in accordance with *"the bank rules"* and accordingly were invalid. In support of this contention, they relied upon the decision of the High Court in *McAteer v. Sheahan* [2013] IEHC 417.

160. The trial judge considered the latter point and rejected it. Mr. Hade's complaint was that two people were required to witness a signature in order to comply with the bank's rules for the valid appointment of a receiver. However, Mr. Hade led no evidence to that effect and instead relied upon the recital of the evidence advanced in *McAteer v. Sheahan*. In fact, that case shows that it is not necessarily the case that the signature of the individual executing the Deed of Appointment must be witnessed by two persons even where the deed is required to be made under seal. It was not authority for the proposition advanced by Mr. Hade and it could not constitute evidence of fact in these proceedings. It follows that the High Court was correct in these proceedings to conclude that Mr. Hade had not proved his bare assertion on this point. It is to be noted that s.108(1) of the Act of 2009 merely requires that the appointment of a receiver be *"by writing"* so the bank satisfied the statutory requirement.

161. The argument in relation to the *"granting"* of a Mortgage and Charge or Housing Loan Mortgage after the commencement of the Act of 2009 was not made prior to this appeal. It is not open to a party to raise new arguments of substance, unrelated to those previously advanced, at this stage in the proceedings, without obtaining the prior leave of the court, which was neither sought nor granted. The Hades have had a very considerable time in which to research and present their case. Mr. Hade's Statement of Claim in his plenary proceedings was delivered in 2014 and amended in 2017. The trial lasted for seven days in 2022. The parties each delivered three separate sets of written submissions. At no point did either Mr. or Mrs. Hade raise this argument in the eight years available for them so to do. It is simply not permissible to do so at this stage and it does not form part of this appeal. I will not address it further.

162. For these reasons I would not allow the appeal against the finding of the High Court that the Receiver was validly appointed.

10. Were the properties sold at a undervalue?

163. The Hades claim that the properties were sold at an undervalue and that the Receiver is liable to account to them by way of damages. However, the Hades adduced no evidence as to the values of the Sold Properties when they were sold by the Receiver. It follows that they cannot make out a case that there were sold at an undervalue thereby occasioning them loss. On the other hand, two witnesses gave evidence for the Receiver to the effect that the best price reasonably obtainable was achieved in respect of each of the Sold Properties and the High Court was entitled to accept same. The High Court was quite correct to reject this ground of defence/counterclaim or claim for damages on this ground alone. In addition, the High Court was correct to note that as the mortgagor, the Hades were *"solely responsible for the Receiver's acts or defaults"* in accordance with the provisions of s.108(2) of the Act of 2009.

164. For these reasons I would dismiss this ground of appeal.

11. Did the Receiver mismanage the properties?

165. The Hades objected strongly to the conduct of the receivership, in particular to the fact that the properties were left vacant for many years so that no rent was collected and the properties fell into disrepair in some instances.

166. The trial judge carefully assessed all the evidence in relation to this aspect of the case, as is set out in paras. 173-189 of his judgment.

167. His conclusions are set out in paras. 189-192 as follows:

> *"189. … In reaching its conclusions on this aspect, the court has had regard to the extensive documentation that was put before it in respect of the management of each of these properties. The court is satisfied that, having regard to the oral and documentary evidence tendered in relation to the management of the properties by the receiver, he did not act negligently in his management of the receivership properties.*
>
> *190. …[Mr. Hade] as the borrower and mortgagor of the properties, was adamant that they should not be sold pending the determination of his plenary proceedings against the bank and the receiver…*
>
> *191. Secondly, the court accepts the evidence of Ms. McCarthy that it was in fact very difficult to effect sales of the properties. The court accepts her evidence in relation to the efforts that were made to sell the four units in St. Maelruns Park and of the difficulties that were encountered, when two purchasers each insisted on the insertion of clauses guaranteeing that the litigation between [Mr. Hade] and the bank and the receiver, would be concluded within a specified period of time. The*

court accepts that the receiver was not in a position to give any such assurance or agree to any such special condition, and for that reason the sales fell through.

192. Thirdly, the court is satisfied that the receiver encountered substantial difficulties with tenants in the properties and had to bring applications before the PRTB to have them evicted from the properties. In addition, he faced difficulties posed by the activities of the so called Rodulphus Allen Family Trust in connection with the properties. Fourthly, the court accepts that the proceedings herein were originally scheduled to be heard in October 2018 and again in April 2019. They were adjourned on both occasions. The court accepts that it was a reasonable decision to make to place the properties "on hold" in the months and years leading up to the first hearing date in 2018, on the basis that the conclusion of these proceedings would determine all questions that would arise in relation to the underlying debt, the appointment of the receiver and his management of the receivership."

168. On this basis the trial judge concluded that the Receiver did not act negligently in managing the properties. This was a clear finding of fact based upon the evidence of a witness (Ms. McCarthy) whom he held to be an honest and reliable witness, and extensive documentary evidence, and the fact that the Receiver was required to obtain an injunction from the High Court. The fact that the properties remained unlet for a number of years and fell into disrepair is not sufficient either to establish mismanagement on the part of the Receiver on the facts in this case or to permit this court to overturn the High Court's findings of fact. The High Court's findings were open to the High Court judge to reach on the basis of credible evidence and there is no basis for this court to overturn these conclusions.

169. For these reasons this ground of appeal also should be rejected in my judgment.

12. The use of the wrong address for 29, Kingswood Heights

170. There was confusion in the documentation between 24, Kingswood, Tallaght and 29, Kingwood Heights. At all material times the Hades owned 29, Kingswood Heights and not 24, Kingswood Heights. The solicitor acting for them at the time confirmed in correspondence that his undertaking was to hold the title deeds relating to 29, Kingswood Heights. In the circumstances, the argument that the mortgage created over 29, Kingswood Heights was invalid was described by the trial judge as having "*no substance*" and I would agree. Mr. and Mrs. Hade knew at all times that the mortgage was to be created over this property which was owned by them and their solicitor confirmed that fact in writing. It is not open to them now many years later to contend otherwise.

Conclusions

The Summary Proceedings

171. On the summary proceedings I am satisfied that the trial judge was correct to enter judgment in favour of the bank in the sums claimed by the bank against Mr. Hade and Mr. and Mrs. Hade. No argument was advanced that the sums claimed were incorrect. I am satisfied that the arguments advanced by the Hades by way of defence to the bank's claim for judgment did not provide an answer to the bank's claim, nor did they give rise to any claim for damages against the bank on foot of their counterclaim. For these reasons I would dismiss the appeal of the Hades in the summary proceedings.

172. In my judgment the bank was wholly successful in the summary proceedings and no reason was advanced by the Hades why the bank ought not to recover its costs of the summary proceedings and their counterclaim in those proceedings. The trial judge did not explain why he departed from the usual approach that costs should follow the event and he appeared to conflate the position of the bank with the Receiver when he made no order as

to costs. I would allow the bank's appeal in relation to the refusal to award it the costs of the summary proceedings in the High Court.

The plenary proceedings

173. The High Court dismissed Mr. Hade's claim against the bank and the Receiver in these proceedings. For the reasons I have set out above, I too would dismiss the claim against the bank and the Receiver brought by Mr. Hade in these proceedings. I therefore would refuse Mr. Hade's appeal. I would also allow the bank's appeal against the refusal to award it the costs of defending the plenary proceedings in the High Court as it has been entirely successful and therefore was presumptively entitled to an order for its costs. The question of the Receiver's appeal on the order for costs should be addressed at the hearing in relation to the costs of the appeals.

174. The High Court held that the Receiver acted unlawfully in taking possession of the Repossessed Properties without first obtaining orders for possession in the Circuit Court. In my judgment the High Court judge erred in his construction of the Land and Conveyancing Law Reform Act 2009 and the Receiver was entitled to take possession of the Repossessed Properties without the necessity of obtaining orders for possession from the Circuit Court. It followed that the Receiver was never a trespasser in respect of the Repossessed Properties. His conduct in repossessing the Repossessed Properties could not therefore attract an award of exemplary damages and in awarding exemplary damages in respect of the repossession of the Repossessed Properties the trial judge erred.

175. The Receiver accepted that he was obliged to obtain orders for sale from the Circuit Court prior to selling the Sold Properties and that he failed to do so. Accordingly, it is accepted that he acted unlawfully.

176. Mr. Hade, a co-owner of three of the Sold Properties, never at any stage in the proceedings sought exemplary damages from the Receiver (or the bank). It was never an

issue in the case until the trial judge delivered his judgment. In deciding to award exemplary damages against the Receiver when he was not on notice of any such claim, did not have the opportunity to adduce relevant evidence or advance any submissions on his behalf or address the level of any exemplary damages which the High Court might contemplate awarding, the trial judge failed to afford him fair procedures and erred in awarding exemplary damages.

177. The conduct of the Receiver in selling the Sold Properties without first obtaining an order from the Circuit Court, was not, in the circumstances of this case, of such moral turpitude or so egregious as to warrant the Court marking its disapproval by awarding exemplary damages against the Receiver. The Receiver sought and obtained legal advice prior to selling the properties and therefore he did not act in reckless disregard of whether he was entitled to sell the properties. Section 105 of the Act of 2009 provides a statutory remedy in damages if a property is sold without obtaining a court order which suggests that a degree of moral turpitude, over and above the breach of the statutory provision, is required in order to attract exemplary damages in addition to the damages provided by statute.

178. Even if this were a case in which it was appropriate to award exemplary damages, the quantum was wholly excessive in the circumstances of this case where the Receiver had clearly at all stages attempted to act lawfully and abide by legal advice albeit that it proved to be in error on this point. For these reasons, I would allow the appeal of the Receiver.

Noonan and Butler JJ. have authorised me to indicate their agreement with this judgment.