THE HIGH COURT

[RECORD NO. 2015 85 SP]

BETWEEN

PERMANENT TSB PLC
FORMERLY IRISH LIFE & PERMANENT PLC

PLAINTIFF

AND
BRIAN DONOHOE

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on the 15th day of June 2018

1. In these proceedings the plaintiff seeks an order pursuant to s. 62(7) of the Registration of Title Act 1964 for possession of two rental properties, one in Co. Galway and the other in Clondalkin, Dublin 22. The special summons was listed for hearing before me on 10 and 11 May 2018 together with two notices of motion as follows:-

(a) A notice of motion dated 19 December 2017 brought by the defendant seeking an order pursuant to O. 19, r. 7 of the Rules of the Superior Courts directing the plaintiff to reply to his notice for particulars dated 1 December 2017; and

(b) A notice of motion dated 17 April 2018 brought by the plaintiff seeking an order setting aside a notice to cross-examine served by the defendant on 26 February 2018, or in the alternative, an order pursuant to O. 38, r. 3 and O. 40, r. 31 granting the plaintiff special leave to use the affidavit of Jacqueline O'Brien sworn on 7 September 2017 as evidence at the trial without requiring her production for cross-examination.

2. The hearing of the special summons could not proceed without first hearing each of the above notices of motion. Due largely to the length of the affidavits filed in the proceedings (as described below), the hearing of those notices of motion took up the entire of 10 and 11 May 2018.

3. Before turning to the relief claimed in the respective notices of motion, I should explain, by way of background, that these proceedings were commenced in 2015. The defendant Mr. Donohoe is acting in person. An unusually large number of affidavits have been filed in the proceedings. This is in circumstances where Mr. Donohoe has sought to air an extensive range of issues in his defence of the claim. The background to the proceedings is more fully described in the judgment of McDermott J. delivered on 24 February 2017, in which McDermott J. deals with a previous application made by the plaintiff to set aside service of a notice to cross-examine which had been served by the defendant at that time. The same judgment also refers to an earlier notice for particulars served by the defendant dated 30 November 2016. As McDermott J. records, in paragraph 35 of his judgment, Mr. Donohoe made a submission to the court during the course of the hearing before McDermott J. that the plaintiff should be directed to answer the notice for particulars of November 2016. It should be noted that Mr. Donohoe's request was made on a relatively informal basis during the course of the hearing before McDermott J. of the plaintiff's application to set aside service of the previous notice to cross-examine. No notice of motion had been served at that time by Mr. Donohoe seeking to compel the plaintiff to respond to the notice for particulars dated 30 November 2016. Nonetheless, in light of the request made to him by Mr Donohoe in the course of the hearing before him, McDermott J. expressed the view in his written judgment that he was not satisfied that a response to the notice for particulars was necessary for Mr. Donohoe to understand the plaintiff's claim which, as McDermott J. observed, is absolutely clear from the affidavit submitted in support of the special summons.

4. In the same judgment, McDermott J. came to the conclusion that there was no need for cross-examination of Ms. Jacqueline O'Brien, the deponent of the principal affidavits sworn on behalf of the plaintiff. It is fair to say that the principal focus of McDermott J's judgment is the proposed cross examination of Ms O'Brien. McDermott J. held that the notice to cross-examine was defective in form. In addition, McDermott J said, at paragraph 38, that:-

> *"Even if that were not so I am satisfied that there is no factual issue relevant to these proceedings to be determined on the basis of the affidavits furnished by both sides to date. Furthermore, I am satisfied that insofar as there are issues raised by the defendant in his replying affidavits, many of them are vexatious, frivolous and scandalous and ought not to be the subject of cross-examination of Ms. O'Brien. In addition, a number of the matters raised amount to legal submissions upon which the defendant may rely at the hearing without the necessity for cross-examination."*

5. Since the judgment of McDermott J. was delivered on 24 February 2017, the following additional affidavits have been filed:-

(a) An affidavit of Mr. Donohoe sworn on 30 March 2017;

(b) An affidavit of Jacqueline O'Brien sworn on 7 September 2017;

(c) A short and commendably succinct affidavit sworn by Mr. Donohoe on 19 December 2017 grounding the application to compel the plaintiff to respond to his notice for particulars dated 1 December 2017;

(d) A remarkably lengthy and detailed affidavit sworn by Mr. Donohoe on 27 February 2018. This affidavit is 78 pages long and comprises 602 paragraphs. There are approximately 226 pages of exhibits;

(e) An affidavit of Jacqueline O'Brien sworn on 10 April 2018. This is not a response to the lengthy affidavit described in subparagraph (d). It is sworn in response to the application to compel the delivery of particulars and in support of the application brought by the plaintiff pursuant to the notice of motion dated 17 April 2018 seeking to set aside the notice to cross-examine.

(f) A further affidavit of Mr. Donohue sworn on 26 April 2018.

6. Having briefly set out the background, I now turn to the motions before the court. I deal first with the application in relation to particulars. I then deal with the application in relation to the notice of cross-examination.

The Application to Compel the Plaintiff to Provide Particulars

7. The first issue which I have to consider is whether it is appropriate for me to embark upon a consideration of this application in

circumstances where Mr. Donohoe, in the course of the hearing before McDermott J. in 2017, asked the court on that occasion to direct the plaintiff to provide the particulars sought pursuant to Mr. Donohoe's previous notice for particulars dated 30 November 2016. In this context, I should explain that, while the form of the questions set out in Mr. Donohoe's notice for particulars dated 1 December 2017, is different to the earlier notice for particulars dated 30 November 2016, in substance, many of the requests for particulars are the same or virtually the same. An issue therefore arises as to whether the determination of McDermott J. gives rise to an issue estoppel which prevents Mr. Donohoe from re-litigating his request for particulars now. While the matter is by no means clear-cut, I have come to the conclusion (with some reservation) that no issue estoppel arises here. I have come to that conclusion in circumstances where no formal application was brought before McDermott J. in 2017 by notice of motion seeking an order compelling the plaintiff to provide the particulars sought at that time. Instead, the matter appears to have been mentioned by Mr Donohoe to McDermott J. on an informal basis and thus there is no significant discussion about the issue in the judgment delivered by McDermott J. on 24 February 2017. That judgment is concerned for the most part with the application to set aside the notice to cross-examine. I do not believe that it can safely be concluded that the defendant's entitlement or otherwise to raise particulars was fully or properly before the court on the last occasion before McDermott J. In these circumstances, it seems to me that the better view is that no issue estoppel arises such that Mr. Donohoe is not estopped from pursuing his present application and I will therefore proceed to consider it.

8. The next issue which arises is whether it is open to a party in special summons proceedings (which have not been adjourned for plenary hearing) to seek particulars. In this context, it is important to record that the particulars sought are not raised in relation to anything pleaded in the Indorsement of Claim on the Special Summons. They relate in part to the affidavit evidence before the court and in part they seek answers to questions which Mr. Donohoe believes will assist him in his defence of the proceedings. Counsel for the plaintiff has strongly urged that there is no basis under O. 19 to seek particulars of anything other than a pleading. Counsel has drawn attention to the language of O. 19, r. 7 (which is the rule on which Mr. Donohoe has expressly sought to rely) which refers solely to pleadings. O. 19, r. 7 (1) provides as follows:-

> *"A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."*

9. Counsel has also relied on the definition of "pleadings" contained in O. 125, r. 1 where "pleading" is defined as follows:-

> *""pleading" includes an originating summons, statement of claim, defence, counter-claim, reply, petition or answer".*

10. None of the documents mentioned in the definition of "pleading" in O. 125, r. 1 comprises an affidavit. While Mr. Donohoe sought to suggest that "answer" is sufficiently wide to extend to an affidavit, I am of the view that Mr. Donohoe is mistaken in that submission. In my view, an "answer" does not have such a wide meaning. An "answer" is simply a somewhat archaic synonym for a defence which, largely for historical reasons is used in certain types of proceedings under the rules. For example, O. 70, r. 20 refers to a defence in matrimonial proceedings as an "answer".

11. However, it has to be acknowledged that the provisions of O. 19, r. 7(1) are not confined exclusively to "pleadings" within the non-exhaustive definition given in O.125, r.1. On the contrary, O.19, r 7(1) also expressly extends to a "notice or written proceeding requiring particulars". It is therefore necessary to consider whether those words are sufficient to extend to an affidavit. No authority has been cited to the court by either party in relation to the meaning of the words "notice or written proceeding requiring particulars". Clearly, the reference to a "notice" would not be sufficient to extend to an affidavit. They are obviously very different things. The reference to "notice" in O. 19, r. 7(1) appears to me to be intended to cover the very large number of proceedings which are now commenced by originating notice of motion. There may be circumstances where a party would be entitled to seek particulars of some matter stated in an originating notice of motion – in the same way as a defendant is entitled to seek particulars of matters pleaded in the indorsement of claim on a summons or of an allegation made in a statement of claim.

12. Nor do I believe that the words "written proceeding requiring particulars" can reasonably be interpreted as extending to affidavits. In this context, O. 19, r. 7(1) must, like any other statutory provision, be read in context. Thus, it must be read in the context of O. 19 as a whole and indeed of the Rules of the Superior Courts as a whole. It is clear from a consideration of O. 19 as a whole that it is concerned with pleadings properly so called and with documents that fulfil the same function as pleadings. It is not concerned with affidavits. There are separate provisions of the rules that deal with the requirements for affidavits. In particular, O. 40 contains detailed rules in relation to affidavits. There is no equivalent provision in O. 40 entitling a party to raise particulars of matters stated in an affidavit in the same way as a party is entitled to seek particulars of a pleading as provided for in O. 19. Had it been the intention of the Rules Committee to confer a right on a party to proceedings to seek particulars of matters stated in an affidavit, I have no doubt that the Rules Committee would have expressly provided for this in O. 40. It seems quite clear to me that O. 40 is the relevant provision setting out the detailed requirements to be met in the context of affidavits, while O. 19 is dealing, quite separately and distinctly, with the detailed requirements to be met in the context of pleadings. There is no reason to believe that the Rules Committee intended that there should be any overlap between O. 19 on the one hand dealing with pleadings and O. 40 on the other dealing with affidavits.

13. Moreover, it must be remembered that affidavits contain sworn evidence. It would be surprising that a party would be entitled to raise, by a simple notice for particulars, questions relating to the content of affidavits. That would amount, in substance, to a form of cross-examination of the deponent of the affidavit and would potentially undermine the quite separate rules that exist in relation to cross-examination of deponents of affidavits (dealt with below in the context of the plaintiff's motion).

14. For all of the reasons outlined above, I have come to the conclusion that there is no basis under O. 19, r. 7 for Mr. Donohoe to seek particulars of the matters stated in the affidavits sworn on behalf of the plaintiff in these proceedings. Nor is there any basis under O. 19 on which Mr. Donohoe is entitled to pose questions (not arising out of something pleaded by the plaintiff) even where Mr. Donohoe believes that the answers to those questions may assist him in his defence of the plaintiff's claim. Nothing in O. 19 entitles a party to proceed in that way. This is clear from the decision of the Court of Appeal in Northern Ireland in *Coyle v. Hannan* [1974] NI 160 approved in this jurisdiction by Laffoy J. in *Geaney v. Board of Management of Pobalscoil Chorca Dhuibhne* [2009] IEHC 267.

15. As noted above, the application brought by Mr. Donohoe solely invokes O. 19, r. 7 as the basis for his application. I am very conscious, however, that Mr. Donohoe is a lay litigant and I therefore do not believe that I should, on that ground alone, reject Mr. Donohoe's application without first considering whether, apart from O. 19, r. 7, there might be any other basis on which Mr. Donohoe could properly apply to the court to compel the plaintiff to provide the particulars, materials and further information sought in his notice for particulars dated 1 December 2017.

16. Mr. Donohoe submitted that, if these proceedings are to be disposed of fairly, he must have the right to require answers to his

request for particulars. He relies on a decision of MacMenamin J. in *Ryan v. Financial Services Ombudsman* (High Court, Unreported, 23 September 2011) in which MacMenamin J. held that, in proceedings before the Financial Services Ombudsman, the requirement for constitutional fairness required that certain material should be supplied by the bank in that case to the complainants in that case. In adopting that view, MacMenamin J. relied on observations made by Finnegan J. in *J&E Davy v. Financial Services Ombudsman* [2010] 3 IR 324 at p. 361 where Finnegan J. said:-

> *"Procedures before the respondent are to be informal. The discovery process of the courts is not to be imported into these procedures. However, access to documents may be necessary in the interest of fairness to enable a party to establish or answer a complaint. It is within the respondent's power to require a complainant to produce documents. He should consider a request for documents in the light of the information before him and determine whether the documents are necessary to enable a financial service provider to deal with the complaint. … . The respondent must consider the request [for documents] in this light and where fairness so demands he should direct that documents be furnished. He is not, however, required to mimic court procedures. ... It is necessary that any factual matters which are before a decision maker and which form part of the material upon which he will base his decision should be made available to the parties to the procedures …"*

17. The observations of both MacMenamin J. in *Ryan v. Financial Services Ombudsman*, and Finnegan J. in *J&E Davy v. Financial Services Ombudsman* were made in the specific context of proceedings before the Ombudsman. The observations were also made in the context of the disclosure of documents rather than the provision of particulars. Nonetheless, it seems to me that the observations are potentially relevant for present purposes. If, in the course of High Court proceedings which are to be tried on affidavit, the court considers that additional information or evidence is required from one party in order to enable the court to fairly adjudicate on an issue or to enable another party to answer a complaint, there must be an inherent jurisdiction in the court to direct (subject to any safeguards that it may be appropriate to impose in an individual case) the provision of that material or evidence. There could not be a higher standard imposed on the Financial Services Ombudsman than applies in High Court litigation. Of course, in contrast to the Ombudsman, the High Court already has a range of sophisticated and well-tried procedures available to it under the existing provisions of the Rules of the Superior Courts (including O 19 dealing with particulars and O 31 dealing with discovery and interrogatories) by which it can secure that both sides to litigation will have access to the material necessary to ensure that a trial can be conducted fully and fairly. It is therefore likely it would only be on very rare occasions that it might be necessary to look beyond the rules and invoke the inherent jurisdiction of the court. Nonetheless, it seems to me that, if in any case it is shown that basic fairness requires that additional material should be placed before the court and there is no provision of the rules which can be called in aid for that purpose, the court must have an inherent power to direct that the material in question should be made available. Otherwise, there would be a manifest failure to ensure that the constitutional requirement of fair procedures is observed.

18. It therefore seems to me to follow that the High Court must retain an inherent jurisdiction to direct a party to furnish additional materials or information, if the High Court is satisfied that these are required in order to comply with fair procedures and provided that the provision of the material would not operate unfairly against the party from whom it is sought. In expressing this view, I do not believe that this approach is inconsistent with what was said by the Supreme Court in *Lopes v. Minister for Justice* [2014] 2 I.R. 301 in relation to the inherent jurisdiction of the court. In that case, the Supreme Court made it clear that the inherent jurisdiction of the court could not be used as a means of getting round legitimate provisions of procedural law. On the other hand, the Supreme Court also made clear that the purpose of any asserted inherent jurisdiction is to supplement procedural law in cases not adequately covered by procedural law itself. In *Lopes*, Clarke J. (as he then was) said (pp. 307-308):-

> *"It is important to emphasise that the inherent jurisdiction of the court should not be used as a substitute for, or means of getting round, legitimate provisions of procedural law. That constitutionally established courts have an inherent jurisdiction cannot be disputed. That the way in which the ordinary jurisdiction of those courts is to be exercised is by means of established procedural law including the rules of the relevant court is also clear. The purpose of any asserted inherent jurisdiction must, therefore, necessarily, involve a situation where the court enjoys that inherent jurisdiction to supplement procedural law in cases not covered, or adequately covered, by procedural law itself. An inherent jurisdiction should not be invoked where there is a satisfactory and existing regime available for dealing with the issue under procedural law, for to do so would set procedural law at nought."*

19. In my view, it would only be appropriate for the court to exercise the inherent jurisdiction to direct a party to furnish further materials in cases:

> (a) where the court is satisfied that, to do so, would not involve any undermining of legitimate provisions of procedural law;
>
> (b) where the existing procedures under the rules do not provide adequately for what is sought;
>
> (c) where the court is convinced that basic fairness requires the provision of the material sought; and
>
> (d) furthermore where, to do so, would not operate unfairly against the party from whom it is sought.

20. In my view, the court should not intervene to give a direction of this kind unless the material sought is directly relevant to a triable issue and where the court is persuaded that it is genuinely necessary that the material should be furnished. The court should not intervene in this way if the issue, in respect of which the provision of material is sought, is speculative or lacking in substance or is manifestly unsustainable. In this context, it is important to recall that in the field of discovery, the courts have consistently made it clear that, for example, discovery will not be ordered on the basis of a bare unsubstantiated or speculative assertion. This is clear from the decision of the Supreme Court in *Framus v CRH plc* [2004] 2 IR 20 at p 40 and from the decision of Geoghegan J in *Carlow Kilkenny Radio Ltd v Broadcasting Commission* [2003] 3 IR 528 where Geoghegan J cited the following observation of Bingham MR in *R v Secretary of State for Health ex p Hackney Borough* (unreported, Court of Appeal of England and Wales, 29 July, 1994) at p 9:

> *"It is not open to a plaintiff in a civil action … to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertions that the …. Plaintiff is otherwise unable to begin to substantiate. This is the proscribed activity usually described as "fishing": the lowering of a line into the other side's waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant had no reason to suspect".*

21. Thus, it would be quite inappropriate for the court, in the exercise of the inherent jurisdiction discussed above, to intervene purely on foot of unsubstantiated allegations. If is inappropriate to do so in the context of discovery, then it follows that it would be equally inappropriate to do so in the context of the inherent jurisdiction of the court. To do so would run the risk identified by the

Supreme Court in *Lopes* that parties might seek to invoke the inherent jurisdiction in order to get round legitimate provisions of procedural law such as the prohibition on so-called "fishing expeditions".

22. Subject, however, to the considerations discussed in paragraphs 19-21 above, I am of opinion that the court has power, in the exercise of its inherent jurisdiction, to give a direction to the parties in these proceedings to provide further material which the court considers necessary to do justice or to enable the court to full and fairly adjudicate on an issue of substance. Thus, notwithstanding the fact that Mr. Donohoe's motion solely invokes O. 19, r. 7, I believe that, in fairness to him, I should consider his application as though it had been brought under the inherent jurisdiction of the court and by reference to the principles which I have outlined above. I will therefore consider each element of the notice for particulars in order to assess:–

> (a) Whether it is genuinely necessary in order to permit Mr. Donohoe to defend the claim made against him or to advance some triable counterclaim that the materials sought be furnished;
>
> (b) In assessing the question of necessity, it will be important in each case to consider whether there is a sustainable case to be made by Mr. Donohoe in respect of a triable issue;

23. If I come to the conclusion that there is no sustainable case to be made by Mr. Donohoe in respect of some triable issue, I do not believe that it would be appropriate for the court to direct the provision of the materials sought by him. Likewise, I do not believe that it would be appropriate for the court to make a direction where the material sought relates to a speculative issue or an issue which is raised on the basis of pure assertion. As noted above, that would run the risk that existing legitimate safeguards (such as the prohibition on "fishing expeditions") would be undermined.

The Notice for Particulars

24. I now turn to consider each of the "particulars" sought by Mr. Donohoe. In paragraph 1 of the notice for particulars, Mr. Donohoe seeks a copy of the plaintiffs "normal terms and conditions" as mentioned in Clause 1 of the special conditions attached to the letter of approval dated 30 April 2007 (which is exhibit "JO'B 1" to Ms. O'Brien's affidavit sworn on 23 April 2015). During the course of the hearing before me, it was admitted by counsel for the plaintiff, that there is no separate document in existence called "Permanent TSB Normal Terms and Conditions". Counsel said that the only terms and conditions were the General Mortgage Loan Approval Conditions and the Permanent TSB Mortgage Conditions, each of which is listed in paragraph 1 of the Acceptance of Loan Offer signed by Mr. Donohoe on 30 April 2007. In light of this admission by the plaintiff, paragraph 1 of the notice for particulars is no longer necessary. Mr. Donohoe now knows there is no document called "Permanent TSB Normal Terms and Conditions" and he is therefore in a position to make whatever arguments he wishes in relation to this issue at the hearing of the special summons. I therefore refuse to make any direction in respect of paragraph 1 of the notice.

25. In paragraph 2 of the notice for particulars, Mr. Donohoe seeks "un-redacted copies of all instruments/deeds of transfer and assignment on the transaction documents relating to previous sales, transfers and assignments of the mortgage and its related security from/to PTSB and their assignees". In support of this request, Mr. Donohoe cites the Circuit Court practice direction "CC 17 – Proceedings for possession or sale on foot of a mortgage" which provides in paragraph 3 H that among the required proofs where a plaintiff seeks an order for possession are the following:-

> *"where the name of the mortgagee company has changed, or the rights of the mortgagee under the mortgage have been transferred or assigned to another party, proof (as the case may be) of the name change (e.g. as recorded in the Companies Registration Office) or of the instrument of transfer or assignment."*

26. While the Circuit Court practice direction is not in force in the context of High Court proceedings, Mr. Donohoe suggests that a similar requirement should apply in the context of High Court proceedings. He also refers to the decision of Haughton J. in *Irish Life & Permanent TSB v. McMahon* [2015] IEHC 378 where the court directed that copies of the securitisation documentation should be put on affidavit by the plaintiff and that the defendants should have an opportunity to consider that affidavit and respond.

27. In the present case, Mr. Donohoe seeks to raise a significant number of issues in relation to the securitisation process which the plaintiff put in place in relation to the mortgage, the subject matter of these proceedings. Among the points made by Mr. Donohoe is that, having sold the loan and related mortgage security in 2008, the plaintiff has no right to demand possession from him or to appoint receivers over his property or to sue him in these proceedings. In his lengthy affidavit sworn on 27 February 2018, he has exhibited a number of documents including (at exhibit BPD Fig. 5-22) extracts from a mortgage sale agreement dated 23 March 2009 (as amended and restated by a global deed of amendment dated 14 September 2011) which suggests that all rights title interest and benefit of the plaintiff in the mortgages the subject matter of that mortgage sale agreement have been transferred to a company called Fastnet Securities 7 Ltd. ("Fastnet 7"). Mr. Donohoe maintains that, by its terms, this mortgage sale agreement (if it applies to his mortgage) shows very clearly that the plaintiff lost all title to the mortgage which is the subject of these proceedings and that accordingly the plaintiff is no longer in a position to pursue its claim for possession. He disputes the averments made by Jacqueline O'Brien on behalf of the plaintiff to the effect that the securitisation arrangements involved a transfer of beneficial interest only and that legal title remained at all times in the plaintiff. Mr. Donohoe is also not prepared to accept Ms. O'Brien's averment that the mortgage and loan were "desecuritised" in August 2014 and he says that there has been a complete failure by the plaintiff to explain what "desecuritisation" means.

28. In response, counsel for the plaintiff has argued that it is well settled law that securitisation does not involve the transfer of legal ownership. Counsel has referred me to the decision of Peart J. in *Wellstead v. Judge Michael White* [2011] IEHC 438 and the judgment of McGovern J. in *Freeman v. Bank of Scotland plc* [2014] IEHC 284 where, in each case, it was held that a securitisation scheme did not prevent the original mortgagee from enforcing a mortgage against a mortgagor. The case was also made on behalf of the plaintiff that Mr. Donohoe had, in any event, consented to any securitisation as a consequence of his acceptance of the Permanent TSB General Mortgage Conditions and in particular clauses 6.7 and 6.8 of those conditions. At this point, it should be noted that Mr. Donohoe disputes the validity and enforceability of those clauses. Among the many issues which he seeks to raise in these proceedings is a contention that these clauses of the general mortgage conditions are unfair within the meaning of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI no. 27 of 1995) ("the Unfair Terms Regulations"). That is an issue that will require to be debated in due course at the hearing of the special summons if the Unfair Terms Regulations apply to this borrowing. As I understand the law in relation to the Unfair Terms Regulations, the question of fairness or unfairness is to be assessed as at the time of conclusion of the contract and, accordingly, that issue would not of itself justify a requirement to produce documents relating to a securitisation process put in place at a later time.

29. However, the alleged unfairness of the terms is not the only issue that arises in relation to securitisation. Mr. Donohoe also the case, on the basis of the documents exhibited by him that the securitisation process here is likely to have involved a transfer of the legal ownership of the charges over his properties. In light of the decisions of Peart J. in the *Wellstead* case and of McGovern J. in the

Freeman case, there may ultimately be no substance to the defence which Mr. Donohoe seeks to raise in relation to securitisation. Nonetheless, I do not believe that the court can safely conclude at this stage that this defence is without substance. It is striking that although securitisation has been raised by Mr. Donohoe on a number of occasions in the affidavits filed by him in these proceedings and although he has exhibited a number of documents relating to securitisation processes undertaken by the plaintiff at various times, the plaintiff has never placed before the court the relevant documents dealing with the specific securitisation and "de-securitisation" of the loan and mortgage taken out by Mr. Donohoe. I appreciate that the plaintiff suggests that the securitisation process (and the reversal of that process) are not immediately relevant in circumstances where the plaintiff remains the registered owner of the charges, the subject matter of these proceedings and where the court has, in the judgments described above, held that a securitisation process does not involve the transfer of legal ownership of any charges held by the relevant bank involved in that process. On the other hand, the court has no way of assessing, on the basis of the relatively cursory evidence placed by the plaintiff before the court to date, whether the particular securitisation arrangements that were entered into in this case in respect of Mr. Donohoe's mortgages were on similar terms to those considered by Peart J. in the *Wellstead* case or by McGovern J. in the *Freeman* case. Furthermore, the court has no information as to whether the securitisation arrangement in respect of Mr. Donohoe's loan and mortgages was on the terms of the arrangements entered into between the plaintiff and Fastnet 7 (as outlined above). The securitisation process is described in very general terms in paragraphs 50-55 of Ms. O'Brien's affidavit sworn on 9 August 2016 and in paragraphs 60-62 of Ms. O'Brien's affidavit sworn on 7 September 2017.

30. While it may be understandable that the plaintiff has taken the view that the securitisation process is not relevant, I do not believe that the court could safely conclude at this stage that Mr. Donohoe has no sustainable point to make in relation to securitisation and in particular in relation to the title of the plaintiff to bring these proceedings. While s. 31 of the Registration of Title Act 1964 ("the 1964 Act") provides that the register is to be conclusive evidence of the title of the owner of any charge appearing on the register, s. 31 of the Registration of Title Act 1964 also makes clear that nothing in the 1964 Act is to interfere with the jurisdiction of any court of competent jurisdiction to rectify the register where there is fraud or mistake. Thus, there is at least the possibility (I put it no higher than that) that Mr. Donohoe may be able to establish, by reference to the specific elements of the particular securitisation process put in place in respect of his loan and mortgage, that some party other than the plaintiff is the true owner of the charges registered against his property. In particular, I do not believe that the court is in a position at this stage to rule out such a possibility. The terms of the documents exhibited by Mr Donohoe (if similar terms were put in place in respect of the securitisation of Mr Donohoe's mortgages) suggest on their face that there may have been a transfer of legal ownership. Prima facie, this is inconsistent with the case made by the plaintiff that there has never been anything more than the transfer of beneficial ownership. In these circumstances, it seems to me that, while there is no more than a possibility that Mr. Donohoe may succeed on this issue, there is nonetheless sufficient material before the court to satisfy me that the issue is not a purely speculative one.

31. It might be otherwise if the plaintiff had already placed appropriate evidence and documents before the court dealing in more detail with the securitisation process and what the plaintiff has described as the "desecuritisation" of the loan and mortgages in issue. The plaintiff has not placed before the court any of the underlying documents or extracts from those documents. As noted above, the averments sworn on behalf of the plaintiff in relation to this issue are in very general terms and do not provide any detail as to the nature of the particular securitisation process that was put in place in respect of Mr. Donohoe's loan and mortgages. Thus, even if Mr. Donohoe had not brought the present motion, I believe that it is likely that the court, on the hearing of the special summons, would have required more evidence from the plaintiff in relation to both the securitisation itself and the reversal of that process.

32. In the circumstances, I believe that it is appropriate in this case to take a similar approach to that adopted by Haughton J. in the *McMahon* case mentioned above and to direct that the plaintiff should file a further affidavit dealing with the securitisation process and in particular exhibiting the securitisation documentation and any relevant documents which show the reversal of the securitisation. In giving that direction I am conscious that there may be aspects of the documentation which are commercially sensitive and it may well be appropriate that aspects of the documentation should be redacted. At this point, I express no view on the extent (if any) to which redaction might be appropriate. However, it does seem to me that the plaintiff should address on affidavit why it is that, notwithstanding the securitisation process put in place in 2008, the plaintiff continued to have the right to pursue Mr. Donohoe in respect of the enforcement of the mortgage granted by him. The plaintiff should also explain on affidavit (again exhibiting the relevant documents) how the securitisation was subsequently reversed. If this is explained on affidavit, it may well be the case that the approach taken by Peart J. in the *Wellstead* case and the approach taken by McGovern J. in the *Freeman* case will require to be followed here. On the other hand, until that evidence is before the court, it will not be possible for the court to assess whether the securitisation process here is similar to that adopted in those cases.

33. In paragraph 3 of the notice for particulars, Mr. Donohoe seeks confirmation by PTSB of its compliance with all Central Bank codes of practice. He refers, in this context to s. 117 of the Central Bank Act 1989 (as amended) and he also relies on paragraph 3G of the Circuit Court Practice Direction – CC 17. While the Circuit Court practiced direction has no application to High Court proceedings, Mr. Donohoe submits that a similar approach should be taken in the High Court.

34. In my view, there is no basis on which Mr. Donohoe can seek this confirmation. In my view there is no sustainable case to be made by him that a breach of any of these codes gives rise to a defence on his part in relation to the claim for possession. Insofar as the Central Bank's code of practice on the transfer of mortgages and its code in relation to its Asset Securitisation are concerned, McGovern J. in *Freeman v. Bank of Scotland* [2014] IEHC 284, has made it clear that a failure to comply with these codes (if there was, in fact, any such failure) does not extinguish the loan or furnish a defence to a borrower.

35. Similarly, insofar as the Central Bank's code of conduct on mortgage arrears is concerned, the Supreme Court has clarified in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46 that a breach of the code (other than where the breach involves a failure by a lender to abide by the moratorium referred to in the code) will not adversely affect a lender's entitlement to obtain an order for possession. This was made very clear in paragraph 5.28 of the judgment of Clarke J. (as he then was). In the present case, the provision of the code dealing with the moratorium does not apply. Neither of the properties the subject matter of these proceedings is a residence occupied by Mr. Donohoe himself. Thus, even if there was a breach of any of these codes in this case, this would not provide Mr. Donohoe with a defence. Accordingly, I do not believe that there is any basis to direct the provision of the confirmation sought by Mr. Donohoe in paragraph 3 of his notice and I refuse to make any such direction.

36. In paragraph 4 of his notice, Mr. Donohoe seeks details "of the full and valid itemised accounting of account number 90029744 from inception to date". In the course of the hearing before me, Mr. Donohoe suggested that there were anomalies with the account. He instanced, for example, that in the period from May 2007 to December 2007, the statement of account shows that the balance due increased notwithstanding that all payments of interest due were made during this period (at a time when interest was all that had to be paid under the terms of the relevant facility).

37. In my view, Mr. Donohoe has not established that it is necessary that anything further than the statement of account should be supplied to him. The statement of account has already been supplied in "Exhibit F" to Ms. O'Brien's affidavit sworn on 7th September

2017. That statement of account runs for the entire period from May 2007 to September 2017. In my view, the statement of account is sufficient to enable Mr. Donohoe to run any defence which he believes may arise in relation to any alleged accounting anomalies. It will be for him to establish how any such anomalies (if they exist) give rise to a defence on his part. This statement of account shows the sum debited to Mr. Donohoe's account and the date when this occurred. I have heard nothing from Mr. Donohoe that explains why this information is not sufficient to enable him or an expert appointed by him to work out whether the statement of account is consistent with the terms and conditions governing the loans to Mr. Donohoe. For these reasons, I am not satisfied that Mr. Donohoe has established that it is necessary that anything further should be supplied to him by the plaintiff. I therefore refuse to give the direction sought in respect of paragraph 4 of the notice.

38. In paragraph 5 of his notice, Mr. Donohoe says that he requires a breakdown of the base elements used to calculate a fixed rate of 4.75% interest offered for the first two years of the mortgage. In my view, Mr. Donohoe has failed to establish that this information is necessary in order to assist him in putting forward any sustainable defence to the proceedings. It is clear from exhibit JOB 1 to Ms. O'Brien's affidavit sworn on 23 April 2015 that a rate of 4.75% was offered to Mr. Donohoe in the plaintiff's letter of approval dated 30 April 2007. That letter of approval was accepted by Mr. Donohoe on 30 April 2007. I therefore cannot see any basis on which any issue could be said to arise in relation to the rate of 4.75%. Accordingly, I refuse to direct the plaintiff to carry out this exercise.

39. In paragraph 6 of his notice, Mr. Donohoe says that he requires Ms. O'Brien to swear a supplemental affidavit confirming the accuracy of the account statement figures and confirming that no overcharging or contractual breaches have occurred. In my view, there is no basis on which Mr. Donohoe can require the plaintiff to swear an affidavit of this kind. As noted above, a full statement of account has been exhibited. If Mr. Donohoe thinks that there has been overcharging, it is for him to prove that as a matter of defence. For the reasons set out at paragraph 37 above, Mr. Donohoe should be able to do so by reference to the statement of account and the documents evidencing the agreement between the parties as to the terms and conditions of the loan offer (which are evident from exhibits JOB 1 and JOB 2 to Ms. O'Brien's grounding affidavit sworn on 23 April 2015. In my view, Mr. Donohoe has failed to establish that it is necessary that the plaintiff should provide the materials sought by him in paragraph 6 of his notice. I therefore refuse to direct the plaintiff to deliver any further affidavit in relation to this issue.

40. In paragraph 7 of his notice, Mr. Donohoe requires confirmation that the deed of mortgage dated 8 May 2007 is the current valid instrument over the property as of today's date and that no new charges have been created.

41. I do not see any basis for this request. The matter has been addressed in paragraphs 63-66 of Ms. O'Brien's affidavit sworn on 7 September 2017. Furthermore, insofar as Mr. Donohoe may be concerned about the process of securitisation, I believe that the direction I have given above in relation to a further affidavit in relation to that issue is all that can reasonably be required.

42. A similar issue arises in relation to paragraph 8 of Mr. Donohoe's notice where he requires copies of all instruments of charge executed or registered by the plaintiff or their assignees. In my view, the further affidavit that I have directed in relation to the securitisation process is sufficient and nothing further is required.

43. The same issue arises in relation to paragraph 9 of Mr. Donohoe's notice. There, he seeks evidence relating to what was described by Ms. O'Brien as "de-securitisation". In my view, the direction that I have given in relation to the further affidavit dealing with the securitisation process is sufficient and nothing further is required.

44. In paragraph 10 of his notice, Mr. Donohoe says that he requires copies of a number of affidavits of service filed at an earlier stage in these proceedings. In the course of the hearing before me Mr. Donohoe has confirmed that he has inspected the originals of these affidavits in the Central Office. Mr. Donohoe says that he is entitled to have copies of these affidavits made available to him so that he can swear a response to them. In my view, Mr. Donohoe is mistaken in this request. In the first place, he has (as noted above) already inspected the originals in the Central Office. There is therefore no necessity to direct that these affidavits should be furnished to him. Moreover, there is equally no necessity for Mr. Donohoe to respond to these affidavits. These affidavits deal with service of the proceedings. If Mr. Donohoe disputed the contents of the affidavits, the appropriate course for him to have taken would have been to apply to the court to set aside the orders made on foot of those affidavits. No such application was ever made. It is now far too late to make any such application even if there were grounds for doing so. For completeness, I should make it clear that I have heard nothing from Mr. Donohoe which suggests that he would have had any grounds for seeking to set aside the orders made by the court on foot of those affidavits.

45. The next category of information sought by Mr. Donohoe relates to the appointment of receivers. He says that he requires copies of all of the deeds of appointment together with addresses and contact details of the receivers and copies of all correspondence between the plaintiff and the receivers. He also says that he requires indemnity insurance details of the receivers. Mr. Donohoe contends that he had previously sought this information under the Data Protection Acts and had not been given the relevant information held by the plaintiff. Mr. Donohoe says that he has reported the plaintiff and the receivers to the Data Protection Commissioner on the basis that data has been wrongfully withheld by them. Mr. Donohoe also complains that the failure to provide this information adversely affects his response to the plaintiff's claim and his ability to raise a counterclaim against the plaintiff.

46. In effect, this is a request for fairly wide-ranging discovery of documents. No attempt has been made to comply with the requirements of O. 31, r. 12 governing requests for discovery. More importantly, I cannot see any basis on which it could be suggested that disclosure of these documents is relevant or necessary at this stage. If Mr. Donohoe has a valid complaint that there has been a failure to comply with the provisions of the Data Protection Act, that would be a matter for the Data Protection Commissioner to investigate. If there was a breach of the Data Protection Acts, that would not give rise to a defence to the proceedings.

47. Furthermore, in Exhibit BPD fig. 4-05 and Exhibit BPD fig. 4-06 to his affidavit of 30 March 2017, a significant number of documents have been exhibited by Mr Donohoe relating to the appointment of receivers and the subsequent discharge of those receivers. In the circumstances, I am of the opinion that Mr. Donohoe has sufficient information available to him to form a view as to whether there is any basis to contend that the appointment of the receivers in this case was in some way invalid. I have not been persuaded by Mr. Donohoe that there are any additional documents that Mr. Donohoe genuinely requires in order to challenge the validity of the appointment of the receiver. I should also say that even if there is a basis on which to challenge the validity of the appointment of the receivers, I cannot see how that would give rise to a defence to the plaintiffs' application for an order pursuant to s. 62(7) of the 1964 Act for possession of the premises. Any invalidity in the appointment of the receiver would not invalidate the mortgage and would not undermine the plaintiff's rights under s. 62(7) of the 1964 Act. It might possibly be otherwise if Mr. Donohoe were in a position to show that, but for the appointment of the receivers, the principal monies due on foot of the facilities had never become due. However, I cannot see how such a case could be made. The loans have been in default for a very long period of time.

48. On the penultimate page of his notice, Mr. Donohoe also seeks details of all entities including Fastnet to whom the mortgage and loans were sold or assigned and he says he requires un-redacted copies of all transaction documents. In addition, he says that he requires credit default swap insurance details. When I enquired of him as to why he requires the credit default swap details, Mr. Donohoe explained that he was concerned that there might be some element of double recovery if, on the one hand, the plaintiff had already been reimbursed by an insurer and on the other hand was still seeking to enforce the mortgage.

49. Insofar as the sale or assignment of the mortgage is concerned, I have already given a direction in relation of paragraph 2 of the notice for particulars in that I do not believe that anything further is required in order to dispose of these proceedings fairly. Insofar as the credit default swap insurance issue is concerned, I cannot see how this gives rise to any defence on the part of Mr. Donohoe. Even if it were the case that the plaintiff had been paid by an insurer, this would not give rise to a defence on the part of Mr. Donohoe, since any such insurer would be entitled to require the plaintiff to pursue the present claim against Mr. Donohoe in the plaintiff's own name. This would follow from an insurer's right of subrogation. It would not involve double recovery from Mr. Donohoe. He has only been pursued once. I therefore do not believe that there is any basis to direct the plaintiff to provide details of any credit default swap insurance that may have been in place at any time.

50. The next category of "particulars" which Mr. Donohoe seeks is that he says he requires copies of all instruments and documents executed using an alleged power of attorney. In this context, Mr. Donohue appears to have great difficulty in understanding how the plaintiff could have proceeded in this case without relying on a power of attorney and he claims that any such power here is invalid. He queries how a receiver could act as his agent without doing so under such a power of attorney. In my view, this is not a sustainable point of defence. The plaintiff was not required, as a matter of law, to rely on any power of attorney in order to appoint a receiver. Nor did the receiver have to act on foot of any power of attorney in order to act as agent of Mr. Donohoe. On the contrary, the mortgage conditions expressly provided that any receiver appointed by the plaintiff would be the agent of Mr. Donohoe as mortgagor. This is a very common provision. It reflects the provisions of s. 24(2) of the Conveyancing Act, 1881 and s. 108(2) of the Land and Conveyancing Law Reform Act, 2009 which both state that the receiver is deemed to be an agent of the mortgagor.

51. A further category of material sought by Mr. Donohoe is what he describes as a "full response" to the data access requests previously made by him under the Data Protection Acts. In my view, this is not a matter for the court. The data access requests relate to account numbers 22004913 and 22005303. This is not the account the subject matter of the present proceedings. Mr. Donohoe has not demonstrated why it is necessary in order for him to defend these proceedings that he should have all data relating to these earlier accounts. In the circumstances I refuse this aspect of Mr. Donohoe's notice.

52. The next category of material sought by Mr. Donohue relates to the origin of the funds used by the plaintiff in advancing the loan. Mr. Donohoe contends that he should be provided with proof that the principal sum specified in the letter of approval was actually advanced out of funds of the plaintiff. Mr. Donohoe has referred me in this context to s. 36 of his very lengthy affidavit sworn on the 27 February 2018. This section runs from paragraph 483 to paragraph 519 of this affidavit. I have carefully considered this section of the affidavit. I regret to say that I do not believe that there is anything in this section of Mr. Donohoe's affidavit which gives rise to any stateable defence on his part. He contends that funds were created by bookkeeping entries for a transaction account in his name without his permission authorisation or knowledge and were then falsely represented to him as a loan. He contends that he entered into the loan agreement without knowing the true position and he claims that he is entitled to rely on the doctrine of *non-est factum*. He also contends that there was no consideration by the plaintiff and furthermore that there was no *consensus ad idem* and that the contract is null and void. I regret to say that I cannot see any basis for any of these contentions. They are based upon pure assertion only. With due respect to Mr. Donohoe, I do not believe that it is necessary in this judgment to detail the allegations made by Mr. Donohue in these paragraphs of his lengthy affidavit. It is sufficient to record that there is nothing in this section of the affidavit which, in my view, goes beyond speculation or assertion or which gives rise to any stateable defence and I therefore refuse to direct the plaintiff to furnish these "particulars".

53. The penultimate category of "particulars" sought by Mr. Donohoe relates to the "public indemnity insurance details of Kevin Callan and Belgard Solicitors". In my view, there is no basis on which Mr. Donohoe is entitled to any details relating to the insurance position of the plaintiff's solicitors. Mr. Donohoe referred me in this context to the professional indemnity insurance regulations of the Law Society but was unable to point out any provision of those regulations which gave an entitlement to one party in proceedings to seek insurance details relating to the solicitors for the opposing party. I can see nothing in the regulations which would entitle Mr. Donohoe to these details and I therefore refuse this element of his application.

54. The final element of the notice for particulars relates to "details of the solvency" of the plaintiff from May 2007 and the "perfection of a valid bona fide banking licence, as a regulated compliant trading entity". It should be noted in this regard that in his lengthy affidavit sworn in February 2008, Mr. Donohoe seeks to make the case that the plaintiff was insolvent since 2007 and was trading while insolvent and was therefore in breach of liquidity regulations. He also maintains that the Central Bank and the government failed to conduct investigations of the banks liquidity in 2007 and 2008, and he maintains that had he known that the plaintiff was insolvent and in breach of regulations he would not have entered into contractual arrangements with them.

55. Again, I regret to say that, in my view, the material in this section of Mr. Donohoe's affidavits, constitutes no more than unsubstantiated assertion and speculation on his behalf. I do not believe that Mr. Donohoe has established that these matters give rise to any sustainable defence on his part. Furthermore, the only potential loss which he has identified is that he says that additional costs have been incurred at his expense as a consequence of the securitisation process undertaken by the plaintiff. He says that this securitisation was more likely in the context of an insolvent lender than in the case of a solvent lender. However, there is no evidence to support that proposition. Securitisation was a process which was well known and regularly utilised long prior to the financial crisis of 2007/2008. There is no evidence - as opposed to assertion - before the court to support Mr. Donohoe's proposition. This is a classic example of "fishing" for evidence. In the circumstances, I have not been persuaded that it is necessary in order to dispose of these proceedings fairly that the material sought should be provided by the plaintiff.

56. For all of the reasons outlined above, the only order to be made on foot of the notice for particulars in this case is an order for the plaintiff to file a further affidavit dealing with the securitisation process and in particular exhibiting the securitisation documentation and any relevant documents which show the reversal of the securitisation. The affidavit to be filed by the plaintiff should address why it is that, notwithstanding the securitisation process put in place in 2008, the plaintiff continued to have the rights to pursue Mr. Donohoe in respect of the enforcement of the mortgage granted by him. The plaintiff should also explain on affidavit (again exhibiting the relevant documents) how the securitisation was subsequently reversed. At this point, I express no view on the extent (if any) to which it may be appropriate for the plaintiff to redact parts of the copied documents to be exhibited to the affidavit. Any issue that arises in relation to redaction can be addressed at a later time following the filing and service of the further affidavit by the plaintiff.

The Plaintiff's Application to Set Aside Service of the Notice to Cross-Examine

57. In his judgment delivered on 24 February 2017, McDermott J. has already set aside a previous notice to cross-examine served in 2016. In his judgment, McDermott J. made clear that many of the issues sought to be raised by the defendant in these proceedings were vexatious, frivolous and scandalous and ought not be the subject of cross-examination of Ms. O'Brien.

58. In these circumstances the plaintiff contends that the defendant, Mr. Donohoe was not entitled to serve a new notice to cross-examine on 26 February 2018. In response, Mr Donohue says that the new notice to cross-examine relates to alleged inconsistences on the part of Ms. O'Brien which have emerged subsequent to the judgment of McDermott J. in February 2017. In particular, Mr. Donohoe suggests that there are significant inconsistencies between the affidavit of Ms. O'Brien sworn on 7 September 2017 (in response to Mr. Donohoe's affidavit of 30 March 2017) and the earlier affidavits sworn by her in these proceedings (namely the affidavits that were in existence at the time McDermott J. considered the previous application). Mr Donohoe contends that in these circumstances he must be entitled to cross-examine Ms. O'Brien in relation to these alleged inconsistences. He relies on the judgment of O'Donovan J. in *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369 and on the judgment of Hardiman J. in the Supreme Court in *O'Callaghan v. Mahon* [2006] 2 IR 32, in particular, Mr. Donohoe has referred me to the passage in the judgment of O'Donovan J. in the Seymour case where O'Donovan J. said that where there are material conflicts of fact between deponents of affidavits before the court, the most appropriate course to take is to direct that one or more of the deponents should be cross-examined on his or her affidavit. As O'Donovan J. observed:-

> *"This is so because it is impossible for a judge to resolve a material conflict of fact disclosed in affidavits."*

59. Mr. Donohoe also drew my attention to the observations of Hardiman J. in the O'Callaghan case where it was emphasised that:-

> *"A full and unhampered right to cross-examine a person who makes grave allegations against another at a tribunal of enquiry is an important constitutional right. It cannot be impinged upon without a firm basis in law, which must itself be consistent with the constitution".*

60. I fully accept the force of those observations. Of course, where there are material contradictions between the deponents of affidavits, the only way in which those conflicts can be resolved (in the absence of directing a plenary hearing) is by cross-examination. I fully acknowledge that cross-examination can be crucial in those circumstances. However, in order to give rise to a right of cross-examination any conflict of evidence must be in relation to a material or relevant issue. If the conflict relates to an unsustainable, speculative or irrelevant issue, cross-examination will manifestly not be necessary.

61. Similar considerations can potentially arise where there are inconsistencies between affidavits sworn by the same deponent (or where there are inconsistencies between affidavits sworn by a number of deponents on behalf of the same party). However, again, it seems to me that cross-examination will only be necessary or appropriate in circumstances where those inconsistencies relate to a material issue such that cross-examination can be said to be necessary.

62. In his lengthy affidavit sworn in February 2018, Mr. Donohoe outlines the inconsistencies which he alleges exist in the evidence given in affidavit by Ms. O'Brien. He says that as a consequence of these inconsistencies Ms. O'Brien is not a credible or competent witness and he furthermore goes so far as to suggest that she has committed perjury.

63. I should observe at this point that it is a huge leap for anyone to suggest that a deponent has perjured herself or himself just because (so it is alleged) there are inconsistencies between various aspects of the affidavit evidence placed before the court by that deponent. In my view, there is no material before the court sufficient to justify the allegation of perjury against Ms. O'Brien.

64. I acknowledge, however, that if there were material inconsistencies between the most recent affidavit sworn by Ms. O'Brien in September 2017, and the previous affidavit sworn by her prior to the judgment of McDermott J. in February 2017, that might give rise to a basis for the service of a new notice to cross- examine, and that in such circumstances it would be difficult to suggest that Mr. Donohoe was wholly estopped from serving such a notice. However, that presupposes that there is some material inconsistency between Ms. O'Brien's previous averments and those made by her in her affidavit sworn in September 2017.

65. It is therefore necessary to consider whether there is any material inconsistency between what Ms. O'Brien previously said and what she now says in her affidavit of September 2017. In this regard, Mr. Donohoe in his lengthy affidavit sworn on 27 February 2018 has helpfully set out the inconsistencies which he says exists.

66. In paragraphs 92-98 of the lengthy affidavit, Mr. Donohoe says that the plaintiff must have relied on a power of attorney in circumstances where receivers were appointed. He poses the question as to how the receivers could have acted as his agent unless they acted pursuant to a power of attorney. He says that Ms. O'Brien is therefore clearly incorrect when she swears in paragraph 47 of her replying affidavit of 7 September 2017, that the plaintiff never relied on the power of attorney clause. I have already dealt with this issue in the context of Mr. Donohoe's notice for particulars and I therefore do not need to repeat what I have already said. It is sufficient to record that in my view there is no basis for the suggestion that the plaintiff must have relied on the power of attorney given by Mr. Donohoe. I therefore do not believe that there is any material issue in relation to this contention by Mr. Donohoe such as to give rise to any basis to cross-examine Ms. O'Brien on this issue.

67. In paragraphs 99-104 of his lengthy affidavit, Mr. Donohoe suggests that Ms. O'Brien has perjured herself in paragraphs 52 and 53 of her affidavit of September 2017 in circumstances where she said the receivers did not take possession of the properties the subject matter of these proceedings and where she says that the receivers were appointed solely to collect rents. In paragraph 101 of his affidavit sworn in February 2018, Mr. Donohoe says that the deeds of appointment of the receivers (which he exhibits) specifically state that they were appointed to enter upon and take possession of the secured assets. In paragraph 103 Mr. Donohoe specifically refers to an admission allegedly made by Ms. O'Brien to this effect in paragraph 53 of her affidavit sworn on 7 September 2017.

68. Mr. Donohoe is correct in that the deeds for appointment of the receiver appear on the face of them to refer to the "secured assets". The deeds are not expressly confined to rents although I note that in the notice given by the receivers of their own appointment, they describe themselves as rent receivers. However, it does not seem to me that this inconsistency justifies cross-examination in this case. The inconsistency is apparent on the face of the deeds of appointment and this can be relied upon by Mr. Donohue at the hearing of these proceedings to the extent that it is conceivably relevant, but I should make clear that I do not see how any such inconsistency assists Mr. Donohoe.

69. There is in fact no evidence (as opposed to assertion) before the court that the receivers ever sought to take possession of anything other than the rents. The letters which have been exhibited from the receivers expressly confine themselves to looking for the rents. This is consistent with the plaintiff's letter to the defendant of 3 October, 2011 notifying him that the plaintiff intended to

appoint rent receivers. There is a suggestion in paragraph 102 of the February 2018 affidavit sworn by Mr. Donohue that the receivers entered upon the properties themselves and changed locks and took possession, but this is no more than an assertion put forward in the most general terms. It is also impossible to see how this could (even if there was evidence to support it) give rise to a defence to the claim for possession now made in these proceedings. The claim for possession in these proceedings is made not by the receiver but by the plaintiff itself. Accordingly, I do not believe that any useful purpose would be served by allowing cross-examination on this issue.

70. In paragraphs 105-134 of Mr. Donohoe's affidavit of February 2018, Mr. Donohoe seeks to suggest that there are a number of inconsistencies in the evidence before the court as to the nature of the assignment that took place in relation to the securitisation process. It is unnecessary for present purposes to examine each of these alleged inconsistencies. In my view, the appropriate way in which to deal with the securitisation issue is by means of an additional affidavit on the part of the plaintiff as directed above in relation to the notice for particulars served by Mr. Donohoe. If the documents relevant to the securitisation of the loan and mortgage in this case are placed before the court, I can see no useful purpose for permitting cross-examination in relation to any alleged inconsistencies between the affidavits sworn to date. As I have already mentioned in the context of the request for particulars, the affidavit evidence sworn on behalf of the plaintiff in relation to the securitisation process is in very general terms. What the court needs to see are the relevant documents. The documents will explain the nature of the securitisation and will therefore allow the court to assess whether there is any basis for the complaints made by Mr. Donohoe in relation to securitisation. I cannot see how cross-examination of Ms. O'Brien will assist this process.

71. In the circumstances, I have come to the conclusion that it would be wrong and inappropriate to permit cross-examination of Ms. O'Brien in this case and I therefore will make an order setting aside the notice to cross-examine and directing that the proceedings will be heard exclusively on affidavit.

The Unfair Terms Regulations and the Position of Consumers

72. For completeness, I should mention that significant reliance was placed by Mr. Donohoe in the course of his submissions to me on the Unfair Terms Regulations and on a number of authorities of the Court of Justice of the European Communities dealing with the unfair terms directive. In particular, Mr. Donohoe has sought to rely upon observations made by the Court of Justice in Case C-415/11 *Azis* and in Case C-169/140 *Morcillo* which emphasise the principle of equality of arms and the requirement that a consumer should get a fair hearing. I fully acknowledge these principles and I have attempted to ensure that Mr. Donohoe had every opportunity to make his case in support of his motion seeking to compel the plaintiff to respond to his notice for particulars and in opposition to the plaintiff's motion to set aside the notice to cross-examine. At the beginning of the second day of the hearing, Mr. Donohoe expressed considerable unhappiness that he had been furnished with a significant body of authorities by the plaintiff the previous evening and had spent much of the night seeking to understand and digest these authorities. Mr. Donohoe suggested that there had been a failure on the part of the plaintiff to comply with the requirements of practice direction no. 54 dealing with lay litigants which envisages that copy authorities would be furnished in advance of a trial.

73. Had I considered that Mr. Donohoe was not in a position to proceed on the second day of the hearing, I would, of course, have adjourned the hearing to allow him time to properly digest the authorities (even though no application was made by Mr Donohoe to adjourn the hearing). However, on examination of the plaintiff's authorities and Mr. Donohoe's own authorities, there was a significant overlap between them. More importantly, it was quite clear to me on the second day of the hearing, that, if anything, Mr. Donohoe was more focused and more assured in making his submissions than he had been on the preceding day. In fact, I found Mr. Donohoe to be an impressive advocate who presented his case very thoroughly and it was clear that he had a complete command of all of the detail of his case and of the case law and other supporting materials which he sought to invoke.

74. Obviously, it will be a matter for the court at the hearing of the special summons to address the substance of Mr. Donohoe's complaint about alleged breaches of the Unfair Terms Regulations. It would be inappropriate for me to address that issue at this stage.

Conclusion

75. In light of the findings made by me above, the following orders will be made:-

(a) I will first make an order in the terms set out in paragraph 56 above.

(b) Save to the extent set out at (a) above, I will refuse the balance of the application by Mr Donohoe to compel the plaintiff to respond to his notice for particulars dated 1 December 2017;

(b) I will also make an order setting aside Mr. Donohoe's notice to cross-examine dated 26 February 2018.

(c) As previously directed by McDermott J., these proceedings will be heard solely on affidavit and on the basis of legal submissions to be made by the parties.

76. I will hear the parties as to the length of time to be given to the plaintiff to file its further affidavit. I will also hear the parties in relation to costs. Subject to dealing with those two issues, the special summons will be returned to the Chancery List for the purposes of fixing a new date for the hearing of the summons. While it will be a matter for the judge in charge of that list, there may be a saving of court time if the hearing of the summons ultimately proceeds before me.