

**APPROVED**

**[2024] IEHC 423**



**THE HIGH COURT**

**Record No.: 2020/1 SP**

**BETWEEN:**

**SENIORS MONEY MORTGAGES (IRELAND) DAC**

**Plaintiff**

**-and-**

**DONAL FINGLETON (AS ADMINISTRATOR AD LITEM OF THE ESTATE OF  
THE LATE ELIZABETH MURPHY DECEASED)**

**Defendant**

**JUDGMENT of Mr. Justice Rory Mulcahy delivered on 12 July 2024**

**Introduction**

1. These summary proceedings concern a type of loan commonly referred to as a “lifetime loan” or “reverse mortgage”. The essential feature of this type of loan is that no repayments are due on the loan until the death of the borrower but that the entirety of the loan, together with interest, becomes repayable following the borrower’s death. In this application, the plaintiff seeks an order for possession of a residential property in Sligo on foot of a Deed of Mortgage and Charge dated 22 March 2007 (“**the Mortgage**”). There is no dispute that there are sums due and owing on foot of a loan given to the late Elizabeth Murphy (“**the Deceased**”) and that the Sligo property was given as security for the loan. Nor is there any

**NO REDACTION REQUIRED**

dispute that the plaintiff is the lawful assignee of both the loan and the security and is, *prima facie*, entitled to possession under the terms of the Mortgage.

2. The court, however, raised two issues during the course of hearing the plaintiff's application. The first related to the manner in which interest has been calculated on the loan, the plaintiff having continued to apply interest to the loan after the death of the Deceased up to the date of the hearing. The second issue concerned the fact that, as became apparent, the demand made for repayment of the loan facility sought a sum in excess of the amount then due and owing.

3. In respect of the first of those issues, two matters arise for consideration. First, whether the court should concern itself with the balance due on the loan where it is clear that there has been default in discharging the loan. And second, if so, whether the provisions in the loan regarding how interest is to be calculated can be regarded as unfair contract terms within the meaning of Directive 93/13/EEC on unfair terms in consumer contracts ("**the Directive**" or the implementing regulations, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 27/1995).

4. In respect of the letters of demand, the question raised was whether a demand for a sum significantly in excess of the sum due and owing can be regarded as a valid demand sufficient to trigger the plaintiff's entitlement to seek possession.

### **Factual Background**

5. By letter dated 19 February 2007, Seniors Finance Ireland Ltd (a company unrelated to the plaintiff herein) offered to advance the sum of €46,000 to Ms Elizabeth Murphy, the Deceased. It was a pre-condition to the making of the loan that the Deceased execute a Deed of Mortgage over the property the subject of these proceedings.

6. The terms of the loan offer made clear that the Deceased would not be obliged to make any monthly repayment of principal, interest or any other amount during the term of the loan, rather monies due on foot of the loan would become due and payable on the happening of one of a number of events including, relevantly, the death of the Deceased. The Deceased executed the loan agreement on 7 March 2007. I will address below the terms of the loan offer regarding the calculation of interest.

7. The Deceased executed a mortgage and charge (“the Mortgage”) in favour of Seniors Finance Ireland Ltd on 22 March 2007. The property was unregistered land and the mortgage was registered in the Registry of Deeds in April 2007.

8. Clauses 1.2 and 1.3 of the Mortgage provide that:

*“1.2 All moneys remaining unpaid by the Mortgagor to the Mortgagee and secured by this Mortgage shall immediately become due and payable on demand to the Mortgagee on the occurrence of any of the following events that is to say:*

*(a) .... or*

*(b) on the death of the mortgagor or where two or more persons constitute the mortgagor the death of the survivor of such persons; or*

*(c) ....;*

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

*1.3 The demand herein referred to shall mean a demand for payment of the secured moneys made by the Mortgagee ... upon the Mortgagor and such demand in case of moneys due or owing on current account may be made at any time and in other cases may be made when or at any time after the Mortgagee becomes entitled to call for payment of the moneys and separate demands may be made in respect of separate accounts at different times.*

9. Clause 6.1 of the Mortgage confers an entitlement on the mortgagee to possession:

*At any time after the execution of this Mortgage the mortgagee may without any further consent from or notice to the Mortgagor or any other person enter into possession of*

*the Mortgaged Property or any part thereof or into receipt of the rents and profits of the Mortgaged Property or any part thereof.*

**10.** That power is subject to the provisions of Clause 7 of the mortgage which provide, in relevant part, as follows:

*The Mortgagee shall not exercise any of the powers provided for in clause 6 hereof or conferred by statute until any of the following events shall occur:*

*(a)...*

*(b)...*

*default is made in complying with the demand made under sub-clause 1.2 of this Mortgage in consequence of:*

*(i) the death of the mortgagor or where two or more persons constitute the mortgagor the death of the survivor of such person; or (ii) the compulsory acquisition of the Mortgaged Property.*

**11.** The Deceased died on 20 March 2018. As noted above, under the terms of the Mortgage, the death of the mortgagor represented an event of default. However, the right of the mortgagee to possession of the land did not arise automatically on the death, rather a subsequent demand for repayment was required. A demand for repayment was made on 14 May 2019 addressed to the “LPR of Elizabeth Murphy Deceased” in the sum of €133,909.78.

**12.** The plaintiff’s predecessor in title then took steps to have an administrator *ad litem* appointed pursuant to section 27(4) of the Succession Act 1965 for the purposes of substantiating proceedings proposed to be taken by the plaintiff. Donal Fingleton, Solicitor, was given liberty to apply to extract a grant of letters of administration *ad litem* by order of the High Court (Allen J) dated 16 December 2019. Following his appointment, a further letter of demand was sent to the administrator on 17 December 2019 making a further demand for the sum of €133,909.78.

13. A further letter was sent to the administrator on 24 December 2019 noting the default in repayment of the sum demanded and seeking vacant possession of the property.

### **The Proceedings**

14. The proceedings commenced by way of Special Summons on 3 January 2020 in the name of WF Shap Ireland DAC, the successor in title to the original mortgagee, Seniors Finance Ireland Ltd. An Order was made on 15 November 2021 substituting Finance Ireland Credit Solutions DAC for WF Shap Ireland DAC, following the assignment of the loan and mortgage to the latter company. A further Order was made on 12 December 2022 substituting the plaintiff for Finance Ireland Credit Solutions DAC, following a further assignment of the loan and mortgage to the plaintiff.

15. The proceedings came on for hearing in the Chancery Special Summons List on 15 January 2024. Ms Olivia Murphy, the daughter of the Deceased, had been put on notice of the proceedings in circumstances where she is in occupation of the property the subject matter of these proceedings and would appear to be the main beneficiary of the Deceased's estate. Ms Murphy delivered an affidavit which set out the circumstances of her engagement with the plaintiff since the death of her mother, and which also highlighted the difficulty she would face in obtaining alternative accommodation. She noted the extent to which the interest due on foot of the loan had increased since the time of her mother's death. Ms Murphy made submissions on a subsequent date in which she provided an important portrait of her mother and the circumstances in which she took out the loan, the subject of the proceedings. She made clear that she was not disputing the validity of the loan or mortgage or, indeed, the plaintiff's entitlement to possession. She was very concerned, however, about the sums said to be owing in respect of the loan and the impact that that might have on her and her ability to find alternative accommodation once the property was sold by the plaintiff to discharge the loan balance.

16. The administrator *ad litem* also filed an affidavit in the proceedings. The administrator had been appointed solely for the purpose of substantiating the proceedings and he conducted the proceedings appropriately in light of the scope of his appointment. He identified that it might have been possible to argue that possession proceedings were statute barred in light of the provisions of the Civil Liability Act 1961, as amended, but

acknowledged that in light of the decision of the High Court (Simons J) in *WF Shap Ireland DAC v Fingleton* [2020] IEHC 50, that defence was not available. Section 9(2)(b) of the 1961 Act requires that where a cause of action is subsisting at the time of a person's death, any proceedings relating thereto must be taken within two years of the date of death. However, Simons J concluded that the cause of action was *not* subsisting at the date of death, since the entitlement to possession was not triggered until a demand for payment was made, either on foot of an event of default, or, in that case (as in this), the death of the mortgagor. The two-year time limit in the 1961 Act, therefore, did not apply, rather the twelve-year limitation period provided for in the Statute of Limitations relating to actions to recover the possession of land was the applicable period.

**17.** The administrator did not advance any other positive defences to the possession proceedings.

**18.** Other than a plea that there was a particular sum due, and a bald averment to like effect, there was no evidence of the sums said to be due and owing at the time that the proceedings were instituted, or of how the sums were calculated, still less of the sums due at the time that the proceedings were heard. In this regard, the grounding affidavit averred to a sum of €103,712.62 as having been demanded on 14 May 2019 and 17 December 2019, different from the sums actually demanded. The Special Summons pleaded that the sum actually demanded, €133,909.78, was said to be due and owing at the date of the Special Summons, but the grounding affidavit referred to the lower sum only. In the circumstances, I requested that the plaintiff provide a further affidavit setting out the sum then said to be due and how it was calculated. I adjourned the matter to 26 February 2024.

**19.** Having reviewed the affidavit of John Moriarty sworn on 26 February 2024, it became apparent that interest had continued to accumulate on the loan following the death of the Deceased. Having regard to the terms of the loan facility, I raised queries with counsel for the plaintiff regarding, first, whether that was what was provided for in the loan offer, and second, whether a term allowing for the continued accrual of interest after the death of the Deceased could be regarded as an unfair contract term. As these issues had not previously been raised, the proceedings were further adjourned to 8 April 2024. The plaintiff provided written submissions and made oral submissions regarding the interpretation of the terms of the loan and whether they constituted unfair contract terms.

20. The affidavit of Mr Moriarty did not address the discrepancy between the letter of demand, the special summons and the grounding affidavit, and I requested that the plaintiff provide a further affidavit addressing the discrepancy in circumstances where it appeared that the sum demanded in the letters of demand was likely to be in excess of what was due and owing at the time of the demands. The plaintiff's solicitor provided an affidavit in which he acknowledged that the sums claimed in the letters of demand were overstated due to an error on his part. The affidavit set out that the sum due and owing at the date of demand was €103,712.62. The sum said to be due and owing as at 28 May 2024 was €145,190.65. Relevant statements of account were provided.

21. I requested that the plaintiff provide further written submissions on the question of whether the demands for payment for sums in excess of what was then due could be relied on for the purpose of triggering its entitlement to seek possession of the property. Further written submissions were provided addressing that question, and further oral submissions were heard on 1 July 2024.

### **The Relevant Contractual Terms**

22. The Letter of Offer dated 19 February 2007 contains a number of matters which are relevant to the question of calculation of interest. Of most relevance, and relied on by the plaintiff, is Clause 1 of the General Conditions, which provides:

*“Interest is calculated on the balance outstanding on the home loan at the close of business each day from the Drawdown Date until the home loan is repaid in full. Interest takes place and on the last day of each calendar month thereafter until the home loan is repaid. Interest charged to the loan is included in the outstanding balance on which interest is calculated. The outstanding balance on which interest is calculated will include all sums outstanding. If redemption of the home loan takes place otherwise than on the last day of a calendar month the amount required to redeem the loan will include interest from the first day of the month in which redemption takes place to the date of redemption. Interest is calculated on a compound basis.*

*The rate of interest is fixed for the duration of the home loan.*

*The Drawdown Date of your mortgage will be the date on which the advance monies are issued.”*

**23.** The loan offer contains a box headed “IMPORTANT INFORMATION AS AT FEBRUARY 19, 2007”. It contains, in relevant part, the following information:

1. <i>Amount of Credit Advanced</i>	<i>€46,000</i>
2. <i>Period of Agreement</i>	<i>The date of death of the last surviving borrower (estimated to be 20 years)</i>
3. <i>Number of Repayment Instalments</i>	<i>One (See “Repayment”)</i>
4. <i>Amount of each Instalment</i>	<i>Total Amount (See “Repayment”)</i>
5. <i>Total Amount Repayable</i>	<i>€176,420</i>
6. <i>Cost of this credit (5 minus 1)</i>	<i>€130,420</i>
7. <i>APR*</i>	<i>6.95%</i>

*\*\*\* The term of this loan is not for a period certain and so must be estimated for the purpose of complying with the Consumer Credit Act 1995. The estimate used is derived from actuarial tables. See Repayment.*

*This [total amount repayable] figure is estimated. After 5 years the total amount repayable would be €64,373, after 10 years the total amount repayable would be €90,085 and after 15 years the total amount repayable would be €126,067.*

**24.** The Term of Mortgage is given as “Lifetime Mortgage”. It is stated that a fixed interest rate of 6.95% APR applies to the loan.

**25.** Under the heading “REPAYMENT”, the Special Conditions of the loan provided as follows:

*The Applicant shall not be obliged to make any repayment of principal, interest or any other amounts payable during the term of the home loan. The home loan shall become due and payable on the happening of any of the following events:*

...

(7) *the Applicant dies, or in the event of there being more than one Applicant on the death of the last surviving Applicant;*

....



*then (i) the obligation on SFIL to make the Advance shall cease absolutely cease and determine; or (ii) of the Advance has been drawn down, the Advance together with all interest accrued thereon and all costs, fees and expenses shall become immediately repayable on demand.*

**26.** The plaintiff also highlights further provisions within the “Repayment” section of the Loan offer which provide that, upon the death of the Deceased, the sum lent together with all interest accrued thereon and all costs, fees and expenses shall become immediately repayable on demand.

**27.** My concern regarding the fairness of the contractual terms was prompted by what seemed to me to be a *possible* tension between the provisions regarding interest, which suggest that interest will continue to accrue until the loan is repaid in full, and the provision regarding the period of the loan agreement which is described as being the date of death of the borrower.

### **Entitlement to possession**

**28.** Under the provisions of the mortgage, the plaintiff is not entitled to exercise its powers of possession unless one of the events described in Clause 7 of the mortgage occurs. These include, as set out above, a default in complying with a demand made under Clause 1.2 for repayment of all monies unpaid following the death of the borrower. I am satisfied that the death of the borrower has occurred and a demand for repayment has been made of the borrower’s estate, and there has been no repayment on foot of that demand.

**29.** It may be that that is sufficient to entitle the plaintiff to the order for possession it seeks. However, it is clear that the demand made purported to include interest accrued after the date of death of the borrower. Having regard to the nature of the mortgage at issue in this case and the particular terms thereof, it seemed to me that an issue arose as to whether the terms of the loan which provided for the continuing accrual of interest after the date of the borrower’s death were unfair contract terms within the meaning of the Directive. In the event that I conclude that they are unfair contract terms, an issue will arise as to the enforceability of the contractual provisions regarding interest and, potentially at least, the entitlement of the plaintiff to seek possession on the basis of default of payment of a demand

made on foot of those provisions. In those circumstances, it is appropriate to consider whether the contract terms are fair prior to making an order for possession.

### **Unfair Contract Terms**

**30.** The plaintiff does not dispute that the agreements at issue here are consumer agreements and accepts that it is “beyond dispute” that a Court may, of its own motion enquire into the fairness of the terms of a loan contract secured by way of mortgage. Reference is made in the plaintiff’s submissions to *Pepper Finance Corporation (Ireland) DAC v Cannon* [2020] IESC 2. In fact, as that case makes clear, a Court is *obliged* to consider the fairness of terms in a consumer contract, irrespective of whether their fairness is put in issue by the consumer:

*“78. The line of authorities on the Directive cited by the parties includes Pannon GSM v Gyorfi (C-243/08, EU:C:2009:350), where the CJEU was asked whether the consumer protection provided by the Directive required the national court to carry out a review of the fairness of contractual terms of its own motion, even where they had not been challenged in court by the consumer.*

*79. The Court commenced its analysis with the statement that the system of protection introduced by the Directive was based on the idea that the consumer was in a weak position vis-à-vis the seller or supplier, in relation to both bargaining power and level 31 of knowledge, and could be led to agree to terms without being able to influence their content. The aim of compensating for that imbalance would not be achieved if it was left to the consumer to raise the unfairness of the terms, and therefore effective protection could only be attained if the national court acknowledged that it had power to evaluate the terms of its own motion and to rule that the consumer was not bound by an unfair term. Consequently, the national court’s role was not limited to a power to rule on the possible unfairness of a term, but also consisted of an obligation to examine the issue if it had available to it the legal and factual elements necessary for that task.”*

**31.** Having regard to the nature of the loan at issue in these proceedings, where the consumer, necessarily, has died at the time that the lender seeks repayment of the loan, it seems to me particularly appropriate that the court would consider of its own motion the fairness of the contractual terms in this case.

32. The plaintiff contends that the particular clauses do not fall to be assessed pursuant to the Directive or implementing regulations because they relate to the main subject matter of the contract and/or the adequacy of the price and remuneration. It references the observations of the High Court (Simons J) in *Start Mortgages v McNair* [2020] IEHC 140 on the application of the Directive to mortgages:

“83. *The implications of the Directive for mortgages has been considered in detail by the High Court (McDermott J.) in Permanent TSB plc v. Davis [2019] IEHC 184. The judgment emphasises that neither (i) the definition of the main subject matter of the contract, nor (ii) the adequacy of the price and remuneration, are to be considered when assessing the fairness of a term, provided same are in plain intelligible language. This follows from Article 4(2) of the Directive.*

*2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.*

84. *McDermott J. identified the main subject matter of a loan agreement as follows (at paragraph 30 of the judgment).*

*“[...] However, it is clear that the main subject matter of the agreement was that all monies advanced under the loan would be repaid by monthly instalments and at a variable interest rate over a period of thirty-five years. The loan would be secured on the family home: it was so secured. If the borrowers defaulted on their repayments the plaintiff became entitled to seek an order for possession having made the appropriate demand for repayment and make good their security. These terms were in clear and intelligible form and were fully understood by each of the parties to involve the offering of the defendants’ family home and principal place of residence as security for the loan and that in default of making the agreed repayments the security might be realised by the lender (see AIB Mortgage Bank v Cosgrove [2017] IEHC 803 per Faherty*

*J., at para 60 and Allied Irish Banks plc v O'Donoghue [2018] IEHC 599 per Meenan J., at paragraphs 7-21)."*

85. *This approach has very recently been approved of by the High Court (MacGrath J.) in KBC Bank Ireland plc v. Brennan, unreported, 25 February 2020, [27] to [34].*

86. *Having carefully considered the general and special conditions of the loan agreement in the present case, I am satisfied that the "main subject matter of the contract" is similar to that considered in Permanent TSB plc v. Davis and KBC Bank Ireland plc v. Brennan. In particular, the loan offer of 5 February 2007 sets out, in plain and intelligible language, (i) the terms of the loan; (ii) the period of the loan agreement; (iii) the number and amount of the repayment instalments; (iv) the total amount payable, and (v) the cost of the credit. The applicable interest rate is also set out. The requirement to enter into a mortgage is clearly stated, and there is an express warning that the borrowers' home is at risk if they do not keep up payments on a mortgage secured on it.*

87. *There is nothing in the papers before me to suggest that the loan agreement and/or mortgage contained any "unfair terms".*

**33.** It is clear, therefore, that the amount repayable under the loan agreement does not fall to be assessed under the Directive as long as the terms regarding same are set out in "*plain intelligible language*"? In Case C-26/13, *Kasler v Jelsalobank Zrt*, the CJEU set out what the requirement for plain intelligible language involves:

*"71 The requirement of transparency of contractual terms laid down by Directive 93/13 cannot therefore be reduced merely to their being formally and grammatically intelligible.*

*72 On the contrary, as has already been recalled out in paragraph 39 of this judgment, the system of protection introduced by Directive 93/13 being based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his level of knowledge, the requirement of transparency must be understood in a broad sense."*

**34.** The Court concluded (at para. 75) that the terms of the loan at issue in that case should be set out with sufficient transparency that the “*consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.*”

**35.** Despite some initial reservations, I have concluded that the terms regarding interest and the amount required to be paid are expressed in plain intelligible language such that the Deceased would have been in a position to evaluate the economic consequences of agreeing to the loan on the terms provided. The terms of the loan relating to the applicable interest rate are, therefore, outside the scope of the Directive.

**36.** The interest rate is stated in clear terms and, in addition, it is expressly stated that interest will continue to accrue until the loan was repaid. Further, the repayment provisions of the loan make clear that the obligation to repay arises not on the date of death of the applicant for the loan, but on demand being made for repayment following such a death. Indeed, as set out above, this was the basis of the decision in *WF Shap v Fingleton* referred to at paragraph 15 above. In circumstances where the interest provisions are clear, it is not appropriate for the court to try and read in ambiguity where, in truth, none exists.

**37.** The section of the loan document marked “*Important information as at February 19, 2007*” does refer to the period of the agreement expiring on the date of death of the last surviving borrow. Although this is expressly stated to be an estimate, flexibility regarding the period of the agreement relates to uncertainty regarding the date of death of the borrower, rather than whether interest would continue to accrue. Thus, the terms of the loan are clear, the period of the agreement ended on the borrower’s death in 2018.

**38.** However, there is not necessarily any inconsistency in providing that the period of the agreement ends at a particular date, and interest continuing to accrue after that date. As is clear from the terms of the loan, had the borrower died prior to the loan being advanced, the agreement would have come to an end. In circumstances where the terms of the loan make clear that the loan is only repayable after a demand made following the death of the borrower, I do not think that the terms could reasonably have been interpreted to the effect that interest would cease to accrue upon the borrower’s death. Put otherwise, it was clear that interest would continue to accrue after the borrower’s death until the loan, with interest,

was repaid in full. In fact, the nature of the loan, a reverse mortgage, meant that it was inevitable that this would occur.

**39.** For completeness, I should clarify that my concern about the potential unfairness of the contractual terms related to the fact that it might not have been clear from the terms how interest was to be calculated. My conclusion that the terms were, in fact, clear means not only that the terms fall outside the scope of the Directive, but also that, even if they were within the scope of the Directive, there would likely have been no basis for me to conclude that they were unfair.

**40.** It should be noted that at no point did the administrator or Olivia Murphy seek to argue that the loan had been or was capable of being interpreted otherwise, nor was any evidence advanced to suggest that the terms of the loan were unfair in all the circumstances. For instance, no argument was made that the interest rate applied to the loan was unfair or that the loan was an inappropriate product for the borrower. Part of the reason that the continued application of interest after the Deceased's death has become a significant issue is the long delay that there has been between her death and the finalisation of these proceedings, now more than six years, and the likely further delay that will now occur before the loan is repaid from the proceeds of sale of the Property. As a result of this delay, in excess of an additional €40,000 in interest has become payable, though the total sum repayable remains less than the total sum estimated in the loan agreement. It would, I think, be unfair to criticise the plaintiff for that delay which has been contributed to not just by the Covid pandemic, but also by the fact that the plaintiff had to apply to have an administrator appointed to the deceased's estate for the purpose of substantiating these proceedings.

### **Letters of demand**

**41.** As emerged during the course of this application, the initial letters of demand, made first of the borrower's personal representatives, and then of the administrator were for a sum significantly in excess of the sum then due at the date of demand. The solicitor for the plaintiff has very properly taken responsibility for this error, explaining that the sum included in the letters of demand was "*inadvertently carried over*" from a precedent document which he had used when preparing unrelated proceedings. As Ms Murphy points out, there are also errors in the plaintiff's grounding affidavit, with the incorrect loan amount

included at one point and, regrettably, the Deceased's date of death incorrectly recorded in one instance.

42. The error in the letters of demand prompted me to consider whether the plaintiff is entitled to rely on demands for a sum in excess of the sum then due to trigger its entitlement to seek possession. Having considered the relevant case law opened to me on behalf of the plaintiff, the terms of the loan and the terms of the demand letters, I am satisfied that it is so entitled.

43. The plaintiff referred to a number of cases, including *Flynn v National Asset Loan Management Ltd* [2014] IEHC 408; *Vivier Mortgages Limited v Lehane* [2017] IEHC 605, *Harrington v Gulland Property Finance Limited* [2018] IEHC 445, *Cody v Taite* [2018] IEHC 774, *Fennell v Slevin* [2020] IEHC 677 and *O'Dwyer v Grogan* [2022] IEHC 697 all to the effect that a letter of demand which overstates the amount due is still a valid demand. Counsel for the administrator advised the court that he wasn't aware of any relevant authorities to different effect. In the most recent of those cases, *O'Dwyer*, the court (Roberts J) described this proposition as "*settled law*".

44. *Flynn* is relied on in a number of the later cases. Those proceedings concerned the plaintiff's application for declarations that, for various reasons, she was not indebted to the defendant in respect of a particular loan facility. The facility in question was a so-called demand facility, such that all sums advanced thereunder became repayable "*on demand which may be served by the Bank at any time.*"

45. The Bank made demand for payments of all sums said to be due on the loan facility, a sum in the region of €21.9 million. The evidence suggested that there had been some overcharging of interest to the loan account and the sum claimed was therefore overstated by approximately €143,000. The court (Cregan J) rejected the argument that the overstatement of the amount due in the demand rendered it invalid. In so doing, he referred (at para. 232) to the following passages from *County Leasing Ltd v East* [2007] EWHC 2907 QB:

"121. *The argument for Mr. East [the defendant] was that the amount sought by CLAM's [the plaintiff] demand dated 3rd December, 2005, STG£1,233,033.90 was so vastly in excess of the sum actually due, if I found that clause 5 of the penalty, that it*

*could not sensibly be treated as a demand for the sum which was actually due. The argument was a difficult one, for Mr. Stacey [counsel for the defendant] accepted in principle that it was unnecessary for a demand for payment to be valid, that the document by which the demand was made specify any sum as that said to be due or, indeed, that if a sum was specified, it was specified correctly. Mr. Stacey referred me to some observations of Walton J. in Bank of Baroda v. Panessar [1987] CH 335:*

‘I cannot see any reason why the creditor should not do precisely what he is, by the terms of his security, entitled to do; that is to say, to demand repayment of all money secured by the debenture. As the High Court of Australia [in *Bunbury Foods PTY Ltd v. National Bank of Australasia Ltd* [1984] 51 ALR 609 at pp. 619-620] points out, it would seem stupid that the creditor could put in, without imperilling the validity of the notice, an entirely wrong sum, and one that is much more likely to give rise to confusion and difficulty than is the form of the notice adopted in that and the present case. Indeed, it is quite clear that knowledge of the precise amount of the sums outstanding is only required in the exceptional case, because in most cases, as in the present case, the debtor has no real means whatsoever of paying off the sum which is due, and it would seem to be idle to put the creditor to what might be very considerable expense in ascertaining the precise amount due when there is no likelihood that that sum will represent a realistic target at which the debtor can aim. If on the contrary, the debtor is in a position to pay off the sum demanded and wishes to know the exact and precise sum, he can communicate with the creditor and ask the creditor what sum he is expecting to be paid. Under those circumstances, one imagines that the creditor would say, “Well the last accounts, which are not complete, show in fact a sum of X pounds owing from you. If you can pay that sum at once, then we need not worry too much about the additional sum; we can settle that later” or something along those lines. At any rate on this point I propose to follow the Australian case which seemed to me to be redolent of good common sense.’

*122. The reasoning in Bunbury Foods PTY Ltd v. National Bank of Australasia Ltd was based in part upon an old Privy Council case, Campbell v. Commercial Banking Co of Sydney [1879] 2 NSWLR 375. At p. 385 of the advice of the Privy Council it was said:-*



‘As to the first of these grounds, the learned judges of the Supreme Court have held, and in their Lordships opinion have correctly held, not only that a notice under the Act is not bad because it demands more than is due, and that the jury should have been so instructed (a ruling which affects principally the finding on the second issue), but that where a demand is made for a larger amount than that which is really due, such demand does not do away with the necessity for tendering what is actually due unless there is at the same time a refusal to accept less.’

*124. In my judgment, the decision of the Privy Council in Campbell v. Commercial Bank & Co of Sydney should not be interpreted as having determined that a demand for an amount in excess of that actually due was ineffective if the person making the demand declined to accept the sum properly due when that sum was tendered. As it seemed to me, the question of whether or not a demand is valid falls to be determined at the time it is made, not at some later date. Moreover, whether a demand is valid or not must, I think, depend upon proper construction of the document by which the demand is made, and not upon circumstances arising after the production of the document. It must either be necessary for a demand to state accurately the amount due, or not. If, as the authorities, certainly in Australia, show it is not necessary for the sum due to be stated accurately, then the statement of the correct sum due is not necessary for the demand to be valid.”*

**46.** In *Vivier Mortgages* Baker J described *Flynn* as having “conclusively determined” the issue. There is, however, an important aspect of Baker J’s decision which bears emphasis, the court concluding that the demand does not need to be exact “*provided that it is clear what is to be done by the borrower*”.

**47.** The position, therefore, is that overstatement of a sum due in a demand does not render the demand invalid or ineffective save where the terms of the loan provide otherwise or it is unclear what is to be done on foot of the demand.

**48.** In this case, there is nothing in the loan or mortgage agreements upon which the plaintiff relies which would render the demand ineffective on account of it being overstated. Moreover, it was clear from the letters of demand what was required, payment of the sums

due on the loan. Indeed, having regard to the nature of this loan agreement, which didn't require any payments to be made during the Deceased's lifetime, the demand made was necessarily for the entirety of the money advanced together with interest thereon from the date of drawdown.

**49.** Although it appears that there was some discussion regarding a resolution of these proceedings, at no time was the sum actually due tendered on behalf of the Deceased's estate. Though Olivia Murphy was understandably concerned about the overall amount due on the loan, no issue was raised about the misstatement of the sum due prior to the matter being identified during the hearing of this application.

**50.** In the circumstances, I am satisfied that the error in the statement of the amount due in the demand letters does not render them ineffective such as to deprive the plaintiff of its entitlement to an order for possession. There is no prejudice caused to the estate by this conclusion in circumstances where, if the demand could not be relied on, the plaintiff would have ample time to issue a fresh demand for the sum now due and issue fresh proceedings to recover possession within the applicable limitation period.

## **Conclusion**

**51.** The plaintiff has met the necessary proofs to establish that it is entitled to an order for possession. The provisions of the loan regarding interest do not fall within the scope of the Unfair Contract Terms Directive, and the letters of demand, though they misstated the amount then due and owing on foot of the loan, remain effective for the purpose of triggering the plaintiff's entitlement to possession under the mortgage.

**52.** I will hear the parties regarding the terms of final orders and any stay on the order for possession and, as previously indicated, will list the matter at 2 pm on 29 July 2024 for that purpose.