THE COURT OF APPEAL – UNAPPROVED

Appeal Number: 2022/74

Haughton J.
Ní Raifeartaigh J.
Binchy J.

Neutral Citation Number [2023] IECA 96

BETWEEN/

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF/
RESPONDENT

- AND -

JOHN MCCARTHY AND JEREMIAH HEALY

DEFENDANTS
(Jeremiah Healy, sole Appellant)

JUDGMENT of Mr. Justice Binchy delivered on the 26th day of April 2023

1. This is a judgment in an appeal from a decision of the High Court (Hyland J.) of 24th February 2022 whereby on that date the trial judge granted the respondent summary judgment against the defendants in the sum of €914,762.19. The appeal is brought by the second named defendant, Jeremiah Healy, only ("the appellant").

Background

2. The respondent advanced three loans to the defendants, the first on 1st October 2007, and the second and third on 9th June 2008. The first loan, bearing account reference number XXXX7720 was in the sum of €750,000, the second, bearing account reference number XXXX8167 was in the sum of €250.000 and the third bearing account reference number

XXXX9207 was also in the sum of €250.000. It is not disputed that these loans were accepted and drawn down, and that security was provided by the defendants to the respondent over certain properties (the "secured properties").

3. The defendants fell into arrears in repayment of the loans, and in the usual way the respondent issued demands for payment of all sums due by the defendants. When the defendants failed to repay the loans, the respondent appointed a receiver over the secured properties, all of which were sold on 23rd December 2014, and the proceeds of sale of which were applied in reduction of the outstanding balances of the defendants' loans.

4. Following the disposal of the secured properties, the respondent issued, on 31st July 2015, summary judgment proceedings against the defendants, claiming a total sum of €866,181.74. An appearance was entered on behalf of the defendants on 8th October 2015, and while it is unclear what transpired in the meantime, a motion for judgment was issued by the respondent in February 2017. By this motion, the respondent sought judgment in the sum of €876,619.62.

5. The motion for judgment was grounded on the affidavit of Mr. Sean Buckley, who describes himself as a manager in the arrears support unit of the respondent. In the usual way, Mr. Buckley deposes as to the issue of letters of loan offer by the respondent to the defendants and the default of the defendants in making repayment of each of the loans in accordance with the terms and conditions applicable thereto. He refers to the demands made by the respondent for repayment of all sums due and owing in respect of each loan and describes the balance outstanding in respect of each loan as of the date of his affidavit.

6. In an affidavit sworn on 2nd May 2017, in reply to the affidavit of Mr. Buckley, the appellant refers to the secured properties, and to the sale of those properties through a receiver. The appellant avers that on 8th March 2017, his solicitor sought particulars of the sales of the secured properties including the dates of the sales, by whom they were sold, the

sale prices, particulars as to how the proceeds of sale were credited to the accounts of the defendants, and how those amounts were calculated. He exhibits his solicitor's letter of 8th March 2017, and a reply received from the solicitors for the respondent of 13th March 2017 by which the solicitors for the respondent stated that they had the referred the defendants' solicitor's letter of 8th March to their client for instructions. They also stated that the affidavit of Mr. Buckley had made no reference to the sales of the secured properties because the proceedings are summary judgment proceedings.

7. The disposals of the secured properties were addressed by an affidavit sworn on 3rd April by a Mr. Emmet Pullan, also a manager in the arrears support unit of the respondent. Four properties were sold. In a table in the affidavit, Mr. Pullan provides a description (i.e. the address) of each the four properties, the sale price, the date of sale and the amount credited to the accounts of the defendants. Three of the properties had been sold as part of a portfolio sale of properties. In respect of the sales of those properties, Mr. Pullan avers: *"I say that the properties detailed at entries 1 – 3 in paragraph 4 above were sold as part of a portfolio sale of properties in December 2014. The plaintiffs' assessment of the fair market value of the properties prior to the sale was greater than the amount that the ultimate purchaser was willing to pay. Therefore, the sales proceeded on the basis of the offer made by the purchaser and, although not obliged to do so, the Bank applied a further credit, in addition to the net proceeds received, to the defendants' accounts."* Mr Pullan then avers that as of 8th February 2017, the aggregate sum of €893,199.18 remained due and owing by the defendants to the respondent.

8. The appellant swore a further affidavit on 5th July 2019. In relation to the secured properties, the appellant avers that the defendants had made a data access request of the respondent on 19th July 2016, and while they had received a reply to that request, no information had been provided at that point in time in relation to the sale of the secured

properties. He then refers to the affidavit of Mr. Pullan and to the apparent sale of the secured properties by way of private treaty as part of a portfolio sale of properties. He claims he is entitled to further information in relation to the sales of the secured properties so that he can properly assess the value of the properties at the time of sale, and in particular he says that he needs access to the valuations which were carried out on behalf of the respondent in connection with the sales.

9. The appellant also raised two other issues by this affidavit. The first of these issues concerns the rates of interest applied to the loans of the defendants. The appellant avers that he has been informed by his solicitor that the rate of interest applicable to his loans (as expressly provided for in two of the letters of loan offer, being the loan accounts numbers XXXX9207 and XXXX8167) was to be the European Central Bank main-refinancing operations minimum bid rate (the "Rate"), unless for any reason the Rate was deemed by the respondent to be inappropriate. In that event, the general terms and conditions applicable to the loans required the respondent to notify the appellants of any alternative interest rate to be applied.

10. As regards the third loan, being the loan advanced pursuant to the letter of loan offer of 1st October 2007, it makes no express reference to the Rate. Instead it states simply that the rate of interest shall be the "ECB tracker rate", and the letter does not define that term, and nor, unlike in the other loan offer letters, do the general conditions make any reference to the Rate. However, the appellant argues that in the absence of anything to the contrary, this must have been what was intended because as of the date of that letter (1st October 2007) all Bank of Ireland loans of that kind tracked the Rate.

11. The appellant avers that he has been advised by his solicitors that on 8th October 2008, the European Central Bank ("ECB") made the "dramatic" policy decision to allocate in full all fixed rate tenders received from lending institutions, and that the effect of this decision

was to abolish the Rate. This decision was to take effect from 15th October 2008. The appellant avers that as a result, the respondent was obliged, under the general terms and conditions applicable to the loans, to notify the defendants of the alternative interest rate to be applied to the loans, and that not having done so, there is no applicable interest rate, and that, accordingly, the amount claimed by the respondent in respect of all loans is overstated by the amount of interest claimed in respect of each loan since October 2008, which amounts to a very considerable sum.

12. In advancing this argument about the discontinuance of the Rate, the appellant did not adduce any evidence of any kind. He averred as he did on the basis of advice given by his solicitors, who he said had "*had regard to a number of articles/papers which deal with the difference between fixed and variable rate tenders in the management of liquidity by the Eurosystem*". The appellant did not exhibit any of those articles or papers to his affidavit.

13. The third issue raised by the appellant in his affidavit of 5th July 2019 concerns a review of its tracker mortgages then being conducted by the respondent. The appellant avers that by letter dated 27th October 2017, he wrote to the respondent requesting that his loans be included in the tracker mortgage review. He exhibits that letter, and a letter received in reply from the Bank on 4th May 2018. By that reply, the respondent informed the appellants that the interest rates that had been applied by the respondent were the correct rates in accordance with the terms of the mortgage loan offer letters, which of course the defendants disputed for the reasons set out above.

14. The respondent caused three separate affidavits to be sworn in reply to the second affidavit of the appellant. The first of these affidavits was another affidavit from Mr. Pullan. Mr. Pullan firstly addresses the appellant's claim that the Rate was no longer available from 8th October 2008. He says that the appellant is "simply mistaken" in this regard, and refers to the other affidavits delivered on behalf of the respondent at the same time, and which I

deal with below. At paragraph 5 of his affidavit, Mr. Pullan sets out tables identifying the European Central Bank Main Refinancing Operations rate (the "ECB_MRO rate") since 29th November 2007. Although Mr. Pullan does not expressly aver that that is the Rate (the Rate bears the same nomenclature, save for the additional words "Minimum Bid") it is clear that that is what he means. In the same table he identifies the agreed margin over the ECB-MRO interest rate to be applied to the defendants' accounts, and draws attention to the fact that at all times the respondent actually applied a lower margin than that agreed, being a margin of 1.1% above the ECB-MRO rate, instead of 1.15% in the case of loan accounts ending 8167 and 9207. Mr. Pullan also exhibits copies of the year end statements in respect of each of the three accounts on which changes of interest rates were identified.

15. Mr. Pullan then proceeds to address the sale of the secured properties, and provides considerably more detail in relation to the sale proceeds than in his earlier affidavit. In the case of three of the properties, they were sold as part of a portfolio. Because it was part of portfolio sale, the respondent obtained more than one valuation in each case. Each property was credited with a specific price as part of the portfolio sale. In the case of the first property (a property at Beaufort, County Kerry) the best price within the portfolio was stated to be €132,819.04. There were two valuations obtained in relation to this property. One of them estimated the value of the property at €170,000, and the other at €130,000. Mr. Pullan describes how the two estimates were added together to produce an average valuation of €150,000 and so the price achieved within the portfolio was uplifted by €17,897.47 to reflect the average of the two valuations, and a further €322.08 was added as an apportionment of local property tax.

16. A similar exercise was undertaken in relation to the other two properties sold within the portfolio – (it is unnecessary to go into the detail of these because the appellant did not seek to challenge these figures in any way). As to the fourth property, this was sold on the

open market in the usual way, and Mr. Pullan provides full details of the sale process, the independent valuations obtained in advance of sale (of which there were two), the price achieved (being just above the average of the two valuations), the costs of sale and the net sale proceeds credited to the account of the defendants.

17. The second affidavit provided by the respondent in response to the second affidavit of the appellant is an affidavit sworn by a Mr. Tony Morley, who is described as "an officer of the plaintiff" and also as the "current head of balance sheet management for the Bank of Ireland Group". He avers that he is personally very familiar with the detail and day to day operations of the ECB's refinancing Operations. Addressing the assertion of the appellant that as of October 2008, the rate specified in the loan agreements was no longer available from 8th October 2008 for the remainder of the term of the loan, Mr. Morley avers that the assertions of the appellant are incorrect and show a fundamental misunderstanding of the position. He avers: *"No ECB interest rate was or became "unavailable" in October 2008 as alleged, or at all, and specifically the interest rate to which the defendants' loans herein are tied – being the ECB MRO interest rate – as continued to be set and to be published by the ECB from time to time since before the defendants' loans were drawn down and right through to date."*

18. Mr. Morley then goes on to explain that what did change in October 2008 was the quantum of liquidity made available by the ECB to financial institutions in the Euro system. He explained that between June 2000 and October 2008, the ECB would make a limited pool of liquidity available for qualifying institutions to apply for at the published ECB-MRO interest rate – which rate, he explains, was by definition the "minimum rate for the operation in question". However, if a qualifying institution wanted a better chance of getting the full amount it required, it was allowed to and might bid to pay a marginally higher interest rate over and above the ECB-MRO interest rate *i.e.* over and above the minimum rate. However,

following the onset of the financial crisis, on 15th October 2008 it was decided by the ECB that, rather than making a limited pool of liquidity available for qualifying institutions, it would make an unlimited pool of liquidity available for qualifying institutions at its published ECB-MRO interest rate. In other words, the bidding process was discontinued, but the ECB continued to publish the ECB-MRO interest rate.

19. Mr. Morley refers to a document from the ECB website which he exhibits. The document identifies key ECB interest rates going back to 1st January 1999. Between 1st January 1999 and 9th June 2000, the rate was fixed. From 28th June 2000 up to 15th October 2008 the rate is described (at the top of the column in which the rate appears) as: "variable rate tenders minimum bid rate".

20. Mr. Morley explained that even in circumstances where the respondent borrowed from the ECB on the basis of the higher rate than the minimum bid rate, the defendants were only ever charged the minimum bid rate plus a margin in accordance with the terms of the offer letters. In fact, Mr. Morley explains, so far as accounts numbers 8167 and 9207 are concerned, the defendants were charged a margin that was less than the rate agreed in the letters of offer – they were charged a margin of 1.1% instead of 1.15%.

21. So far as the third letter of offer is concerned, wherein the interest rate was stated to be "4.75% ECB tracker rate", Mr. Morley opined that that was sufficient to establish the loan as a tracker mortgage loan tracking the ECB-MRO rate, even though the special conditions failed to make any reference to that rate.

22. Finally, Mr. Morley refers to and exhibits a number of ECB documents that issued after October 2008, that continue to refer to the "minimum bid rate". He exhibits four such documents, one being a press release of 6th November 2008, another press release of March 2010, a monthly bulletin issued in June 2010 and a statistics pocket book of July 2014. These are exhibited by way of example only and Mr. Morley says there are other documents that

have continued to refer to the rate in these terms. The general thrust of the point being made by Mr. Morley is that while the opportunity to bid at a higher rate than the minimum rate stipulated by the ECB for main refinancing operations was abolished in October 2009 (because the ECB made a decision to make available an unlimited pool of liquidity to qualifying institutions) the Rate itself always remained in being and was never abolished as contended by the appellant.

23. The third affidavit provided by the respondent in reply to the second affidavit of the appellant is an affidavit sworn by Mr. Ciaran Rogers on 17th October 2019. Mr. Rogers describes himself as an economist and provides details of his professional background. He has worked for the Central Bank, the ECB and more recently in Grant Thornton as head of prudential risk. Mr. Rogers avers that he has read all of the aforementioned affidavits and he confirms as correct the explanations given by Mr. Morley in relation to the workings of the ECB-MRO. He specifically avers that the ECB-MRO rate was never discontinued or abolished and it never became unavailable, as the appellant contends. Rather, he says "*it has continued throughout, as it still continues, to be fixed and adjusted upwards and downwards by the ECB from time to time as part of the ECB's implementation of monetary policy and its management of liquidity within the Eurosystem*."

Judgment of the High Court

24. At hearing before the High Court, the defendants elected to make no submissions. They neither consented to nor opposed the application of the respondent. In effect, they left it to the trial judge to decide the application based on the evidence summarised above.

25. The trial judge recorded that she was satisfied of the following matters:

1) That the loans were made by the respondent to the defendants, in accordance with the terms identified in the documents exhibited;

2) That in accordance with the terms of the loans, the respondent was entitled to demand the entire amount should the conditions of the loan not be complied with by the defendants;

3) That the loans were advanced to the defendants by the respondent;

4) That the defendants failed to meet the agreed repayments;

5) That security was provided by the defendants over four different properties in respect of the loans;

6) That demands for repayment of the loans were made in 2014 and 2015;

7) That following failure to repay the loans, the secured properties were sold and the defendants were credited with the net proceeds of sale;

8) That any issues raised by the defendants regarding the sale of the secured properties had been addressed in detail by the affidavit of Mr. Pullan of 8th October 2019, and there was no controverting evidence provided by the defendants in relation to the disposal of the secured properties;

9) That after giving due credit for the net proceeds of sale of the secured properties, there remained monies outstanding by the defendants to the respondent;

10) That the defence raised by the defendants in the affidavits regarding the entitlement of the respondent to charge interest after October 2008 had been addressed in detail by the affidavits sworn on behalf of the respondent;

11) That the evidence relied upon by the defendants in this regard "such as it was, was extremely thin" and accordingly the defence that the defendants had sought to raise in this regard was not one that was based on any evidence, but in any case the defendants had no longer maintained that defence since they had chosen not to make any submissions to the court in relation thereto.

26. The trial judge concluded that there was in fact no defence being proffered by the defendants, and that the defence that had been proffered was well below the threshold of a credible defence. For all of the foregoing reasons, the trial judge granted judgment in the sum of €914,762.19.

Notice of appeal

27. In his notice of appeal filed on 30th March 2022, the appellant sets out the following grounds of appeal:

1) That the trial judge erred in law and in fact by granting judgment in circumstances where the appellant had a credible and *bona fide* defence to the proceedings;
2) That the trial judge erred in law and in fact by failing and/or refusing to adjourn the within proceedings to plenary hearing on the basis that the appellant had a credible and *bona fide* defence to the proceedings;
3) That the decision of the trial judge was contrary to fairness and the balance of justice.

28. The credible and *bona fide* defence referred to in the above grounds of appeal at section A of the notice of appeal is subsequently identified in section B thereof as being, firstly, the dispute on the affidavits regarding the alleged change in the interest rate applicable to the loans, and secondly the manner of sale of the secured properties and the application of the proceeds of sale to the accounts of the defendants. The appellant also claims the trial judge erred in failing to have regard to the exclusion of the defendants loans from the respondent's tracker mortgage review programme.

29. The appellant seeks an order setting aside the judgment of the High Court, and adjourning the proceedings for plenary hearing.

Respondent's notice

30. In its respondent's notice, the respondent claims that the trial judge was correct to grant judgment, and to decline to adjourn the proceedings to plenary hearing in circumstances where:

1) The trial judge was informed by counsel for the appellants that they were neither consenting to nor objecting to judgment being entered against them;
2) The defendants chose not to pursue any of the prospective defences raised in the affidavits; and,
3) The defences raised in the affidavits did not give rise to a credible or a *bona fide* defence in light of the contents of the affidavits and the affidavits filed by the respondent, as well as the submissions made on behalf of the respondent.

Submissions of appellant

31. In the written submissions filed on his behalf, the appellant relies upon the well-known authorities of *Harrisrange Limited v. Duncan* [2002] IEHC 14, and *Aer Rianta Cpt. v. Ryanair Limited (No.1)* [2001] 4 IR 507. It is submitted that the conflict on the affidavits, in particular as regards the applicable rates of interest and the sale of the secured properties were sufficient to overcome the low threshold required to refer the proceedings to plenary hearing, and the issues raised are credible, *bona fide* and good defences to the action. It is submitted that the issues raised by the affidavits by way of defence to the proceedings go directly to the credibility and accuracy of the quantum sought by the respondent, and are more than mere assertions.

32. It is submitted that the trial judge erred in law and in fact in failing to give any regard to the conflicts raised by the affidavits and that the issues in dispute were not simple and capable of being easily determined. The appellant contends that the matters raised by the affidavits require expert evidence and cross examination of witnesses.

33. It is also submitted that even though the appellant adopted a neutral position at the hearing of the motion, that the matters raised by the appellant on affidavit were sufficient to require the proceedings to be determined by way of a plenary hearing.

34. The appellant places significant reliance on the fact that in earlier proceedings brought by the respondent entitled *The Governor and Company of the Bank of Ireland v. Joanne Phelan*, precisely the same issue regarding the alleged change of interest rate was raised by the defendant, and MacGrath J. adjourned the application for further submissions. In the course of his judgment, delivered on 21st July 2020, one year and seven months before the hearing of the within application in the High Court, MacGrath J. stated:

> *"While there may be a strong ground for arguing that the expression "minimum bid rate" is referable to the tender process rather than being a reference to a specific and separate interest rate, I do not believe that the issue raised by the defendant may safely be described as unarguable. I am satisfied that the conflicting views expressed are such that it would be inappropriate to determine this issue without further hearing. There is a clear conflict, which this Court is unable to resolve simply on a consideration of the contents of the affidavits."*

35. The decision of MacGrath J. in *Phelan* was not referred to by either party in the court below. While it was referred to and relied upon in the written submissions of the appellant to this Court, those submissions made no criticism of the respondent for failing to draw the judgment of MacGrath J. to the attention of Hyland J. However, at the hearing of this appeal, counsel for the appellant very strongly criticised the respondent (though not the respondent's legal advisors) for failing to draw the decision of MacGrath J. to the attention of the trial judge in these proceedings. Counsel submitted that since the respondent had failed in its duty to draw this decision to the attention of the Court, the appellant ought to be entitled to rely on Phelan at the hearing of this appeal, even though the appellant had not made any

submissions in the Court below. I will return to this issue, and to the decision of MacGrath J. presently.

36. Finally, counsel also contended that the trial judge erred in not having regard to the refusal of the respondent to admit the defendants loans to its tracker mortgage review programme. Counsel submitted that it is relevant that the respondent has, in another setting, admitted 81 regulatory breaches in the context of tracker mortgages.

Submissions of respondent

37. The respondent argues, firstly, that the appellant cannot be allowed to advance this appeal in circumstances where in the High Court he chose not to pursue any of the prospective defences raised in the affidavits filed by him, and he has not sought leave to do so in this appeal. In this regard the respondent relies upon *K.D. v. M.C.* [1985] 1 IR 697, *Ennis v. AIB* [2021] IESC 12 and *Promontoria (Arrow) Limited v. Mallon & Anor* [2021] IECA 130.

38. In *K.D. v. M.C.* Finlay CJ observed that it is a fundamental principle, arising from the exclusively appellate jurisdiction of the Supreme Court that, save in the most exceptional of circumstances, the Court should not hear and determine an issue which has not been tried and decided in the High Court. However, he added that to that fundamental rule or principle there may be exceptions, but they must be clearly required in the interest of justice.

39. In *Ennis v. AIB,* MacMenamin J., having quoted the relevant passages from *K.D. v. M.C.*, said:

> "*This remains the general principle. It emphasises the weight to be given to finality in litigation, subject to rights of appeal as set out in the Constitution and in statute law. To this end, litigants are required to advance their full case at first instance*".

40. The respondent also relies on the following passages from the judgment of Noonan J. in this Court in *Promontoria (Arrow) Limited v. Mallon & Anor* [2021] IECA 130.

"*However, lest it be thought that the Ennis decision has recalibrated the balance in this area of law in any dramatic way, it is fair to note that although MacMenamin J. allowed for greater flexibility in non-plenary cases, he said (at para. 15 of his judgment) that the K.D. principle remained "the general principle" i.e. that it was a fundamental principle that save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried and decided in the High Court. He also said that while there were exceptions, they must be "clearly required in the interests of justice*". MacMenamin J. viewed the *Ennis* case as falling within the category of "*truly exceptional*".

41. The respondent also relied on the decision of the Supreme Court (Clarke J.) in *Koger Inc. v. O'Donnell* [2013] IESC 28 wherein he stated at para. 7.7:

"7.7 *There are very real reasons both of principle and of practice why, not least in complex cases, parties should be required to carefully consider whatever case they wish to put forward to their best advantage and stick to it. Trials are not a dry run. Tactical decisions are made by all parties on a regular basis in the context of complex trials. Doubtless, with the benefit of hindsight, many parties might wish to be allowed revisit some of the tactical decisions which they took. However, allowing parties do so on appeal is a recipe both for procedural chaos and serious injustice*."

42. The respondent submits that the appellant, having chosen not to make any submissions in the court below, should not now be permitted to advance this appeal.

43. In case the court does not accept that submission, the appellant further submits that the evidence of Mr. Morley, as supported by the evidence of Mr. Ciaran Rogers, makes it clear that the appellant's contention that there was no Rate after October 2008 is incorrect. The respondent submits that the evidence of Mr. Morley makes it clear that both before and after 15th October 2008, the ECB determined the interest rate applicable to main refinancing

operations – the only difference between before and after 15th October 2008 was that on that date the ECB made the decision to make an unlimited pool of liquidity available at its published ECB-MRO interest rate, to qualifying institutions, subject only to their being able to provide adequate security to the ECB. There was therefore no need from that point in time onwards for financial institutions to bid for an allotment of funds at any higher rate in order to try and secure the funds they required. But this had no impact at all on the interest rate applied to the defendants' loans, which rate continued to track the ECB-MRO interest rate. Both before and after October 2008, it is submitted, the ECB fixed and published a single ECB-MRO interest rate for the time being and the distinction which the appellant has sought to draw in the position before and after October 2008 is misconceived.

44. The respondent submits that in circumstances where the defendants advanced no expert evidence, and where the argument they made in this regard was addressed by expert evidence sworn on behalf of the respondent, the trial judge was correct to conclude that the issue raised by the defendants did not meet even the low threshold necessary to adjourn the matter to plenary hearing.

45. As to the reliance by the appellant on *Governor and Company of the Bank of Ireland v. Phelan*, it was submitted that that case may be distinguished, because in *Phelan,* the defendant in that case relied on three affidavits sworn by two deponents each having financial expertise to substantiate Ms. Phelan's argument that the primary rate of interest provided for in her loan contract ceased to be available from 15th October 2008. Counsel for the respondent vehemently rejected that there had been any lack of candour on the part of the respondent in not drawing *Phelan* to the attention of the trial judge. He explained that he had not been in the case in the High Court, and had this issue been raised in advance, he could have taken instructions and if necessary sought leave to file an affidavit in regard to

this allegation. Since the point was made for the first time at the hearing of the appeal, the respondent would be prejudiced if the Court were to take it into account.

46. Counsel for the respondent drew to the attention of this Court that the same issue - i.e. whether the Rate survived after October 2008 - was raised by a defendant in another case (after *Phelan*), namely *The Governor and Company of the Bank of Ireland v. Wales* [2022] IEHC 433. In that case, in a judgment delivered on 13th July 2022 (after these proceedings were heard by Hyland J.) the High Court (Phelan J.) referred the matter to plenary hearing because the defendant in that case *had* adduced expert evidence to support his claim that the Rate had been abolished. Since both parties in the proceedings had supported their positions through expert evidence, the trial judge considered that the question could not safely be described as unarguable, and should be determined following a plenary hearing.

47. In relation to the arguments advanced by the appellant regarding the evidence concerning the sale of the secured properties, the respondent contends that this matter has been addressed in significant detail by Mr. Pullan in his two affidavits. The respondent submits that the trial judge was entitled and correct to conclude that the proceeds of sale from the disposal of the secured properties had been adequately accounted for in the explanation provided by Mr. Pullan, and that since there was no controverting affidavit provided by the defendants, the complaint initially raised by the appellant fell away, and could not give rise to any possible defence to the proceedings.

48. As to the tracker review programme, the respondent says it is unclear what point the appellant is advancing under this heading. The appellant had exhibited correspondence with the appellant in which the respondent had informed the appellant that the defendants' accounts were not identified as being "impacted by the Central Bank's tracker mortgage investigation". There the matter rested, as at 4th May 2018. More fundamentally, the

respondent submits, the appellants complaint under this heading appears to undermine his argument that the Rate ceased to exist, since the purpose of the Central bank inquiry was to consider the unlawful removal of customers from rates tracking the ECB-MRO rate.

Discussion and decision

49. The first issue that falls for consideration is the extent to which the appellant's submissions should be entertained at all, the appellant having chosen to make no submissions to the Court below. Even though the appellant advanced no submissions, he did not accede to judgment, instead leaving it to the trial judge to consider his case on affidavit, which of course she did.

50. The appellant is not asking the Court to receive any new evidence. So far as his submissions are concerned, putting aside the arguments advanced by the appellant that are grounded upon the decision of MacGrath J. in *Phelan* (to which I return below) it does not appear to me that the arguments advanced by the appellant could be said to be new arguments even though no submissions were advanced by the appellant in the Court below; on the contrary, the submissions made to this Court are based upon and go no further than the arguments that were in effect advanced by the appellant by way of his affidavits, since his affidavits were, as is so often the case, a mix of evidence and submission. That this is so is apparent from the central ground of appeal which is, simply, that the appellant placed before the Court, on affidavit, sufficient evidence of a bona fide and credible defence as to necessitate the proceedings being referred to plenary hearing. Even though he made no submissions at first instance, the appellant must surely be entitled to argue that the trial judge erred in arriving at the conclusions that she formed on the evidence, as long as he does not stray beyond his case on affidavit. It does not seem to me that any of the authorities relied upon by the respondent go so far as to prohibit such a course. Those authorities are

concerned with new evidence and new arguments, and, as I have said, except for the submissions of the appellant based upon *Phelan*, neither arise here.

51. I turn therefore to consider whether the appellant advanced sufficient evidence of a credible and *bona fide* defence to the proceedings such as to require the proceedings being referred to plenary hearing. In the affidavits of the appellant, the defendants advanced three arguments in opposition to the proceedings. As is apparent from the above, these arguments were : (1) that the respondent had failed to account properly for the sale proceeds of the secured properties, (2) that the Rate had been abolished with effect from October 2008, and the respondent had failed to follow the procedures required by terms and conditions applicable to each loan as regards the application of a replacement rate and (3) that the respondent had failed to admit the appellants loans to its tracker mortgage review. The appellant contends that the trial judge erred in failing to find that these matters constituted a credible and bona fide defence to the proceedings.

52. As to the first of these arguments, in response to the affidavits of the appellant, the respondent, by the affidavit of Mr. Pullan of 8th October 2019, provided detailed information regarding the valuations of the secured properties obtained by the respondent in advance of the sales of the same, as well as the subsequent sales of the secured properties and the application of the sale proceeds to the loan account balances of the defendants. While it is true that this information was provided much later than it should have been (a matter I will come back to in due course) the fact is that having been provided with this information the appellant took no further issue with it.

53. Although the written submissions of the appellant to this Court refer in a general way to the sales of the secured properties, the valuations of the same and the application of the sale proceeds, nowhere is it explained how these matters give rise to a credible defence, or indeed a defence of any kind, and nor was this explained or elaborated upon at the hearing

of this appeal. In my opinion, there is nothing at all in the affidavits exchanged between the parties regarding the sale of the secured properties that gives rise to even the possibility of a defence to the proceedings, and I can find no fault with the conclusion of the trial judge on this issue (see para.25(8) above). Accordingly, this ground of appeal must be dismissed.

54. The second ground of defence raised by the appellant in his affidavits relates to the Rate. The appellant contends that the Rate was no longer available with effect from 15th October 2008, and that the respondent was required, by its own general terms and conditions, to notify the defendants as to as to the newly applicable rate going forward. Not having done so, the appellant argues, there was no longer any interest rate applicable to the defendants' loans and therefore the sum claimed by the respondent in the proceedings is significantly overstated. In advancing this proposition, the appellant does so on the basis of hearsay only, having been advised by his solicitor that the Rate was unavailable after 15th October 2008. He exhibits no supporting documentation of any kind.

55. In contrast, the respondent addressed the issue in considerable detail, through three affidavits, one of which was provided by a person who appears to be independent of the respondent (Mr. Rogers). There can be no doubt that the trial judge was correct to reject this as being a credible defence based on the evidence before her, and her description of the evidence of the appellant on this point as being "extremely thin" cannot be gainsaid. In truth, the appellant offered no evidence all on the issue, other than hearsay, and merely asserted that the Rate had been abolished. However, at the hearing of this appeal, the appellant seeks to rely on *Phelan* in order to advance this argument. As already mentioned, *Phelan* was not opened to the trial judge by either party.

56. This raises the question as to whether the appellant should be entitled to rely on *Phelan* at all, not having relied on it in the Court below. As I have already mentioned above (see paras. 37-41 above) the respondent, in its submissions, forcefully submits that it is not open

to the appellant to raise before this Court arguments not advanced in the Court below, and moreover the appellant has not sought leave to do so. In this regard, the respondent relies in its submissions on the decision of Finlay C.J. in *KD v MC* [1985] I IR 697, and the decision of McMenamin J. in *Ennis v AIB* [2021] IESC 12, as well as the decision of Clarke J. (as he then was) in *Koger Inc v O'Donnell* [2013] IESC 28.

57. Counsel for the appellant did not reply directly to this point. Instead, she accused the respondent (and not its legal advisors) of lack of candour in not bringing *Phelan* to the attention of the trial judge. Had the trial judge been aware of *Phelan*, the course of the proceedings in the Court below might have been different (so the argument goes) and she might have taken a different view of the defence being advanced by the appellant.

58. Although *Phelan* had been referred to in the written submissions of the appellant, this accusation was made for the first time at the hearing of this appeal. I agree with counsel for the respondent that this is not acceptable. Neither counsel appearing before this Court were in the case in the High Court. Had bad faith been signalled in advance, the respondents' legal advisors could have addressed this with the respondent's personnel, and, if necessary, sought leave of the this Court to address the accusation on affidavit.

59. In submitting that the respondent had been guilty of lack of candour in the High Court, counsel for the appellant placed some emphasis on the fact that the respondent addressed the interest rate question in *Phelan* through affidavits sworn by the same deponents as addressed the same issue in these proceedings. But this falls well short of establishing any lack of candour on their part. The deponents in question had sworn their affidavits in these proceedings in October 2019 nine months before the decision of MacGrath J. of 21st July 2020 in *Phelan* upon which the appellant now relies. Moreover, by the time this matter came on for hearing before Hyland J. on 24th February 2022, MacGrath J. had delivered a second judgment in *Phelan*. Since that case involved an application for possession (and not an

application for judgment in a liquidated amount), it was not necessary for him to adjudicate on the interest rate issue, because he was satisfied that there had been default on the part of the borrower in that case in making payment of her loan instalments (interest aside), and he therefore granted the order for possession sought by the respondent in that case. Accordingly, *Phelan* was well and truly concluded, favourably to the respondent (albeit without any consideration of the interest rate argument) by the time that this case came before the trial judge.

60. Furthermore, since the allegation of lack of candour was made for the first time at the hearing of this appeal, the respondent had no opportunity to address it, and we do not even know if any of the deponents who swore affidavits on behalf of the respondent were in court when the application was moved before Hyland J. None of the foregoing, in my opinion, suggests a lack of candour on the part of the respondent in not drawing *Phelan* to the attention of the trial judge, and this Court could not possibly draw such a conclusion based on this information alone. It would be unfair in the extreme to do so, and, as matters stand, the allegation should not be and cannot be entertained.

61. On the other side of the same coin, it is a matter for a litigant to bring to the attention of the Court any authority upon which he or she wishes to rely. The decision of MacGrath J. had been handed down 19 months before this matter came on for hearing before Hyland J. So, therefore, the appellant also bears significant responsibility for not bringing the decision to the attention of the trial judge. At the hearing of this appeal, the appellant did not address this at all, and it seems to me that as far as this argument is concerned the appellant is indeed faced with a significant problem, because, unlike the other elements of the defence raised by the appellant's affidavits, this is indeed a new argument being advanced by the appellant.

62. If the appellant wished to make the case that he should be allowed to advance this argument on appeal in view of the alleged lack of candour of the respondent in the Court

below, then he needed to make an application to this Court for leave to do so, and that would have afforded the respondent an opportunity to reply, and the Court could then have adjudicated on the issue. But none of that happened, and, without the permission of the Court, the appellant cannot now be allowed to advance this argument. Just as with any other argument, the appellant needed to make it before the trial judge, and, not having done so, and not having sought the permission of this Court to do so, he cannot be permitted to do so now. The authorities relied upon by the respondent make this very clear.

63. In any case, *Phelan*, in my view, is of little, if any, assistance to the appellant, for the simple reason that the opinion expressed by MacGrath J. in that case was based on evidence adduced by the defendant in that case, whereas in this case the appellant proffered no evidence at all to the High Court in support of his assertions, and did not seek leave of this Court to do so for the purpose of this appeal notwithstanding that he had become aware of *Phelan* in the intervening period. What the appellant now asks the Court to do is to refer these proceedings to plenary hearing based only on his assertions, and without having tendered any evidence at all in reply to the detailed affidavits of the respondent regarding the Rate. The case the appellant wishes to make about the Rate cannot succeed without evidence, and since he has provided the Court with no evidence, it has no prospect of success. Reliance on *Phelan* cannot overcome this evidential deficit, not least in circumstances where *Phelan* has concluded without the issue being determined. Accordingly, this ground of appeal must also be rejected.

64. Finally, the appellant has also raised an argument that the trial judge fell into error in failing to hold that the respondent failed to admit the appellant to its tracker mortgage review. The appellant raised this issue in his supplemental affidavit. It is related to the appellant's case that the respondent has not applied the correct rate of interest to the defendants' loans. The respondent accepts that it did not admit the defendants' loans to its

tracker mortgage review, and says it did not do so for the reason that it is the respondents' case that the defendants were at all times charged the correct rate of interest, i.e. the rates provided for in the loan agreements, being the tracker mortgage rate. The appellant does not appear to have taken any issue with the decision of the respondent in this regard, save in these proceedings.

65. The first difficulty with this argument is that it contradicts the appellant's earlier argument that with effect from 15th October 2008 there was no rate of interest applicable to the loans.

66. Secondly, the appellant's argument on this issue appears to be very different from the complaint most usually associated with tracker mortgages, which gave rise to Central Bank intervention, i.e. that a borrower had been improperly deprived of the benefit of very favourable "tracker" interest rates. Here, the appellant is contending that the Rate -being the interest rate which the loans were to track – disappeared, and that the respondent had certain contractual obligations which it did not follow as a consequence of which there was no applicable interest rate. The admission of the defendants' loans to the tracker mortgage review could have no bearing on this issue one way or another. While the trial judge did not address this issue, in my view she did not err by not doing so for the simple reason that the mere admission/non admission of the appellant's complaint to the respondents' tracker mortgage review programme was irrelevant since it has no bearing at all on the issue of whether or not the Rate was discontinued and it therefore could not possibly constitute a defence to the respondent's claim**.** It follows that this ground of appeal must also be dismissed**.**

67. Since all of the appellants grounds of appeal have failed, it follows that the respondent has been entirely successful in this appeal, and in the ordinary course the order of the High Court would be affirmed (including the costs order in favour of the respondent made by the

trial judge) and the respondent would be entitled to an order directing the appellant to pay all of its costs in this appeal pursuant to s.169(1) of the legal Services Regulation Act 2015. However, there is one issue of concern, to which I have made reference earlier. and that is the considerable delay on the part of the respondent in providing the defendants with particulars of the sale proceeds of the secured properties. On the face of it, that delay may well have added to the costs of the proceedings. In these circumstances it is proposed to convene a brief hearing (no longer than half an hour) to address the issue of costs incurred in this Court and in the Court below, at which the parties will of course be at large to raise whatever other issue they may wish to raise as regards costs. The Court registrar will inform the parties of the hearing date in due course, and the parties are of course encouraged to endeavour to reach their own agreement as regards costs in the meantime.

68. As this judgment is being delivered remotely, Haughton and Ní Raifeartaigh JJ. have authorised me to indicate their agreement with it.