THE HIGH COURT

[RECORD NO. 2017 8108 P]

BETWEEN

SHANE MCCARTHY

PLAINTIFF

AND

PADRAIG MORONEY AND GERALDINE MORONEY

DEFENDANTS

AND

THE HIGH COURT

[RECORD NO. 2018 1692 P]

BETWEEN

PADRAIG MORONEY

PLAINTIFF

AND

PROPERTY REGISTRATION AUTHORITY AND ENNIS PROPERTY FINANCE DAC

AND

BANK OF SCOTLAND PLC

AND

SHANE MCCARTHY

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on the 29th day of June 2018

Introduction

1. This judgment is delivered in respect of a number of applications (described in more detail below) which arise in the two sets of proceedings named above. In the first set of proceedings brought by Shane McCarthy against Mr. Padraig Moroney and Mrs. Geraldine Moroney, the plaintiff receiver seeks possession of the lands comprised in Folios 9986, 14683, 11981, 32600F, 19275 and 15169 of the Register, Co. Clare. These proceedings were commenced by plenary summons issued on 8 September 2017.

2. The second set of proceedings were commenced by Mr. Moroney (acting in person) against the Property Registration Authority ("PRA") and the other defendants named above on 22 February 2018. In those proceedings, Mr. Moroney seeks declaratory relief and damages. In particular, Mr. Moroney claims that there has been an unlawful attack on his private property rights as a consequence of the registration by the PRA of the second named defendant "Ennis Property" and the third named defendant ("Bank of Scotland") as owners of registered charges previously granted by Mr. Moroney and his wife in favour of Bank of Scotland Ireland Ltd ("BOSI") over the lands comprised in the Folios described in paragraph 1 above. Mr Moroney also complains that there has been a failure by the PRA to afford him fair procedures. He also contends that there has been a failure to afford him fair procedures as a consequence of the steps taken under the Cross-Border Mergers Regulations (described in more detail below). It will be necessary in due course to analyse the claims made by Mr. Moroney in greater detail but, before doing so, I should identify the nature of the applications which came on for hearing before me on 15, 16 and 17 May 2018.

The applications before the court

3. There are a number of applications before the court as follows:

(a) In terms of date, the first application before the court is an application by Mr. McCarthy (as the receiver appointed by Ennis Property over the lands comprised in the Folios described in paragraph 1 above) for interlocutory orders against Mr. Moroney and his wife, Mrs. Geraldine Moroney, restraining them from impeding or preventing Mr. McCarthy from taking possession of the lands in question (together with certain ancillary relief which it is unnecessary, at this point, to address).

(b) In chronological sequence, the next application is Mr. Moroney's application (in the proceedings commenced by him) for an interlocutory order compelling the PRA to remove the charges currently held in the name of Ennis Property from the Folios described in para. 1 above.

(c) the next application is the motion brought by Mr. Moroney (filed on 11 April, 2018) seeking an order joining the Attorney General and certain other parties including Pepper Finance DAC ("Pepper") as defendants to the proceedings.

(d) there is also an application brought on 20 April 2018 by Ennis Property and Mr. McCarthy in Mr. Moroney's proceedings seeking orders pursuant to O. 19 r. 28 (RSC) and/or the inherent jurisdiction of the court dismissing the proceedings on the grounds that they are either frivolous or vexatious or are bound to fail and/or are an abuse of process.

(e) there is also a further application brought by Mr. Moroney on 30 April 2018 in which he seeks an order pursuant to O. 60 r. 2 (RSC) joining the Attorney General as a notice party to Mr. Moroney's proceedings.

And

(f) the remaining application (similar to that described at (d) above) is the notice of motion dated 20 April 2018 brought by Bank of Scotland against Mr. Moroney seeking to strike out Mr. Moroney's proceedings pursuant to O. 19 r. 28 or alternatively seeking an order dismissing the proceedings pursuant to the inherent jurisdiction of the court on the grounds that they are unsustainable.

4. On the first day of the hearing before me, it was agreed that the motions brought by Ennis Property and by Bank of Scotland should be heard first. On the second day of the hearing it was agreed that the hearing of those motions should then be followed by the hearing of Mr. Moroney's application for an interlocutory injunction against the defendants in his proceedings and that the application by Mr. McCarthy for an interlocutory injunction against Mr. and Mrs. Moroney would be dealt with thereafter. It was agreed that the further motions brought by Mr. Moroney to add additional parties to his proceedings would be considered after I give this judgment (to the extent that the joinder of additional parties might still be live at that stage).

Background

5. Before addressing each of the applications before the court individually, it may be helpful at this point to set out some relevant background which is apparent from the documents and affidavit evidence before the court.

6. On 1 June 2004, BOSI issued a Facility Letter to Mr. and Mrs. Moroney offering them a variable interest rate term loan of up to €500,000 for a term of 20 years together with a revolving loan of up to €100,000 for a term of four months. The facility letter recorded that the purpose of the loan was to assist in the purchase of 90 acres of land at Kilmurray, Co. Clare for €700,000 of which €100,000 was to be provided by Mr. and Mrs. Moroney themselves and the remainder was to be funded by the BOSI facilities. The Facility Letter made clear that, as security for the loan, BOSI required a first specific charge over the 90 acres to be acquired together with a first specific charge over land comprising 48 acres at Claremount, Broadford, Co. Clare and a similar charge over 4 acres of development land also at Broadford.

7. The Facility Letter (which was countersigned by Mr. and Mrs. Moroney on 2 June 2004) was stated to be subject to the BOSI General Loan Conditions issued in 2004.

8. On 29 June 2004, Mr. and Mrs. Moroney executed a Deed of Mortgage and Charge in respect of the facilities described in the Facility Letter under which they charged their property in each of the Folios mentioned above in favour of BOSI. It will be necessary in due course to consider some of the provisions of the June 2004 Deed.

9. On 21 November 2004, BOSI issued a further facility letter to Mr. and Mrs. Moroney offering a further variable interest rate loan up to €144,000 for a term of 20 years for the purpose of the purchase of what was described as a "S. 50 apartment at Parkview Hall, Dublin Road, Limerick". The Facility Letter made clear that this loan would be offered on the basis of the existing security over the lands described above, together with a first charge over the Section 50 apartment.

10. Mr. and Mrs. Moroney countersigned the Facility Letter of 21 November 2004 (by executing the relevant acceptance attached to the letter) on 22 December 2004.

11. There is no dispute between the parties that the funds the subject of the Facility Letters described above were duly advanced to Mr. and Mrs. Moroney. There was a subsequent amendment made to the 20 year Facility in 2008, but, at this point, I do not believe that it is necessary to consider that amendment.

12. There was a further amendment made to the Facilities by an amending Facility Letter dated 9 February 2009 which provided (*inter alia*), at that time, for interest only payments together with certain repayments of principal (dealt with in more detail below) and which also provided that the loan facilities should now be subject to the 2008 edition of the BOSI standard conditions. These amendments were accepted by Mr. and Mrs. Moroney on 6 March 2009.

13. A further Facility Letter issued on 5 May 2009 which provided for a facility of €142,500 to refinance certain of the existing liabilities. This facility was also made available on the basis of the existing security.

14. During the course of 2010, proceedings were commenced in the High Court in Ireland and contemporaneously in the Court of Session in Scotland seeking the approval of a cross- border merger under the European Communities Cross-Border Mergers Directive 2005/56/EC ("the Cross-Border Mergers Directive") under which the business of BOSI in Ireland would be transferred to Bank of Scotland (which had its seat in Edinburgh). On 22 October 2010, the High Court in Ireland issued a pre-merger certificate confirming that the relevant pre-merger requirements had been completed (insofar as Ireland was concerned) in respect of the proposed merger.

15. Subsequently, on 10 December 2010, the Court of Session in Edinburgh approved the completion of the cross-border merger and fixed 23:59 hours (GMT) on 31 December 2010 as the time and date on which the consequences of the merger were to have effect. As a matter of law, BOSI ceased to exist as at that time on 31 December 2010 and all of the assets and liabilities of BOSI became assets and liabilities of Bank of Scotland. That is clear from the terms of the cross-border mergers directive and the Irish regulations implementing the directive, namely the European Communities Cross-Border (Mergers) Regulations 2008 (S.I. no 157 of 2008) ("the 2008 Regulations"). If any further authority is required for that proposition it is to be found in the observations of Clarke J. (as he then was) in *Kavanagh v. McLaughlin* [2015] 3 IR 555 at p. 573. The decision in *Kavanagh v. McLaughlin* is considered in more detail below.

16. On 29 November 2014, Bank of Scotland entered into an agreement to sell a portfolio of loans and related security (including the loans to Mr. and Mrs. Moroney) to a company called ELQ Investments 11 Ltd ("ELQ"). However, prior to the completion of that sale, the bank, ELQ and Ennis Property entered into a Deed of Novation on 12 December 2014 under which it was agreed that Ennis Property would take the assignment of the loans in place of ELQ.

17. On 20 March 2015, notice of the proposed assignment was given to Mr. and Mrs. Moroney in writing. The letter to Mr. and Mrs. Moroney stated that the sale would occur on 20 April 2015 and that from the date of the sale, amounts owing in respect of the facilities would now be owed to Ennis Property. The letter also informed Mr. and Mrs. Moroney that Ennis Property has appointed Pepper to provide portfolio and asset management services on its behalf and that Pepper may contact them in relation to the facilities. The letter stated that up until 17 April 2015 (being the last business day prior to the sale date) Mr. and Mrs. Moroney might continue to make contact with the existing relationship manager Ms. Aisling O'Flynn at Certus (the entity which appears to have administered the loans on behalf of Bank of Scotland).

18. On 20 April 2015, a deed of assignment was executed between Bank of Scotland and Ennis Property under which the loans and mortgages were assigned by Bank of Scotland to Ennis Property.

19. At this point it is important to record that, as the relevant Folios show, the charge in favour of BOSI was duly registered on 19 July 2004. The Folios also show that on 9 April 2015 Bank of Scotland became the owner of the charges and that subsequently on 24 April 2015, Ennis Property was registered as the owner of the charges.

20. At the time of the acquisition by Ennis Property of the loan portfolio, the facilities previously made available by BOSI to Mr. and Mrs. Moroney were no longer performing. It appears from the statements of account which have been exhibited that the last payments received by BOSI were in February 2011. Since then, no payments were made other than an amount subsequently realised by the sale of the apartment in Limerick. It should also be noted, at this point, that (as explained in more detail at a later point in this judgment), the payments made prior to February 2011 were very erratic.

21. On 29 February 2016, Ennis Property issued letters of demand addressed to both Mr. Moroney and Mrs. Moroney advising that the loan accounts were substantially in arrears, declaring that all loans had become immediately due and payable, and making demand for immediate repayment of the amounts due. The letter stated that the balance due on the loan accounts as of 29 February 2016 amounted to €1,071,136.01. It should be noted, at this point, that there is now a dispute between the parties as to the amount actually due on foot of the loans. According to an affidavit sworn by Mr. Moroney on 15 May 2018, there has been an overcharge of interest of €196,000. Mr. Moroney's affidavit is supported by a report from Mr. Eddie Fitzpatrick who has identified that surcharge interest has been claimed, and Mr. Fitzpatrick has suggested that surcharge interest has been held to be irrecoverable in a number of cases including in the decision of Finlay Geoghegan J. in *ACC Bank plc v. Friends First Managed Pension Funds Ltd.* [2012] IEHC 435.

22. Mr. and Mrs. Moroney did not respond to the letters of demand. Subsequently, on 11 March 2016, Ennis Property appointed Mr. McCarthy as receiver over the lands comprised in the Folios described in paragraph 1 above. As discussed further below, there is now an issue as to whether Mr. McCarthy's appointment was effective.

23. On the 14 June 2016, Mr. McCarthy wrote to Mr. Moroney calling for the animals on the lands to be removed immediately. This was followed by a reminder on 24 June 2016. However, there was subsequently a concern about TB and the animals had to be tested. The necessary tests appear to have been completed by early 2017. According to Mr. McCarthy's affidavit sworn on 6 August 2017, Mr. Moroney confirmed to Mr. McCarthy that the tests "had come back negative" such that the risk of infection was not a barrier to the removal of the livestock from the lands. Thereafter, there was further correspondence between Mr. McCarthy and Tom Casey Solicitors on behalf of Mr. Moroney in which Tom Casey Solicitors disputed the validity of the appointment of the receiver and sought a number of the documents described above. Those documents were supplied by James Riordan & Partners, Solicitors, acting on behalf of Mr. McCarthy in April 2017. By their letter of 21 April 2017, James Riordan & Partners indicated that if Mr. Moroney failed to remove the animals on the land and provide confirmation of vacant possession of all of the lands subject to the receivership within fourteen days from that date, proceedings would be taken to secure possession of the land.

24. There was a further exchange of correspondence between Tom Casey Solicitors and James Riordan & Partners which culminated in a letter of 10 May 2017 from James Riordan & Partners indicating that if Mr. Moroney or his agents sought to impede or frustrate the receiver, an application would be brought to the court seeking appropriate relief.

25. Mr. McCarthy's proceedings seeking possession of the property were commenced by plenary summons issued on 8 September 2017. On the same day, Mr. McCarthy's application for interlocutory relief was filed.

26. The plenary summons together with the notice of motion and grounding affidavit were subsequently served on Mrs. Moroney on 25 September 2017 and on Mr. Moroney on 30 September 2017. Such service is confirmed by two affidavits sworn by Daniel P. Keane, summons server, both sworn on 11 October 2017.

27. Mrs. Moroney has never participated in these proceedings brought by Mr. McCarthy. When I enquired of counsel for Mr. McCarthy whether Mrs. Moroney was made aware of the hearing date of Mr. McCarthy's application for an interlocutory injunction, my attention was drawn to the fact that Mr. McCarthy's application had previously been listed for hearing before Creedon J. on 16 February 2018 (at which point Mrs. Moroney did not attend). Creedon J. granted an adjournment on that occasion at the request of Mr. Moroney. Counsel for Mr. McCarthy drew my attention to a letter addressed to Mr. and Mrs. Moroney dated 15 December 2017 notifying them that the matter was listed for hearing before the court on 16 February 2018. Both Mr. and Mrs. Moroney were therefore made aware that the hearing was due to take place on 16 February 2018. In addition, I was provided with a copy of a letter dated 16 February 2018 addressed to Mr. and Mrs. Moroney in which James Riordan & Partners informed them that Creedon J. had agreed to a short adjournment of the hearing of the application on Mr. Moroney's application. That letter concluded in the following terms:

> *"The court directed that the plaintiff's application would proceed on the next day*
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> *The plaintiff was given liberty to seek the earliest possible new hearing date in the chancery list to fix dates on Thursday next, 22 February 2018, and will do so. You are of course entitled to attend that application, but if you would prefer not we can notify you of the new date in due course. We note finally that Mr. Moroney once again acknowledged in open court that no repayment has been made on the relevant loans since 2011".*

28. As I understand it, the court on 22 February 2018 fixed Tuesday 15 May 2018 as the hearing date of Mr. McCarthy's application. On that day Mr. Moroney attended and participated fully in the hearing of Mr. McCarthy's application and also in the hearing of the other applications before the court. Mrs. Moroney did not attend. Notwithstanding the concluding words of the letter from James Riordan & Partners of 16 February 2018 quoted in paragraph 27 above, no evidence was provided to me that Mrs. Moroney was notified of the new date for the hearing of Mr. McCarthy's application on 15 May 2018. This is an issue which I address further below.

29. On the same day as the application by Mr. McCarthy was listed for hearing before Creedon J. on 22 February 2018, Mr. Moroney commenced his own proceedings attacking the registration of Bank of Scotland and subsequently Ennis Property as owners of the registered charges previously registered in favour of BOSI. On that day he also launched his application seeking interlocutory relief requiring the PRA to remove the charge from each of the Folios mentioned in paragraph 1 above. In turn, this led to the motions by each of Bank of Scotland and Ennis Property seeking to strike out or dismiss Mr. Moroney's proceedings. As mentioned above, all of these motions (together with Mr. Moroney's motions to join additional parties) all came on for hearing before me on 15 May 2018. As noted above, it was agreed between the parties that the motions to strike out or dismiss Mr. Moroney's proceedings should be dealt with first. I take the same course in this judgment.

The motions to dismiss

30. Before turning to the specific basis on which Ennis Property and Bank of Scotland seek to strike out or dismiss Mr. Moroney's claim, it is important to consider the nature of the court's jurisdiction on an application of this kind. While I was not addressed at any length, in oral argument, by counsel for either Ennis Property or Bank of Scotland in relation to the jurisdiction of the court, the issue

was addressed in the written submissions and I was also provided with a copy of the decision of the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] 2 IR 301. In his judgment in that case, Clarke J. (as he then was) summarised the relevant principles relating to the court's jurisdiction to dismiss proceedings at pp. 307 – 310 of the report. For present purposes, the applicable principles can be synopsised as follows: -

> (a) If on the basis of the facts pleaded, a case is bound to fail, then the proceedings should be dismissed under O. 19, r. 28.
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> (b) In contrast, the inherent jurisdiction of the court can be invoked where it is possible to establish the facts at an interlocutory stage with clarity, and where it is possible to show (again with clarity) that those facts do not support the claim made such that the court can conclude that the proceedings are bound to fail on the merits.
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> (c) The inherent jurisdiction of the court should, however be sparingly exercised. The court should be slow to entertain an application to dismiss.
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> (d) In responding to an application to dismiss a claim, all that a plaintiff needs to do is to put forward a credible basis for suggesting that the plaintiff may, at trial, be able to establish the facts which are asserted and which are necessary for success in the proceedings. The court should bear in mind that, in a plenary action, a plaintiff has available the range of procedures provided for in the rules to assist in establishing facts such as discovery, interrogatories and the summoning of witnesses by subpoena. Some of these steps are not available at an interlocutory stage, in the case of others, it is usually not practicable to take such steps prior to the hearing of an application to dismiss.
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> (e) There are certain types of cases which are more amenable to an assessment of the facts at an early stage. This is especially so in cases which are wholly or significantly dependent on documents.
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> (f) Although not specifically stated by Clarke J. in *Lopes v. Minister for Justice*, it is also clear from the case law that the onus lies on a defendant in an application of this kind to demonstrate that it is very clear either that the plaintiff's claim is bound to fail or that it should be struck out under O.19. r. 28.
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> (g) Again, although not specifically mentioned by Clarke J. in *Lopes v. Minister for Justice*, it is also clear from the judgment of McCarthy J in the Supreme Court in *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425 (which is cited by Clarke J. in *Lopes* at p. 428) that if a statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed.

31. I must now consider the applications brought by Ennis Property and by Bank of Scotland in light of the principles summarised in paragraph 30 above. In considering these applications, I must also bear in mind that both parties elected to bring their applications prior to delivery of any statement of claim by Mr. Moroney. In these circumstances, I do not believe that it would be appropriate for the court to confine itself to a consideration of the claim solely as pleaded in the endorsement of claim on Mr. Moroney's plenary summons. In fairness to Mr. Moroney, I believe that I should also consider his claim as described in the various affidavits sworn by him in the context of the present applications and also as described by him in his written and oral submissions. In this regard, it was suggested at one point by counsel for Bank of Scotland that "*there was an element of a moving target in relation to the various affidavits that Mr. Moroney had sworn in relation to the proceedings so far*". However, I do not believe that this observation is altogether fair in circumstances where, as noted above, the present applications were brought before delivery of a statement of claim.

32. For the reasons outlined above, it would not be appropriate to confine my review to the claims specifically pleaded in the indorsement of claim. I have to proceed on the basis that Mr. Moroney might, in due course, have pleaded his case in more detail in a statement of claim and, to the extent that the case now sought to be made by him goes beyond the ambit of the indorsement of claim, I have to bear in mind the observations of McCarthy J in *Sun Fat Chan*, that a statement of claim (and thus also an indorsement of claim) might be amended. My analysis of the claims made by Mr Moroney proceeds on this basis.

33. On my analysis of the affidavit evidence and submissions of Mr. Moroney, he seeks to make the following case:-

> (a) He accepts that the cross-border merger took place in accordance with the requirements of the 2008 Regulations. However, he contends that the 2008 Regulations are unconstitutional insofar as they provide that every contract to which a transferor company is a party shall continue, subsequent to the merger as if the successor company had been a party to it in place of the transferor company. (See Regulation 19(1)(g) of the 2008 Regulations). As I understand it, the reason why Mr. Moroney contends that this is unconstitutional is that it acts as a "*sledgehammer*" in that it takes effect (he says) in total disregard of a borrower's rights and without affording a borrower fair procedures. Mr. Moroney relies very strongly in this context on the decision of the Supreme Court in *Dellway Investments Ltd. v. National Asset Management Agency* [2011] 4 I.R. 1. His case is that there is no facility for the borrower to be heard, and furthermore, there is no way in which Regulation 19(1)(g), as drafted, can reasonably be interpreted in a manner that provides such a facility to the borrower. As I understand his case, he is saying that, even allowing for the application of *East Donegal v Attorney General* [1970] I.R. 317 principles, the court cannot construe Regulation 19(1)(g) in a way that would give a borrower a right to be heard. Mr. Moroney's case is that because the Regulation cannot be interpreted in line with *East Donegal* principles, it must follow that the Regulation is unconstitutional because it does not afford a borrower *Dellway* rights.
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> (b) Mr. Moroney also makes the case that the obligation to provide fair procedures to a borrower (such as himself) applies to the PRA. He relies on a decision to which Hardiman J. made reference in *Dellway* namely *The State (Philpott) v. Registrar of Titles* [1986] ILRM 499 where the registrar of titles had entered an inhibition against dealings with Mr. Philpott's land even though Mr. Philpott was engaged in selling the land at the time. He was not given notice of the proposal to enter the inhibition. The decision of the registrar was quashed by Gannon J. Mr. Moroney relies on what Gannon J. said at p. 507:-
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> > *"because of the grave nature of the interference with rights over land … I am of opinion that, unless the urgency of the circumstances otherwise requires, justice requires that notice should be given to the person* whose rights may be affected *of the intention to enter such an inhibition and an opportunity given to show cause why it should not be entered". (*the emphasis is that of Mr. Moroney).

(c) Mr. Moroney makes a further argument that there has been a failure to comply with Regulation 19(1)(h) of the 2008 Regulations which requires that every contract to which a transferor company is a party becomes a contract, following the merger, between the successor company and the counterparty "*with the same rights … as would have been applicable thereto if that contract … had continued in force between the transferor company and the counterparty …".* Mr. Moroney contends that, in this case, he, as the relevant counterparty, did not have the same rights against Bank of Scotland subsequent to the cross-border merger between BOSI and Bank of Scotland, as he previously had against BOSI. This is because (so Mr. Moroney submits) the successor company is unregulated in the State.

(d) In paragraph 3 of his fourth affidavit, he also raises an issue that the transfer by BOSI to Bank of Scotland was not effected pursuant to Part III of the Central Bank Act 1971 ("the 1971 Act").

(e) Mr. Moroney also makes the case that he did not consent to his facilities "*leaving regulation. I was not informed by Bank of Scotland Ireland that this could occur*". Mr. Moroney submits in this context that there was a failure to disclose to him that the loans could be "*sold out of regulation*" and that this non-disclosure is contrary to the Unfair Terms Directive (Directive 93/13/EEC) and the Irish Regulations which implement that Directive namely the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995) ("the 1995 Regulations"). Mr. Moroney argues, on the basis of the decision of Barrett J. in *Allied Irish Banks plc. v. Counihan* [2016] IEHC 752, that the omission to inform him that his loan could be transferred to an unregulated entity, causes significant imbalance in the rights and obligations of the parties under the relevant loan contracts contrary to the requirement of good faith under the 1995 Regulations and the underlying Directive. For this purpose, Mr. Moroney, although very frankly admitting that he and his wife took out these loans for the purposes of their farming business, seeks to rely on the decision of the Court of Justice in Case C-110/14 *Costea v. S.C. Volksbank Romania S.A*. Mr. Moroney submits that Costea provides a basis for him to rely on the 1995 Regulations notwithstanding that the loans were taken out for the purposes of a farming business.

(f) Mr. Moroney, again relying on *Costea*, also seeks to make the case that Clause 14.2 of the 2008 Loan Conditions constitutes an unfair term contrary to the requirements of the 1995 Regulations in circumstances where the heading to Clause 14.2 does not give any hint that Clause 14.2 permitted BOSI not only to assign or transfer its rights, benefits and obligations under the relevant loan agreements and related security but also to novate those rights, benefits and obligations. Mr. Moroney seeks to make the case that what occurred here, as between Bank of Scotland and Ennis Property was, in truth, a novation. Mr. Moroney submits that this novation is unlawful in circumstances were Clause 14.2 of the Loan Conditions constitutes an unfair term for the reason summarised above.

(g) Mr. Moroney also contends that there has been a failure to properly transpose Article 14(3) of the Cross-Border Mergers Directive. Mr. Moroney draws attention to the way in which Article 14(3) contemplates that where the laws of a Member State require the completion of special formalities before the transfer of the assets, rights and obligations by the merging companies becomes effective against third parties, those formalities must be carried out by the successors companies. Mr. Moroney points out in particular that Article 14(3) refers not only to "*assets*" and "*obligations*" but also to "*rights*". The equivalent provision in the 2008 Regulations (namely Regulation 19(2) makes no mention of rights. Regulation 19(2) simply provides as follows:-

> *"The successor company shall comply with filing requirements and any other special formalities required by law … for the transfer of the assets and liabilities of the transferor companies to be effective in relation to other persons."*

As I understand the argument which Mr. Moroney seeks to make, he says that this is a further instance of the "*inherent disregard for the rights of a borrower in its construction which appears to be the theme of the entire Regulation 19 principles*". For completeness, it should also be noted that Mr. Moroney respectfully disagrees with the approach taken by the Supreme Court in *Kavanagh v. McLaughlin* where it was suggested that Regulation 19(2) reflects Article 14(3). Mr. Moroney contends that no one in McLaughlin made the argument which he seeks to advance here, and that the Supreme Court decision can be distinguished on that basis.

(h) Mr. Moroney makes a further argument in respect of Article 14(3) in that he submits that the successor company (namely Bank of Scotland) was unable to comply with its obligations in respect of the special formalities mentioned in Article 14(3) insofar as it was not regulated in the State. He also says this is inconsistent with the provisions in the Deed of Mortgage and Charge that provide that the Deed is governed by and is to be construed in accordance with the laws of Ireland.

(i) On the basis of the arguments summarised above, Mr. Moroney submits that the court should strike down all of the transactions which were rooted in the implementation of Regulation 19 and he seeks an order under s. 31 of the Registration of Title Act 1964 ("the 1964 Act") rectifying the register on the grounds of fraud or mistake. In the alternative he suggests that the court should state a case for consideration by the Court of Appeal which was the course taken by Noonan J. in *Tanager v. Kane* [2017] IEHC 697. For completeness, it should be noted that the decision of Noonan J. in that case related to a point of law which does not arise here (namely whether Bank of Scotland was entitled to transfer a charge to the plaintiff in that case without first becoming registered as owner of the charge). Furthermore, the proceedings before Noonan J. in that case comprised an appeal from the Circuit Court such that no further appeal lay in the ordinary course from a decision of the High Court in that case.

(j) As mentioned in paragraph 21 above, Mr Moroney in the affidavits delivered by him also strongly maintains that there is a significant overcharge of interest on the account. However, I do not believe that this claim is relevant to Mr Moroney's proceedings seeking to remove the charges. Even if there had been an overcharge of interest, that would not affect the validity of the charges. All it would do would be to affect the amount secured by those charges. I therefore do not believe that this is an issue that falls to be considered in the context of Mr Moroney's proceedings. I will return to the issue later when dealing with Mr McCarthy's application for an interlocutory injunction in the proceedings he has initiated against Mr and Mrs Moroney.

Has Ennis Property and Bank of Scotland established clearly that Mr. Moroney has no case?

34. I now deal, in turn, with each of the aspects of Mr. Moroney's case as summarised in paragraph 33 above.

Mr. Moroney's reliance on *Dellway*

35. Ennis Property and Bank of Scotland each make the case that *Dellway* is of no application here. They say that in *Dellway*, the National Asset Management Agency ("NAMA") had to decide, in its discretion, whether to acquire the plaintiffs' loans. Here, they say, the PRA has no such discretionary role under s. 64(1) of the 1964 Act. They also say that insofar as Mr. Moroney challenges the validity of Regulation 19 on *Dellway* grounds, Mr. Moroney is mistaken because – unlike *Dellway* – there is no decision making process within Regulation 19. They submit that Regulation 19 simply deals with the consequences of a cross-border merger and that this does not engage the *Dellway* principles.

36. In my view, Ennis Property and Bank of Scotland are correct in suggesting that the PRA is not involved in exercising any discretionary power (nor is it involved in any deliberative process) when it comes to register a change in ownership of a charge under s. 64 of the 1964 Act. This is an issue that I address in more detail below in the context of Mr. Moroney's submissions in relation to the *Philpott* case.

37. Regulation 19 simply deals with the consequences of a cross-border merger. In my view, the *Dellway* principle is only engaged where there is a discretionary decision to be made by a public authority which has the capacity to adversely affect rights. That seems to me to be clear from all of the judgments of each of the members of the Supreme Court in that case. Regulation 19 does not appear to me to have any adverse impact on the position of Mr. Moroney. Regulation 19 simply sets out the consequences that flow from the merger. It should be recalled in this context that the Supreme Court has made it very clear in *Kavanagh v. McLaughlin* [2015] 3 IR 555 that the transfer of security is one of the consequences that flow from a cross-border merger which takes place pursuant to the 2008 Regulations and the Cross-Border Mergers Directive. In that case, Clarke J. (as he then was) said that the effect of the argument made by the borrowers in that case was that, following the merger, the relevant security would cease to exist. At para. 52 of his judgment he said: -

> *"It must be recalled that one of the consequences of such a merger is that one or more of the entities involved are likely to cease to exist. Where, as here, the entity which ceases to exist (being BOSI) is the one in whose favour security is held, then it follows that, if the argument put forward on behalf of the McLaughlins is correct, that security can no longer be held by BOSI (because it has ceased to exist) nor by BOS (because it was not transferred). Thus it must, in substance, be accepted that a consequence of the McLaughlins' argument is that the involvement of a company holding security in a cross-border merger may lead to that security simply ceasing to have effect by virtue of it being neither capable of being owned by an entity which has ceased to exist, nor being transferred to another entity which is to continue in existence in the aftermath of the relevant merger. It cannot be doubted that such a result would have a consequence which was the direct opposite of the intention of the Directive (being to facilitate cross-border mergers). It would mean, in effect, that, despite there being no intention to be found to that effect in the wording of the Directive, the cross-border merger regime would have little or no application in the case of secured lenders."*

38. The argument made by the borrowers in that case was rejected by the Supreme Court. In para. 67 of his judgment, Clarke J. said: -

> *"As previously indicated, a result of the proper interpretation of the Directive and the Irish Regulations which led to the conclusion that an extremely important part of the practical business of a lending institution (and, indeed other companies) was not to be transferred in the context of a cross-border merger would be highly surprising. Such an interpretation could only be reached if there was clear wording in the body of the relevant measures which could lead only to an interpretation which had that effect. On the contrary, an analysis of the meaning of the term "asset" leads to the conclusion that it clearly includes security backing up loans, which loans themselves are part of the assets of the relevant lending institution. The security has the potential to have a significant effect on the value of those loans. It is, in that context, clearly an asset. The company is better off with the security than it would be if it had not security in place.* For those reasons I am satisfied that it is absolutely clear that amongst the assets which passed from BOSI to BOS on the cross-border merger coming into effect was whatever security BOSI held in respect of loans which were transferred at that time." (Emphasis added).

39. In my view, it is very clear from the Supreme Court judgment that the Supreme Court took the view that the transfer of security by BOSI to Bank of Scotland was a necessary consequence of the merger. In arriving at that conclusion the Supreme Court relied on Regulation 19 of the 2008 Regulations and on Article 14 of the Directive.

40. Mr. Moroney, however, argues that the case which he makes now was never made in the course of the proceedings before the Supreme Court in *Kavanagh v. McLaughlin*. In making this argument, it seems to me that Mr. Moroney must be taken as suggesting not merely that Regulation 19 is defective, but that the entire cross-border merger regime is deficient in that it fails to provide for any facility for borrowers to be heard. As I understand his argument, he says that the regime under the 2008 Regulations infringes the constitutional rights of borrowers, and in particular their right to be heard. He relies strongly on *Dellway* in support of this proposition.

41. In my view, Mr. Moroney's reliance on *Dellway* is misplaced. The reason why the Supreme Court in *Dellway* considered that the plaintiffs in that case were entitled to make submissions in advance of any decision by NAMA to acquire their loans was that, following acquisition of the loans by NAMA the position of the plaintiffs in that case would be very directly prejudiced. It is important to note that the Supreme Court, in that case, found that a debtor whose loan facilities are taken over by NAMA is placed in a much more disadvantageous position than a debtor whose loan facilities is acquired by a transferee from a mortgagee under the ordinary law. The Supreme Court stressed in that case that, in contrast to the position of a transferee under the ordinary law (who takes the transfer subject to all of the rights of the debtor as against the original mortgagee) NAMA is in a distinctly different position. As the quotation from the judgment of Finnegan J. in para. 42 below makes clear, NAMA has powers not available to a mortgagee in ordinary course. Thus, subsequent to any acquisition by NAMA, the debtor will be worse off because of the very extensive powers which are peculiar to NAMA, and which are not exercisable by anyone other than a NAMA entity.

42. In his judgment in *Dellway*, Finnegan J. carried out a careful review of the very extensive powers given to NAMA under the National Asset Management Agency Act, 2009 ("the 2009 Act) and he came to the conclusion that, under the 2009 Act, NAMA, following the acquisition of the loans, would have much more extensive rights and powers than a transferee of the loans in the case of what I might refer to as an "*ordinary*" transfer (i.e. a transfer to an entity which does not have the powers peculiarly conferred on NAMA). The contrast between the position of NAMA on the one hand and any other transferee on the other is well illustrated by the following passage from the judgment of Finnegan J. at p. 376 where he said: -

> *"If only because of the availability to NAMA of a vesting order there is no incentive to NAMA to adopt a wait and see approach and forbear in the exercise of its rights where any of the applicants' loans are overdue for repayment or in breach of a required loan to value ratio. Where a mortgagee forebears, the mortgagor will obtain the benefit of any*

uplift in value and of the income stream. NAMA, by obtaining a vesting order can for itself obtain that benefit. It can achieve the effect of purchasing the lands at a mortgagee's sale, something which a mortgagee cannot do. Thus the incentive for NAMA is to exercise its rights in the event of default and particularly so where the income stream significantly exceeds the interest requirement. The exercise by NAMA of its rights as mortgagee on even one loan having regard to the right to consolidate all mortgages held by NAMA as security for all loans to the applicants compulsorily acquired by NAMA, would have catastrophic consequences for the applicants' entire business. NAMA could refuse to allow the loan in default to be redeemed and the default could trigger defaults on other loans by virtue of their connection with the loan in default through cross guarantees or other mortgage terms."

"NAMA is not a bank. While a bank may transfer a mortgage to whomsoever it wishes, such a transfer would not enhance the rights of the transferee of the mortgage or diminish those of the mortgagor. *The acquisition of a loan by NAMA has both these effects. In addition, the relationship which previously existed between mortgagor and mortgagee is altered. The objective of a mortgagee and any transferee will be to recover the amount due on foot of the mortgage and no more. A mortgagee will not make a profit beyond that. NAMA has, by virtue of its powers to obtain a vesting order, the possibility of making a profit."* (Emphasis added)

43. Similar observations were made by Denham J. at p 235 where she said:-

"The next question is whether the applicants' rights have been affected or would be affected so as to entitle them to be heard prior to NAMA making a decision pursuant to s. 84. To determine whether the applicants would be affected by such a decision of NAMA, it is necessary to consider the potential effect of such a decision on their rights.

The applicants identified several matters which would impact on their rights if NAMA acquired their loans. I am satisfied that the applicants have successfully raised matters which could affect their rights. The remit of NAMA is different to that of a bank. Thus, a change from a bank to NAMA is such that it could affect the applicants' rights. These include the following:-

(a) NAMA is not a bank, it is a particular State institution, it is a work-out vehicle, which is contrary to the business model of Mr. McKillen's business. Its modus operandi will affect Mr. McKillen's business, including his income stream;

(b) NAMA will move on the properties in a manner different to the banks, and this raises potential expenses and losses to the applicants;

(c) There will be an effect on Mr. McKillen's reputation. Mr. McKillen earns his livelihood in the commercial world. It is a fact that NAMA is referred to in commercial circles as a "bad bank". This implies bad assets and consequently a bad borrower which reflects adversely on Mr. McKillen's reputation;

(d) I have read the judgment of Finnegan J. and agree with his comments on two aspects of the applicants' submissions, namely NAMA's statutory exemptions and powers in relation to the mortgages, and the commercial consequences for a mortgagor of the transfer of a mortgage to NAMA.

Consequently, there is clear evidence which shows that a decision of NAMA to acquire the loans …will affect the constitutional rights of the applicants, any decision by NAMA under s. 84 ….directly affects the applicants, and this triggers a right to be heard".

44. What is clear from the decision of the Supreme Court in that case is that the Supreme Court formed the view that, because a transfer to NAMA would have different consequences to a transfer to a non-NAMA entity, there was an obligation on NAMA to give advance notice of its intention to acquire the loans and to give the borrowers an opportunity to be heard in advance of making any decision. It is clear from the approach taken by the Supreme Court in that case that what triggered the right to be heard was the unique position of NAMA and the very extensive rights which it would have which were significantly different to those which a transferee in the ordinary way would have. The Supreme Court judgments make clear that, in the case of an ordinary transferee, the transferee has no greater rights or powers and the borrower has no greater obligations than they respectively had prior to the transfer. In contrast, as the extract from the judgment of Finnegan J. makes clear, NAMA would have more extensive rights than the bank in that case originally had against the borrowers. As a corollary to that, the borrowers' rights would suffer following the acquisition of the loans by NAMA. In contrast, where a transfer takes place between a mortgagee and a non-NAMA entity, the transferee is bound by the same obligations and the borrower has the same rights as against that transferor as previously existed prior to the transfer. That is confirmed by the extract from the judgment of Finnegan J. quoted in paragraph 42 above (in particular, in the passage highlighted by me).

45. For these reasons, it seems to me to be clear that Mr. Moroney is mistaken in seeking to place reliance on *Dellway*. In my view, *Dellway* provides no authority for the proposition which he advances. On the contrary, it is clear from *Dellway* that any transferee of the original rights and obligations held by BOSI will, in contrast to NAMA, be subject to precisely the same rights and obligations as were previously in place prior to the cross-border merger and prior to the subsequent transfer from Bank of Scotland to Ennis Property.

46. I fully appreciate that Mr. Moroney seeks to make a case that he has been prejudiced as a consequence of what has occurred because he is now dealing with what he describes as "*unregulated entities*". He makes the case that Bank of Scotland is unregulated in this State and he also makes the case that Ennis Property is unregulated. I deal with this issue in more detail below. It is sufficient to note at this point that, for the reasons discussed below, I have come to the conclusion that there is no substance to Mr. Moroney's concerns about the regulatory status of either Bank of Scotland or Ennis Property. It is sufficient to record at this point that both Ennis Property and Bank of Scotland are subject to precisely the same obligations and have precisely the same rights as BOSI had prior to the transfer and, in those circumstances, I cannot see how Mr. Moroney is in a position to advance the case made by the plaintiffs in *Dellway*. The plaintiffs in that case could show that an acquisition by NAMA would give NAMA more extensive rights than were held by the original lenders.

47. For completeness, I should also record that, insofar as Mr. Moroney sought to suggest that the cross-border merger regime fails to provide any facility for borrowers to be heard, the cross-border merger process that was undertaken here was subject to the supervision of both the High Court in Ireland and the Court of Session in Scotland. If any borrower could show that they were

adversely affected by the cross-border merger, I have no doubt that the courts both here and in Scotland would permit a borrower to be heard. It would, of course, be very difficult for a borrower to establish such prejudice given the careful way in which the cross-border mergers regime contains provisions which are designed to ensure that the same rights and obligations will continue to subsist as between the merged entity and third parties as previously subsisted between the transferor and the same third parties. Nonetheless, I note in this context that at the hearing which took place in Ireland on 22 October 2010, Kelly J. (as he then was) heard submissions from legal representatives for four customers of BOSI.

48. As noted above, the court hearing the substantive application in respect of the cross-border merger between BOSI and Bank of Scotland was the Court of Session in Edinburgh. I can see nothing in the order made by Lord Glennie in the Court of Session which suggests that anyone other than Bank of Scotland and BOSI were heard during the course of the hearing which took place before him on 10 December 2010. Nonetheless, I have no doubt that if a borrower wished to be heard in opposition to a cross-border merger and could establish that in some way he or she was adversely affected by what was proposed, the relevant court would hear and consider any submissions to be made by that borrower.

49. One further point to bear in mind is that, as Mr. Hugh O'Neill S.C. submitted in the course of his presentation on behalf of the PRA, the cross-border merger regime has been put in place in the State in discharge of its obligations to implement the Cross-Border Mergers Directive. In other words, the provisions of the 2008 Regulations are necessitated by the obligations of membership of the European Union. Accordingly, pursuant to Article 29.4.6 of the Constitution, the validity of such a law cannot be called into question by invoking some other provision of the Constitution (as Mr. Moroney seeks to do). This is a further reason why, in my view, Mr. Moroney cannot succeed on the basis of the case which I have sought to summarise in paragraph 33(a) above.

50. In light of the considerations discussed above, I have come to the conclusion that it is very clear that Mr. Moroney is not going to succeed on this aspect of his case.

Mr. Moroney's reliance on *The State (Philpott) v. Registrar of Titles*
51. As noted in para. 33(b) above, Mr. Moroney contends that, by reference to the decision of Gannon in The State (*Philpott*) v. Registrar of Titles [1986] ILRM 499, he should have been given advance notice by the PRA of its intention, first to register Bank of Scotland as owner of the charges granted to BOSI and secondly, of its intention to register Ennis Finance as owner of the charges.

52. In the *Philpott* case, Gannon J. held that there was a duty on the Registrar of Titles to give notice of the intention to enter an inhibition: -

> *"because of the grave nature of the interference with rights over land"*

Both Ennis Property and Bank of Scotland make the case that, in contrast to the applicant in the *Philpott* case, Mr. Moroney is not adversely affected by the transfers. They submit that the transfer to Bank of Scotland arose as a consequence of the cross-border merger and that Mr. Moroney's rights and obligations were unaffected by that transfer. Similarly, it is argued that the subsequent transfer from Bank of Scotland to Ennis Property was undertaken in accordance with the rights of Bank of Scotland as mortgagee in place of BOSI. Counsel for Ennis Property has submitted that the rights of mortgagees under mortgages are freely assignable, as a matter of law, and moreover, this is something to which Mr. Moroney has agreed under the terms of his contractual arrangements with BOSI.

53. Both Ennis Property and Bank of Scotland also argue that in contrast to the position in the *Philpott* case, there is no basis to suggest that the PRA has any obligation to notify the owner of the lands before giving effect to transfers of this kind.

54. In my view, the submissions made by Ennis Property and Bank of Scotland are correct. In the first place, one must have regard to the provisions of s. 64 of the 1964 Act which deal with the transfer of charges. S. 64(1) is in the following terms: -

> *"The registered owner of a charge may transfer the charge to another person as owner thereof, and the transferee shall be registered as owner of the charge."*

55. As Counsel for the PRA, Mr. O'Neill S.C. (in the course of his submissions dealing with Mr. Moroney's application for interlocutory orders against the PRA) observed, s. 64(1) has the effect that, regardless of what the charge itself says, there is a statutory authority conferred on the chargee to transfer the charge. As Mr. O'Neill further observed, s. 64(1) also makes clear that the transferee is to be registered as the owner of the charge in place of the transferor. This is clear from the use of the word "*shall*" in the sub-section. In other words, the transferee has a right under the section to be registered as the owner of the charge. This entitlement is not subject to any overriding discretion of the PRA.

56. In order to become registered, the transferee must comply with the requirements of s. 64(2) and submit a duly executed instrument of transfer in the prescribed form. Once that transfer is presented to the PRA, its function is simply to register the transfer. While Mr. Moroney submits that the *Philpott* decision requires that advance notice should be given to him, there is no comparison between the facts considered by Gannon J. in the *Philpott* case and the facts which I am required to consider here. In the *Philpott* case, the effect of the registration of the inhibition was to prevent any dealings by the registered owner with the land, notwithstanding that, prior to the registration of the inhibition, the owner had entered into a contract to sell part of the lands comprised in the relevant Folios. The registration of the inhibition therefore had a very serious impact on the ability of the registered owner of lands to dispose of some or all of those lands. In contrast, one needs to consider what is the effect of the registration of the transfers of the charges here. The answer is to be found in s. 64(4) of the 1964 Act which provides as follows: -

> *"On registration of the transferee of a charge, the instrument of transfer shall operate as a conveyance by deed within the meaning of the Conveyancing Acts, and the transferee shall—*
>
> > *(a) have the same title to the charge as a registered transferee of land under this Act has to the land, under a transfer for valuable consideration or without valuable consideration, as the case may be;*

and

> > *(b) have for enforcing his charge* the same rights and powers in respect of the land as if the charge had been originally created in his favour." (Emphasis added)

57. It will be seen from paragraph b of s. 64(4) that the transferee of a charge does not have any greater rights than the transferor had. On the contrary, the transferee has the same rights and powers in respect of the land as the transferor had. This means that

the transferee is subject to the same requirements and obligations which the law imposes on a chargee before the chargee can exercise any of its rights or powers. As noted above, Mr. Moroney suggests that he is worse off now than prior to the merger or the transfer to Ennis Property in circumstances where neither Bank of Scotland nor Ennis Property are regulated entities. That is an issue which I address below. For the reasons set out below, I have come to the conclusion that it is clear that Mr. Moroney has no legal basis to complain about the regulatory status of either Bank of Scotland or Ennis Property.

58. For all of these reasons, I am of the view that it is very clear that Mr. Moroney has no case to make based on the decision in the *Philpott* case or based on his contention that the PRA was obliged to give him an opportunity to be heard before registering the respective transfers of the charges from BOSI to Bank of Scotland, and from Bank of Scotland to Ennis Property. In my view, the *Philpott* case is based on entirely different facts, and is not applicable to a decision of the PRA under s. 64 of the 1964 Act.

Regulation 19(1)(h) of the 2008 Regulations

59. I now turn to the next aspect of Mr. Moroney's case which relates to Regulation 19(1)(h) of the 2008 Regulations. That Regulation makes clear that one of the consequences of a cross-border merger is that every contract to which the transferor company was a party becomes a contract between the successor company and the counterparty

> *"with the same rights, and subject to the same obligations, liabilities and incidents (including rights of set-off), as would have been applicable thereto if that contract, agreement or instrument had continued in force between the transferor company and the counterparty …."*

60. As mentioned in para. 33(c) above, Mr. Moroney makes the case that he, as the relevant counterparty to the contractual arrangements with BOSI, does not have the same rights subsequent to the cross-border merger between BOSI and Bank of Scotland as he previously had against BOSI. This is on the basis that the successor company (Bank of Scotland) is unregulated in the State. He has also argued that, equally, Ennis Finance is not regulated in the State. While the latter submission is not directly relevant to Regulation 19(1)(h), I believe it would be helpful if I were to deal with both of these aspects of Mr. Moroney's case at this point.

61. Insofar as Bank of Scotland is concerned, it is true that Bank of Scotland is not regulated in Ireland, but it must be recalled that the cross-border regime is designed to facilitate cross-border mergers as between corporations in more than one Member State of the EU. There is no exclusion from the cross-border merger regime in respect of banking companies. Moreover, banking companies are entitled under EU law to provide services by way of "passporting" in another Member State. The State into which those services are supplied is not entitled to look behind the regulatory regime of the home Member State.

62. Insofar as Bank of Scotland is concerned, Mr. Hugh Catling has sworn an affidavit on 19 August 2018 on behalf of Bank of Scotland in which he draws attention (in para. 9(i) of the affidavit) to the fact that at the date of the cross-border merger in this case, and at all material times thereafter, Bank of Scotland has been regulated in the United Kingdom. As such, it was entitled, subsequent to the cross-border merger, to provide the services in the State previously carried on by BOSI in Ireland. This follows from the provisions of the European Communities (Licensing and Supervision of Credit Institutions) Regulations, 1992 (SI no. 395 of 1992) ("the 1992 Regulations"). Regulation 20(1) of the 1992 Regulations provides that: -

> *"A credit institution authorised and supervised by the competent authority of another Member State may carry on business within the State by establishing a branch or any other means in any one or more of the activities set out in the Schedule provided that the . . . provision of these activities is in accordance with the authorisation of the credit institution in that Member State and the requirements of these Regulations are complied with in full".*

63. Thus, I do not believe that it can plausibly be suggested that he has any cause of action in relation to the transfer, as a consequence of the cross-border merger, of his loans (and the related security) from BOSI to Bank of Scotland. The fact is that Bank of Scotland was at all times regulated in the United Kingdom. The State is obliged, as a matter of EU law, to respect the form of regulation which is in place in the United Kingdom (as Regulation 20(1) of the 1992 Regulations makes very clear). The State does not look behind the nature of the regulatory regime in place in the United Kingdom. It would be contrary to EU law were the State to do so. What is clear is that there is such a regulatory regime in place and Bank of Scotland has at all times been subject to it. There is therefore no basis, in my view, to suggest that, as a consequence of the cross-border merger, the loans and the related security have been transferred to an unregulated entity.

64. Insofar as Ennis Property is concerned, it is not itself a regulated entity. However, Ennis Property is required under the Consumer Protection (Regulation of Credit Servicing Firms) Act, 2015 ("the 2015 Act") to act through a regulated credit servicing firm. In the present case, there is no dispute between the parties that Ennis Finance has engaged Pepper for that purpose. Equally, there is no dispute that Pepper is a regulated credit services firm. S. 5 of the 2015 Act inserts a new provision into the Central Bank Act 1997 ("the 1997 Act") – namely s. 34G. The new s. 34G is designed to ensure that the obligations which are imposed on regulated financial service providers will also apply in circumstances where, as here, a credit servicing firm such as Pepper is acting on behalf of Ennis Property, the owner of the legal title of the loans and related securities. Under s. 34G (1) a credit servicing firm such as Pepper is prohibited, either on its own behalf or behalf of Ennis Property from taking or failing to take an action *"if the taking of or the failure to take the action would otherwise be a prescribed contravention if a retail credit firm took or failed to take that action".*

65. Furthermore, under s. 34G (2) a person who holds the legal title to credit granted under a credit agreement (such as Ennis Property) is prohibited from instructing a credit servicing firm (such as Pepper) to take or fail to take an action *"if the taking of or the failure to take the action would otherwise be a prescribed contravention if a retail credit firm took or failed to take that action."*

66. Thus, s. 34G ensures that the same obligations apply here as apply to a *"retail credit firm"*. For completeness, I should explain that a "retail credit firm" is defined by s. 28(a) of the 1997 Act (as amended by s. 1 of the 2015 Act) as: -

> *"a person who is a regulated financial service provider authorised, by the Bank or an authority that performs functions in an EEA country that are comparable to the functions performed by the Bank, to provide credit in the State . . ."*

67. In light of the provisions of the 1997 Act (as inserted by the 2015 Act), it seems to me that the legislature has very carefully created a situation where transfers taken by an entity such as Ennis Property are, in fact, subject to regulation. This has been confirmed by recent judgments both of the Supreme Court and of the High Court.

68. In *Launceston Property Finance Ltd v. Burke* [2017] 2 IR 798 at p. 806 McKechnie J. in the Supreme Court confirmed that the purpose of the enactment of the 2015 Act was: -

> *"…in order to ensure that borrowers who had a "regulated loan" which was acquired by an "unregulated body" would*

continue to have the protection of various consumer codes and statutory provisions."

69. Subsequently, in *Hogan v. Deloitte* [2017] IEHC 673 Stewart J. was faced with a similar argument by the plaintiff in that case that his loan and related security had been transferred to an unregulated entity. It appears from the judgment of Stewart J. that the unregulated entity in question was called Shoreline Residential Ltd., but it had in turn appointed Pepper as the relevant credit servicing firm on its behalf. Stewart J. rejected the submission made by the plaintiff in that case on this issue in the following terms (at para 39):-

> *"The plaintiff has repeatedly referred to the issue of transfer from a regulated to an unregulated entity. The Launceston decision has unquestionably set this dispute at naught. [Pepper] is a regulated credit institution that meets the requirements of the 2015 Act. . ."*

70. In my view, having regard to the provisions of s. 34 G of the 1997 Act (as inserted by s.5 of the 2015 Act) and having regard to the observations of McKechnie J. in *Launceston* and Stewart J. in *Hogan v. Deloitte*, the law is now clear and accordingly, that Mr. Moroney has no legal basis to make a case that he has been in some way wronged by the transfer of the loan and related security by Bank of Scotland to Ennis Property. While Ennis Property is itself an unregulated entity, the effect of the 2015 Act is that Mr. Moroney has the same protections in practice as he would if he was dealing with a regulated financial service provider.

71. In the circumstances, it seems to me to be strictly speaking unnecessary to consider the argument made by Ennis Property that, in any event, under the terms of the relevant contractual arrangements put in place between BOSI and Mr. and Mrs. Moroney, there was no restriction on the entities to which the rights of BOSI could be transferred. It has been strongly argued by counsel for Ennis Property that the benefit of the mortgagee's interest in the loans and related security was freely assignable both by reference to the terms of the contractual documents in place between Mr. and Mrs. Moroney and BOSI and by reference to the general law on the assignability of contractual rights and benefits. Mr. Moroney has argued that any such provision would be unfair within the meaning of the Unfair Terms Regulations since it would permit a transfer even to a criminal.

72. In light of the conclusion which I have reached in relation to Mr. Moroney's argument based on Ennis Property's status as an unregulated entity, I believe it is sufficient to consider whether there was an entitlement to transfer the benefit of the mortgagee's interest to Ennis Property. At a later point in this judgment I will consider Mr. Moroney's arguments in relation to unfair terms.

73. Counsel for Ennis Property has carefully drawn my attention to the relevant provisions of the Deed of Mortgage and Charge dated 29th June 2004. He has drawn attention to the way in which the expression "*the Bank*" (namely BOSI) in the Deed is expressly stated to include BOSI's successors and assigns. He has also placed some emphasis on the provisions of Clause 20 of the Deed which provides that the Deed is to be enforceable, valid and binding for all purposes notwithstanding any amalgamation or consolidation of BOSI with any other company and was to be available to successors or assigns or any company carrying on the business of BOSI for the time being.

74. Counsel has, of course, placed emphasis upon the express provisions of Clause 27 of the Deed. Insofar as relevant, Clause 27 which is headed "ASSIGNMENT" is in the following terms: -

> *"27.1 This Deed shall be binding upon the inure (sic) to the benefit of each party hereto and its successors and permitted assigns.*
>
> *27.2 The Bank may assign or transfer all or any of its rights or obligations hereunder. Any assignee, transferee or successor of the Bank shall be entitled to enforce and proceed with the security in the same manner as if named herein.*
>
> *27.3 . . ..*
>
> *27.4 The Mortgagor shall not be entitled to assign or transfer any of the Mortgagor's rights, benefits or obligations hereunder without the prior written consent of the Bank".*

75. In my view, Clause 27 very clearly gives the mortgagee the right to assign all of its rights under the Deed. Thus, even if there had been a straightforward assignment from BOSI to Bank of Scotland, that would, in my view, be entirely permissible under Clause 27. As it happened, there was no such assignment. Instead, the cross-border merger took place. The effect of that merger was (as Regulation 19 (1)(g) of the 2008 Regulations makes clear) that any reference in the deed to BOSI is now to be read as a reference to Bank of Scotland. That has the consequence that the reference to "*the Bank*" in Clause 27 of the Deed must now be read as a reference to Bank of Scotland. Therefore, Bank of Scotland has the same entitlement to assign its rights under the Deed as BOSI formerly had prior to the merger. It seems to me that Clause 27.2 clearly permits Bank of Scotland to assign or transfer all or any of its rights or obligations under the Deed to Ennis Property. Thereafter, Ennis Property, pursuant to Clause 27.2 is entitled to enforce and proceed with the security as if it had been named in the Deed as Mortgagee. That seems to me to follow from the very clear language of Clause 27.2.

76. In the circumstances, it seems to me to be unnecessary to consider in any detail the further argument advanced by counsel for Ennis Property that, in addition to the contractual right which arises under Clause 27, Bank of Scotland had a right, as a matter of law to assign its rights under the Deed and that all the necessary formalities required to comply with s. 28(6) of the Judicature (Ireland) Act, 1877 ("the 1877 Act"). It is sufficient to note that it is well established that there are four conditions to be satisfied for the purposes of s. 28(6) of the 1877 Act. The assignment must be in respect of a legal "*chose in action*", there must be an absolute assignment, the assignment must be in writing signed by the assignor and the debtor must be given express notice in writing of the assignment. In my view, there is sufficient evidence before the court to demonstrate that each of these four conditions have been satisfied in the present case. What was assigned to Ennis Property was a "chose in action", the assignment was absolute rather than conditional, furthermore the assignment was in writing (see paragraph 18 above), it was duly signed by the parties, and, prior to the execution of the deed of assignment, notice of the assignment was given to Mr. Moroney on 20 March 2015 (see paragraph 17 above). If, therefore, it was necessary for Ennis Finance to rely on the general law dealing with assignments (as opposed to the provisions of Clause 27 of the Deed) it seems to me to be likely that the court could safely conclude that the requirements of s. 28 (6) of the 1877 Act have been met.

77. Insofar as the facilities themselves are concerned, the relevant contractual right of assignment arises under Clause 14 of the BOSI general conditions. When the facilities were originally put in place, the general conditions which applied were the 2004 version. However, as noted in paragraph 12 above, the parties agreed in 2009 that the 2008 edition of the BOSI standard conditions should apply. As it happens, the provisions of Clause 14 dealing with assignment are essentially unchanged as between the 2004 and 2008 editions. Clause 14 is one of the aspects of the contractual arrangements which Mr. Moroney challenges as an unfair term. Insofar as

relevant, Clause 14 provides as follows: -

> *"ASSIGNMENT AND TRANSFER*
>
> *14.1 The Borrower shall not be entitled to assign or transfer all or any of its rights, benefits or obligations under any of the Finance Documents.*
>
> *14.2 The Bank may at any time, without the prior consent of the Borrower, assign, novate or transfer any of its rights and benefits and transfer any of its obligations under any of the Finance Documents to any person, firm or company, or sub-participate or subcontract any of its rights or obligations under the Finance Documents …"*

78. As recorded above, one of the arguments which Mr. Moroney makes is that, on its face, Clause 14.2 would permit a transfer to a criminal. That is an issue which I address in more detail when I come to consider Mr. Moroney's case in relation to the Unfair Terms Regulations.

79. At this point, it is sufficient to recall that, for the reasons already advanced in relation to Clause 27 of the Deed, the references to the "Bank" in Clause 14.2 must, as a consequence of the cross-border merger, now be read as a reference to Bank of Scotland. When read in that way, it seems to me to be abundantly clear that Bank of Scotland has a contractual right, without the prior consent of the borrower to assign any of its rights and benefits under any of the Finance Documents. For completeness, it should be noted that the term "*Finance Documents*" is broadly defined in Clause 1.1 of the General Conditions as including the "*Loan Agreement, the Security Documents and any agreements, documents, arrangements, letters or undertakings that may be entered into or executed pursuant thereto or in connection therewith . . .*" In turn, the term "*Security Documents*" is defined in the same clause as meaning the "*Security*" identified in the relevant facility letters. At an earlier point in this judgment, I have already drawn attention to the way in which each of the facility letters specifically calls for security in the form of mortgages or charges over the lands the subject matter of these proceedings.

80. For similar reasons, as I have already set out in relation to Clause 27 of the Deed, I have come to the conclusion that Clause 14.2 of the General Conditions confers a very clear right to assign the lender's benefit of every aspect of the contractual arrangements originally put in place between Mr. and Mrs. Moroney and BOSI. Again, it does not seem to me to be necessary for Ennis Property to rely on the general law relating to assignments. However, if Ennis Property had to rely on the general law, I express the same view in relation to this issue as set out in paragraph 76 above. It seems to me that the relevant conditions of s. 28(6) of the 1877 Act have been met.

81. A fine point of law arises as to whether the general law relating to the assignability of the benefit of contracts can apply in the event that there is a specific contractual power of assignment and a court concludes that the contractual provision in question constitutes an unfair term within the meaning of the Unfair Terms Regulations. I do not propose to address that issue in circumstances where, for the reasons outlined below, I do not believe that there is any basis on which Mr. Moroney would be entitled to raise any issue under the 1995 Regulations. As I explain below, it seems to me that Mr. Moroney has very properly and frankly conceded that the loans the subject matter of these proceedings were for business purposes and therefore he is not a consumer for the purposes of the Regulations.

82. Before leaving the question of assignment, it is important that I should record that any assignment by a mortgagee (whether done pursuant to an express power of assignment under a deed of mortgage or other contractual provision) or done pursuant to the general law, could not alter the rights and entitlements of the mortgagor as against the mortgagee. It is quite clear that in the case of any assignment by a mortgagee, the mortgagor will retain the same rights as against the assignee which he or she previously had against the mortgagee. That is very clear from the approach taken by the Supreme Court in *Dellway*. As discussed above, the reason why the Supreme Court took a different view in relation to the proposed acquisition of the loans by NAMA was that, in contrast to the position under the ordinary law, any acquisition of the loans in that case by NAMA would give NAMA much more extensive rights (to the detriment of the relevant borrowers there) that an assignment to a non-NAMA entity. It was because the borrower would suffer a very real detriment as a consequence of the proposed acquisition by NAMA that the Supreme Court came to the view that the borrowers in that case should be entitled to make submissions prior to any decision being made. It seems to me to be clear from the approach taken by the Supreme Court in that case, that the Supreme Court had no difficulty with the operation of the ordinary law relating to the assignment of contractual rights. This is for the very simple reason that the debtor in such cases is entitled to the same rights against the assignee as the debtor previously had against the assignor.

83. For all of the reasons discussed above, it seems to me that there is no basis for the case made by Mr. Moroney as summarised in paragraph 33 (c) above.

Part III of the 1971 Act

84. As noted in paragraph 33(d) above, Mr. Moroney also raises an issue that the transfer by BOSI to Bank of Scotland was not effected pursuant to Part III of the 1971 Act. In my view, this aspect of Mr. Moroney's case is clearly unsustainable. It proceeds on the basis that the only lawful means by which a transfer of banking business could take place is pursuant to Part III of the 1971 Act. In my view, this is plainly incorrect. As I have already sought to make clear in paragraph 61 above, I am of the view that the cross-border merger regime does not exclude mergers between banking corporations and accordingly there was no need for the parties to the cross-border merger here to seek to rely on Part III of the 1971 Act even if it could be said that Part III would permit a cross-border transfer of business. Moreover, the Supreme Court has already considered the legality of the cross-border merger as between BOSI and Bank of Scotland in *Kavanagh v. McLaughlin*. It is clear from that decision that the Supreme Court considered the merger to be entirely lawful.

Mr. Moroney's case that there was failure to disclose to him that the loans could be "*sold out of regulation*"

85. As noted in paragraph 33(e) above, Mr. Moroney says that he never consented to his facilities "*leaving regulation*". He submits that there was a failure to disclose to him at the time the facilities were put in place that the loan could be "*sold out of regulation*". He contends that this "*non-disclosure*" is contrary to the 1995 Regulations.

86. For the reasons already discussed above, I am of the view that Mr. Moroney has no basis on which to contend that his loans were "*sold out of regulation*". As the decision of the Supreme Court in *Launceston* makes clear, the 2015 Act has remedied a lacuna that previously existed. It is quite clear that, as a consequence of the enactment of the 2015 Act, Ennis Property, although not itself immediately subject to regulation, is nonetheless required to act in a manner which is consistent with the regulations and in particular is required to engage the services of Pepper which is a regulated entity.

87. Mr. Moroney, however, seeks to argue that the terms of his contractual arrangements with BOSI were unfair by reference to the

1995 Regulations by virtue of this non-disclosure. That is an issue which will have to be addressed by reference to the terms of the contractual documents as of the date on which the contractual arrangements were concluded between the parties. Thus, it might be said that the facts described in paragraphs 85-86 above are not relevant to this issue since they all occurred subsequent to the conclusion of the contract between Mr. Moroney and BOSI. As I understand the law, the issue of unfairness must be considered, as a matter of principle, as at the date of conclusion of the relevant contract. However, for the reasons discussed below (in the context of the next issue), I am of the view that this is an academic point in circumstances where Mr. Moroney has fairly conceded that the loans were business loans. In those circumstances, it does not seem to me that it is open to Mr. Moroney to make any argument by reference to the 1995 Regulations. If the loans were for the purpose of his farming business, Mr. Moroney could not be said to have acted as a consumer. In these circumstances, I cannot see any basis for this aspect of Mr. Moroney's case.

Clause 14.2 of the 2008 conditions

88. As noted in para 33(f) above Mr. Moroney seeks to make the case that Clause 14.2 of the 2008 loan conditions constitutes an unfair term contrary to the requirements of the 1995 Regulations in circumstances where the heading to the clause does not give any hint that the clause permits BOSI not only to assign or transfer its rights but also to novate those rights. Mr Moroney seeks to make the case in this context that what occurred here as between Bank of Scotland and Ennis Property was in fact a novation. He relies on the novation agreement described in para. 16 above between ELQ, Bank of Scotland and Ennis Property.

89. As I understand the law in relation to unfair terms, the question of the fairness or unfairness of a contractual term is to be determined as of the date on which the contract was concluded. If that is correct, it would be unnecessary to consider whether a novation had actually occurred. Nonetheless, lest I am wrong in that view, I should make clear that the deed of novation described in paragraph 16 above did not involve a novation of the mortgagee's rights under the contractual arrangements originally put in place between BOSI and Mr. and Mrs. Moroney. What the deed of novation did was to novate the rights of ELQ under the agreement of 29 November 2014 with Bank of Scotland to purchase the portfolio of loans and related security, (which included the loans to Mr. and Mrs. Moroney. Under the deed of novation, Ennis Property essentially stood in the shoes of ELQ in relation to the transaction to acquire the portfolio. However, the matter did not end there. There was (as described in paragraph 18 above) a deed of assignment directly between Bank of Scotland and Ennis Property. It was pursuant to that deed that the benefit of the loans and mortgages were assigned by Bank of Scotland to Ennis Property. That did not involve any novation by Bank of Scotland of its rights in respect of Mr. Moroney's facilities and the related security.

90. However, there is a more fundamental problem with Mr. Moroney's case in relation to unfair terms. He has very properly and very frankly conceded throughout the hearing before me that the loan facilities entered into between him and BOSI were for the purposes of his business – namely the farming business carried on by him. In those circumstances, I cannot see any basis on which Mr. Moroney can rely on any of the law relating to unfair terms. The 1995 Regulations apply only to consumer contracts. For this purpose, Regulation 2 defines a "consumer" as meaning – "*A natural person who is acting for purposes which are* outside his business" (emphasis added). In circumstances where it is acknowledged that the loans here were for the farming business of Mr. Moroney, I can see no basis on which Mr. Moroney can be said to have acted as a consumer in relation to the arrangements entered into by him with BOSI. I therefore can see no basis on which Mr. Moroney can succeed based on the 1995 Regulations. It is true that he seeks to rely on the decision of the CJEU in Costea. In that case, a lawyer was held to be a consumer notwithstanding that he was clearly a professional person. Mr. Moroney seeks to draw an analogy with that case.

91. However, in my view, Costea does not assist Mr. Moroney. It is clear from a consideration of the judgment of the CJEU in that case that the lawyer, in taking out the loan there, was acting for a purpose which was outside his business, notwithstanding that he offered part of the assets of his business as security for the loan in question. This seems to me to be clear from paras. 24 – 26 of the judgment where the court said: -

> *"24. In relation to the services offered by lawyers by means of contracts for legal services, the Court has already taken into account the inequality between 'client-consumers' and lawyers owing in particular to the asymmetry of information between those parties to the contracts…*
>
> *25. That consideration cannot, however, rule out a lawyer from being categorised as a 'consumer' within the meaning of Article 2(b) . . . where that lawyer is acting for purposes which are outside his trade, business or profession ….*
>
> *26. A lawyer who concludes, with a natural or legal person acting for purposes relating to his trade, business or profession, a contract which, particularly as it does not relate to the activity of his firm, is not linked to the exercise of the lawyer's profession, is, vis-à-vis that person, in the weaker position referred to in paragraph 18 of this judgment…."*

92. It seems to me to be very clear that the lawyer there was acting for a purpose unrelated to his trade or profession, and accordingly was entitled to be treated as a consumer within the meaning of the Unfair Terms Directive. In contrast, in the present case, as Mr. Moroney has very fairly acknowledged, he was acting for the purpose of his farming business in taking out the facilities of BOSI. I therefore cannot see any scope for the application for the 1995 Regulations. As a consequence, I believe that this aspect of Mr. Moroney's claim is also bound to fail.

93. For the same reason, I do not believe that there is any basis for Mr. Moroney's claim that the ambit of the assignment clause is unfair because it would permit an assignment to anyone even a criminal. In circumstances where Mr. Moroney cannot be said to be a consumer, this argument (which relies on the application of the 1995 Regulations) is not open to Mr. Moroney.

The contention that there has been failure to properly transpose Article 14(3)

94. In paragraph 33(g) above, I have sought to summarise the case which Mr. Moroney makes that there has been a failure to properly transpose Article 14.3 of the Cross- Border Mergers Directive. It has to be acknowledged that there is a difference in the language used as between Article 14.3 of the Directive and Regulation 19(2) of the 2008 Regulations. Article 14.3 is in the following terms: -

> *"Where, in the case of a cross-border merger of companies covered by this Directive, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall be carried out by the company resulting from the cross-border merger."*

95. It will be seen from the language of Article 14.3 that it refers to the transfer of assets, rights and obligations. In contrast, Regulation 19(2) of the 2008 Regulations refers only to "*assets and liabilities*" and makes no express reference to "*rights*". Regulation 19(2) is in the following terms: -

"The successor company shall comply with filing requirements and any other special formalities required by law (including the law of another EEA State) for the transfer of the assets and liabilities of the transferor companies to be effective in relation to other persons".

96. As noted above, the Irish provision does not refer to "*rights*". It simply refers to "*assets and liabilities*". However, I do not believe that this involves any failure to transpose the requirements of the Directive. It is a well-established principle of law that a national implementing provision of an EU directive is to be interpreted insofar as possible in light of the wording and purpose of the Directive. The decision in Case C-106/89 *Marleasing* SA [1990] 51 ECR 4135 makes this clear. That approach has been expressly applied in Ireland in many cases including the decision of the Supreme Court in *Nathan v. Bailey Gibson Ltd* [1998] 2 IR 162.

97. It seems to me that when the *Marleasing* principle is borne in mind, there can be no doubt but that Regulation 19(2) would be interpreted in a manner consistent with Article 14(3). In particular, it seems to me that a court would regard the word "*assets*" in Regulation 19(2) as being sufficiently broad to also encompass "*rights*". In that way, it seems to me that it would be a relatively straightforward matter to conclude that Regulation 19 (2) can be read in a manner consistent with Article 14.3. In the circumstances, I do not believe that any issue in relation to the transposition of Article 14.3 can be said to arise. That being so, it follows that I must conclude that Mr. Moroney does not have a stateable case based on this aspect of his argument.

98. For completeness, I should make clear that in this case the necessary formalities in terms of registration of Bank of Scotland as owner of the charges in question were all appropriately completed prior to the transfer to Ennis Property. Thus, the lacuna which existed on the facts (as identified by Laffoy J. in the Supreme Court) in *Kavanagh v. McLaughlin* does not exist in this case. As recorded in paragraph 19 above, and as the relevant Folios show, Bank of Scotland became registered as owner of the charges on 9 April 2015 (prior to the execution of the deed of assignment on 20 April 2015). Subsequently, following the execution of the assignment, Ennis Property was registered as the owner of the charges on 24 April, 2015.

The suggestion that Bank of Scotland was unable to comply with its obligations in respect of the special formalities mentioned in Article 14 (3)

99. As I have sought to summarise it, in paragraph 33(h) above, Mr. Moroney makes a further argument in respect of Article 14(3). He submits that Bank of Scotland as the successor company was unable to comply with its obligations in respect of the special formalities mentioned in Article 14(3) insofar as it was not regulated in the State. He also says that because Bank of Scotland was a United Kingdom entity and was not regulated in the State, this was a breach of the provisions of the Deed which provides in Clause 28.1 that the Deed is to be governed by and construed in accordance with the laws of Ireland and furthermore that the courts of Ireland are to have jurisdiction to determine any dispute that arises.

100. For the reasons already discussed above, I believe that there is no foundation to suggest that Bank of Scotland was unregulated. Furthermore, I believe that it is clear that there was no infringement of Clause 28.1 just because Bank of Scotland was not itself regulated in Ireland and was not itself an Irish incorporated entity. Clause 28 is concerned with the Deed and with how the Deed is to be construed. The Deed must, as a consequence of Clause 28, be construed in accordance with the laws of Ireland. In other words, Irish law applies to the Deed in every respect. However, that does not mean that each party to the Deed must be a subject of Ireland. It is commonplace for "*law and jurisdiction*" clauses to opt for a particular law or a particular jurisdiction even though none of the parties to the relevant agreement containing that clause is based in the chosen jurisdiction. For example, the English courts have, for many years, been kept busy with disputes about agreements governed by English law even where none of the parties to such agreements is English or even has any connection with England.

101. Similarly, the fact that Bank of Scotland is a UK entity did not prevent it completing the necessary formalities to ensure that it was registered as owner of the charges in the land registry. Again it must be remembered that what we are dealing with here is an EU – wide measure – namely the Cross-Borders Mergers Directive. It expressly envisages cross-border mergers and the consequent necessity for the successor company to comply with any necessary formalities in any member state – notwithstanding that the successor company is, of necessity, likely to have to carry out those formalities in a member state other than its home member state.

102. In these circumstances, I have come to the conclusion that there is no basis for this element of Mr. Moroney's claim and accordingly it is very clear that this element of his claim is bound to fail.

The case for an order under s. 31 of the 1964 Act

103. As mentioned in paragraph 33(i) it is part of Mr. Moroney's case that he is entitled to an order under s. 31 of the 1964 Act rectifying the register on the grounds of fraud or mistake. In circumstances where, on my analysis of his various claims (as discussed above), I cannot see any basis for those claims, I likewise cannot see any basis upon which he could be said to be entitled to an order under s. 31 of the 1964 Act. It seems to me to be very clear that there is no basis at all for the suggestion that there was any fraud or mistake in the registration of either Bank of Scotland or Ennis Property. It follows that it is very clear that Mr. Moroney has no case under s. 31.

104. In the alternative, Mr. Moroney suggests that the court should state a case for consideration by the Court of Appeal. This was the course taken by Noonan J. in *Tanager v. Kane* [2017] IEHC 697. The issue which arose in that case (namely whether Bank of Scotland was entitled to transfer a charge to Tanager without first becoming registered as owner of the charge) does not arise here for the reasons outlined in paragraph 98 above. Furthermore, as I mentioned in para. 33 (i) above, the proceedings before Noonan J. in that case comprised an appeal from the Circuit Court such that no further appeal lay in the ordinary courts from a decision of the High Court in that case. In the present case, there is the availability of an appeal should any party be dissatisfied with my judgment. However, the more pertinent point is that, on the facts, the issue of law which arose in Tanager does not arise here.

Conclusion in relation to the motions to dismiss

105. For all of the reasons discussed above, I have come to the conclusion that it is very clear that no aspect of Mr. Moroney's case (whether pleaded or whether raised in the course of his submissions and affidavits) has any prospect of success. In my view, it is very clear that his case will fail. In those circumstances, I believe, having regard to the decision of the Supreme Court in *Lopes v. Minister for Justice*, that the appropriate relief to grant is an Order dismissing Mr. Moroney's proceedings on the basis that they are bound to fail. To permit proceedings to proceed which manifestly have no prospect of success would be an abuse of the court process. While I have every admiration for Mr. Moroney's industry in seeking to make the case that he has advanced and argued before me, and while I have been very impressed by the manner in which he has conducted the hearing of the motions before me, in my view, a dismissal appears to be the only appropriate order that can be made on these motions. I see no basis on which Mr. Moroney could succeed on any aspect of his various claims. Although no motion to dismiss has been brought by the PRA itself, it seems to me that the proceedings must be dismissed against all Defendants. Otherwise, the relief sought by the moving parties would be set at nought. For the avoidance of doubt, it seems to me that the order sought be made under both the inherent jurisdiction of the court and Order 19, Rule 28.

Mr. Moroney's motion seeking an interlocutory injunction
106. Lest I be wrong in my view about the sustainability of Mr. Moroney's various claims, and in the event that any party chooses to appeal the orders proposed by me, I will proceed to deal now, for completeness, with the application for an interlocutory injunction brought by Mr. Moroney requiring the PRA to remove the charges registered on the Folios.

107. In circumstances where the relief sought is mandatory in nature, it is well-established that the test to be applied is more stringent than the *Campus Oil* test. It is necessary to satisfy the court not just that there is a fair question to be tried, but that the plaintiff has a strong case. This is clear from the decision of the Supreme Court in *Maha Lingam v. Health Service Executive* (discussed in more detail below). For the reasons discussed above in the context of the motions brought by Bank of Scotland and Ennis Property, I do not believe that Mr. Moroney has any case to make, such that this element of the test for the grant of an injunction cannot be satisfied. However, lest I am wrong in that conclusion, I will now consider the other elements of the test namely: -

> (a) whether damages would be an adequate remedy for Mr. Moroney if an injunction were refused and he was ultimately to succeed at trial.
>
> (b) in the event that I conclude that damages would not be an adequate remedy for Mr. Moroney, I must next consider whether damages would be an adequate remedy for Ennis Property in the event that an injunction were granted now, and the court at trial subsequently came to the conclusion that an injunction ought not have been granted.
>
> and
>
> (c) in the event that I conclude that damages would not be an adequate remedy for either party, I must then consider the balance of convenience.

108. Insofar as the adequacy of damages is concerned, there is certainly an argument to make by Mr. Moroney that damages would not adequately compensate him for the loss of a family farm (if that were to happen as a consequence of the wrongful registration of the transferees as owners of the charges). However, even on the assumption that damages would not adequately compensate Mr. Moroney, it is clear that damages would not adequately compensate Ennis Property if an injunction were granted now and Ennis Property were subsequently to succeed at trial. The reality is that Mr. Moroney (having regard to the extent of the indebtedness he already has to Ennis Property on foot of the BOSI facilities) would not be in a position to satisfy an undertaking as to damages. In the circumstances, I should therefore consider the balance of convenience.

109. Insofar as the balance of convenience is concerned, I believe that the balance lies strongly against the granting of an injunction. As Mr. O'Neill S.C. on behalf of the PRA observed, there are two important considerations in this context: -

> (a) In the first place, if the charges are vacated, Mr. Moroney would then be entitled to deal with the property free of the charges now registered in favour of Ennis Property. Between now and the trial (if there were to be a trial), judgment creditors could register their judgments as mortgages against the property and leapfrog ahead of Ennis Property in terms of priority. As outlined above, Mr. Moroney would not be in a position to compensate Ennis Property for the loss of their priority. In contrast, if an injunction is refused and Mr. Moroney were ultimately to succeed at trial (which I believe to be an entirely unrealistic prospect), it is difficult to see what damage would be suffered by Mr. Moroney in circumstances where, in light of the decision in *Kavanagh v. McLaughlin*, Bank of Scotland was undoubtedly entitled to be registered as a transferee of the charges, there would still be charges registered against the property even if the court were to hold that Ennis Property was not entitled to be registered.
>
> (b) the second point is that the charges here were registered in April 2015. This is more than three years ago. As Mr. O'Neill observed, Mr. Moroney has, on the face of it, sat back for a very long period of time. To bring this interlocutory application seeking mandatory orders three years after the charges were originally registered in favour of Ennis Property does not show the level of urgency that would justify the court in holding that the balance of convenience favours the grant of an injunction. The delay in seeking relief here is very extensive, and this delay, in my view, weighs heavily when assessing where the balance of convenience lies. Where a plaintiff seeks mandatory relief, there must be an obligation on such a plaintiff to seek such relief at the earliest possible time. While delay is always a factor that the court can take into account when considering the balance of convenience, it seems to me that, where mandatory relief is sought, delay weighs particularly heavily against the grant of an injunction.

110. In light of the considerations identified in paragraph 109 above, I am very firmly of the view that the balance of convenience lies against the grant of the injunction sought by Mr. Moroney, and I would therefore refuse his application even if I had not found that he clearly has no sustainable case to make in these proceedings.

The Receiver's Application for an Injunction
111. I now turn to Mr. McCarthy's application for an injunction against Mr. and Mrs. Moroney. Mr. McCarthy seeks relief in his capacity as Receiver appointed by Ennis Property over the lands in issue. Mr. McCarthy seeks an interlocutory injunction restraining Mr. Moroney and Mrs. Moroney pending the trial of these proceedings from taking any steps to prevent him taking possession of the lands. Although framed in negative terms, counsel for Mr. McCarthy has acknowledged that, in substance, this is an application for an interlocutory order of a mandatory kind requiring Mr. and Mrs. Moroney to vacate the lands and enabling Mr. McCarthy to take possession of the lands as receiver. Counsel has acknowledged that, in those circumstances the ordinary Campus Oil principles are modified. In particular, Mr. McCarthy must do more than establish a fair question to be tried. He must show that he has a strong case. Counsel for Mr. McCarthy was undoubtedly correct in making this concession. The decision of the Court of Appeal in *Bank of Ireland v. O'Donnell* [2016] 2 I.R. 185, makes clear that it is not the "*fair issue*" standard that applies in cases where, in substance, the relief sought is mandatory in nature. Instead, the Court of Appeal indicated that what must be shown (in accordance with the principles discussed in the Supreme Court judgment in *Maha Lingam v. Health Service Executive* [2005] IESC 89) is that the plaintiff has a strong case that the defendants do not have a right to remain in possession of the lands. In *Okunade v. Minister for Justice* [2012] 3 I.R. 152, Clarke J. (as he then was) at p. 183 explained the rationale underlying the requirement that a plaintiff seeking a mandatory order should meet the higher *Maha Lingam* standard. Clarke J. said:-

> *"It is, therefore, hardly surprising that, in such cases, where the result of the interlocutory application will either completely, or significantly, decide the case, the courts have felt it necessary to impose a higher standard before an injunction can be granted (normally the Maha Lingam standard). That variation from the pure Campus Oil test can be seen as nonetheless still coming within the general principle of attempting to fashion an order which runs the least risk of injustice for if the grant or refusal of an interlocutory order will go a long way towards deciding the case then the risk*

of an injustice is even greater and the court requires a greater degree of assurance before intervening."

112. In the present case, I must therefore be satisfied that Mr. McCarthy, as receiver, has established on the evidence before me, that he has a strong case for possession of the lands. If he surmounts that hurdle, it will then become necessary to consider the following further elements of the test, namely:-

> (a) Whether damages would adequately compensate the plaintiff in the event that an injunction were to be refused.
>
> (b) If so, I must then consider whether the defendants (Mr. and Mrs. Moroney) could be compensated in damages in the event that an injunction is granted now on an interlocutory basis and it is subsequently found, at trial, that the injunction should not have been granted.
>
> (c) In the event that damages would not compensate either party, I must consider the balance of convenience.

The Position of Mrs. Moroney

113. Before addressing the *Maha Lingam* standard, it is necessary to consider the position in relation to Mrs. Moroney. She has not participated in this hearing. Nor has she entered an appearance to the summons issued by Mr. McCarthy. However, as recorded in paragraph 27 above, when I enquired of counsel whether Mrs. Moroney was aware of the hearing date of the application for an interlocutory injunction, my attention was drawn to the terms of the *inter partes* correspondence. In paragraph 27 (above), I have quoted in full the concluding paragraph of the letter sent by the solicitors for Mr. McCarthy to Mr. and Mrs. Moroney on 16th February, 2018. That letter informed Mr. and Mrs. Moroney that Mr. McCarthy had been given liberty to seek the earliest possible new hearing date in the Chancery List to fix dates, which was scheduled to take place on 22nd February, 2018. The letter expressly stated that:-

> *"…You are, of course, entitled to attend that application,* but if you would prefer not we can notify you of the new date in due course". (emphasis added)

114. As noted in paragraph 28 above, no evidence was provided to me that Mrs. Moroney was ever in fact notified of the new date for the hearing of Mr. McCarthy's application – namely 15th May, 2018. In my view, this is a matter of importance in circumstances where the letter of 16th February, 2018, clearly represented to Mrs. Moroney that if she did not attend the list to fix dates on 22nd February, 2018, she would be notified of the new date. While it is the case that Mrs. Moroney has never taken any part in these proceedings, and while it might be suggested that she has chosen not to make any enquires herself as to what happened on 22nd February, 2018, I must bear in mind the nature of the relief which is sought in these proceedings and the nature of the test that must be satisfied. I must also bear in mind the terms of the letter quoted in paragraph 113 above.

115. I do not believe that it would be safe for the court to proceed to consider granting any relief against Mrs. Moroney. The court would need to be assured in the circumstances described above that Mrs. Moroney was not under the impression that she would be given advance notice of the date when the matter would be listed for hearing. That was what was promised to her in the letter of 16th February, 2018. There is no evidence before me to suggest that this letter was ever followed up, and therefore I have no way of knowing that Mrs. Moroney was aware that the hearing was definitely proceeding as against her on 15th May, 2018.

116. I fully appreciate that Mr. Moroney is the husband of Mrs. Moroney. However, Mr. Moroney has never purported to speak on behalf of Mrs. Moroney. It is notable that the proceedings that have been taken seeking to set aside the charges (all as described above) were taken solely in the name of Mr. Moroney. Mrs. Moroney was never a party to those proceedings. She is a land owner and an account holder in her own right. I do not believe that it would be at all appropriate for the court to assume that she would have been kept informed by her husband. In my view, it is the obligation of the plaintiff to place appropriate evidence before the court in that regard. I should make clear in this context that I am not going so far as to say that there is a positive obligation on a plaintiff in every case to inform a defendant (who has chosen not to enter an appearance) of the date of the hearing of an application of this kind. I asked counsel to address me on the law in relation to this issue. No submissions were ultimately made to me on the law. Instead, I was referred to the correspondence described in paragraphs 27 and 28 above. There was therefore no debate about the legal position that applies, and in particular whether there is any positive obligation on a plaintiff to inform a defendant in such circumstances of the hearing date. I make no decision in relation to that issue. My decision relates solely to the fact that Mrs. Moroney was told that she would be apprised of the hearing date of what was undoubtedly a very significant application to be moved against her, and that was not followed up (at least not on the evidence before the court).

117. In these circumstances, I do not believe that I can proceed with the application against Mrs. Moroney. It seems to me that a new date will have to be fixed for the hearing of the application against Mrs. Moroney and she will have to be informed of that date in advance.

118. It may well be the case that Mrs. Moroney will opt not to attend that hearing in which case it may well follow that any decision that I make against Mr. Moroney will almost inevitably apply equally to her. On the other hand, she may well wish to make a different case to that put forward by Mr. Moroney. For example, while Mr. Moroney has very fairly conceded that the loans were business loans, Mrs. Moroney may not be prepared to make such a concession. For all I know, therefore, she may wish to raise an issue in relation to the 1995 Regulations.

119. The balance of this judgment will therefore consider the application solely insofar as Mr. Moroney is concerned.

Has a strong case been made out against Mr. Moroney?

120. The first issue to be considered in this context is whether there is sufficient evidence before the court to establish a strong case that Ennis Property was entitled to appoint a Receiver, namely Mr. McCarthy. I will then have to consider whether there is a sufficiently strong case that the appointment of Mr. McCarthy was carried out correctly and, if so, whether Mr. McCarthy has placed sufficient evidence before the court to assure the court that he has a strong basis for taking possession of the lands.

121. For all of the reasons discussed above in paragraphs 59 to 84 above, I am of the opinion there is an overwhelming case to be made to show:-

> (a) First, that the mortgage granted by Mr. Moroney to BOSI and the associated debt secured by that mortgage passed to Bank of Scotland.

(b) Equally, it appears to me to be very clear that Bank of Scotland in due course assigned all of its rights with respect to the mortgage and the related secured debt to Ennis Property.

122. Insofar as the transfer of interest to Bank of Scotland is concerned, that follows from the provisions of the 2008 Regulations (discussed above). This position has been confirmed by the decision of the Supreme Court in *Kavanagh v. McLaughlin* (again discussed above). This was further confirmed in the subsequent decision of the Supreme Court in *Freeman v. Bank of Scotland PLC*[2016] IESC 14, where Dunne J. said at p. 5:-

> *"The decision of this Court in Kavanagh v. McLaughlin makes it clear that the cross-border merger had the effect of transferring the Charge held by BOSI to the Bank together with the underlying loan contracts. Thus, the cross-border merger issue cannot give rise to any basis for invalidating the appointment of the receiver in this case."*

123. Insofar as the subsequent transfer from Bank of Scotland to Ennis Property is concerned, a Deed of Assignment was duly executed (as mentioned in para. 17 above) on 20th April, 2015. As noted in paragraph 17 above, notice of that assignment had previously been given to Mr. and Mrs. Moroney on 20th March, 2015. Furthermore, the relevant transfers of the charge from BOSI to Bank of Scotland and from the latter to Ennis Property were both duly registered in the Land Registry. I have already held that, in my view, it is very clear that Mr. Moroney has no basis to challenge the transfer of the charges or the transfer of rights from BOSI to Bank of Scotland or from Bank of Scotland to Ennis Property.

124. For similar reasons, I am of opinion that there is a strong case to be made that Ennis Property had the right, as assignee from Bank of Scotland, to stand in the shoes of BOSI when it came to the appointment of a receiver.

125. The next issue I must consider is whether, on the evidence before me, there is a strong case made out by Mr. McCarthy, as receiver, showing that Ennis Property were entitled to appoint a receiver. The answer to that question depends on the relevant contractual documents that were in force as between BOSI and Mr. and Mrs. Moroney. As discussed at some length above, Ennis Property has no greater rights as against Mr. Moroney than those originally held by BOSI.

126. In order to address this issue, it is necessary to consider the terms of the Deed of Mortgage and Charge ("the Deed") entered into by Mr. and Mrs. Moroney and BOSI on 29th June, 2004. The Deed provides in clause 9.1 that a receiver may be appointed "*at any time after the power of sale has become exercisable".* In turn, clause 8.1 provides that the power of sale arises "*at any time after the occurrence of an Event of Default or where the Secured Obligations have otherwise become payable*". Clause 8.1 further provides that, on the occurrence of such an event, the power of sale may be exercised without any further demand or notice to the mortgagors.

127. In order to understand whether the power of sale had arisen prior to Mr. McCarthy's appointment in this case, it is necessary to consider what is meant by "*Event of Default*" and by the term "*Secured Obligations*". In this regard, clause 1 of the Deed defines an Event of Default as meaning:-

> *"the happening of an event under any loan agreement, facility letter or other arrangement with the Bank whereby the Secured Obligations become immediately due and payable."*

128. The definition of "*Secured Obligations*" is contained in the same clause of the Deed where it is defined as meaning *"all monies, obligations and liabilities, herein covenanted to be paid or discharged by the Mortgagor."*

129. Having regard to these definitions, it seems to me that I must now consider the evidence before the court which is relied upon by Mr. McCarthy to suggest that an Event of Default has occurred. For this purpose, it is necessary to look at the relevant contractual documents governing the terms of the loan accounts entered into by Mr. Moroney with BOSI. The first relevant document in this context is the facility letter dated 1st June, 2004, which was accepted in writing by Mr. Moroney on 2nd June, 2004.

130. The facility letter of 1st June, 2004, makes clear, in its opening paragraph, that BOSI had agreed to make available the loans, the subject matter of the letter, on the terms set out in that letter, and on the terms and conditions set out in the BOSI Standard Loan Conditions (reference: 01.01.04). For the purposes of this exercise, I do not believe that I need to look beyond the terms applicable to the variable interest rate term loan (referred to as "Loan A") which was for an amount of up to €500,000. The facility letter provided that interest only should be paid for the first 24 months of the term and that for the remaining 18 years of the term there would be repayments of principal and interest. The terms of the first page of the facility letter made very clear that payments would have to be made monthly.

131. In the Standard Loan Conditions attached to the June 2004 facility letter, Clause 9(i) provided that if there was any failure on the due date to pay any monies payable or due to it from time to time to BOSI in the manner specified in the facility letter this would be an "*Event of Default*". Clause 9 goes on to provide that should an Event of Default occur, BOSI (now Ennis Property) is entitled, in its absolute discretion, to give written notice to the borrowers declaring all drawings to be immediately due and payable and calling for the repayment thereof. The clause further provides that upon that notice being given, all drawings become immediately payable together with accrued interest. The same clause also permits the bank by written notice to the borrowers to declare a loan to be due and payable on demand.

132. The same terms and conditions apply to Loan B, (the second facility addressed in the 2004 facility letter). I do not however, propose in this judgment to consider that second facility. I believe it is sufficient for present purposes to consider Loan A. If an Event of Default has occurred in relation to Loan A, that would seem to me to be sufficient for the purposes of considering, at this interlocutory stage, the evidence available in relation to the entitlement of Ennis Property to appoint a Receiver.

133. In light of the matters recorded in paragraph 131 above, it is now necessary to consider whether there was a failure by Mr. Moroney to pay monies on the due date for payment thereof. It will therefore be necessary to consider the statement of account.

134. It is clear from the statement of account which has been exhibited by Mr. McCarthy that after the expiry of the two year moratorium on payment of principal, there were a significant number of direct debits in respect of monthly payments due which were not paid. For example, on 25th September, 2006 there was an automated direct debit posting of €11,081.95. However, that direct debit was rejected on the basis of "*refer to payer*". It should be noted nonetheless that BOSI at that time did not exercise its rights under Clause 9 of the 2004 standard conditions.

135. Subsequently, on 9th February, 2009, the terms relating to Loan A and Loan B were both varied. A further facility letter issued on 9th February, 2009 which was accepted in writing by Mr. Moroney on 6th March, 2009. In respect of Loan A the term was now

varied to 24 months from 9th February, 2009. The facility letter provided that interest in respect of the loan was to be payable monthly, that a principal repayment of €50,000 was to be received within twelve months of the initial disbursement of funds together with a further principal repayment of €50,000 to be received with 24 months. The facility letter then stated that:-

> *"The remaining loan balance to be repaid in full at the end of the facility term or to be paid on such other later date as the bank may determine at its sole discretion."*

136. In addition, the 2009 facility letter provided that the 2004 BOSI standard conditions would now be replaced by the 2008 BOSI standard conditions (Ref. 02.08). I should record at this point that both the 2004 facility letter and the 2009 facility letter made it very clear that, as security for the facilities, BOSI required that the charges which are now in issue in these proceedings should be put in place over Mr. and Mrs. Moroney's lands. On the basis of the evidence before the court, there would appear to be no doubt but that the amounts due by Mr. Moroney pursuant to these facility letters are secured by those charges.

137. Under the 2008 standard conditions, Clause 9 continues to deal with "*events of default*". There is no significant difference between the provisions of Clause 9 as contained in the 2008 conditions and the provisions of Clause 9 as originally contained in the 2004 conditions.

138. When one considers the statement of account in respect of Loan A, it is clear that the payments of €50,000 required to be paid within twelve months and 24 months respectively were not in fact paid. In addition, it is clear that there has been no payment of interest since at least 2011. In the circumstances, I believe that there is strong evidence before the court to support the case made by Ennis Property that there has been an event of default within the meaning of the standard conditions such as to entitle Ennis Property to serve a written notice of the kind envisaged by Clause 9 of the 2008 conditions (which are now the operative conditions).

139. In my view, the statement of account clearly shows that there has been a failure to pay on the due date monies payable pursuant to the 2009 facility. Accordingly, there is a strong basis to suggest that Ennis Property became entitled to serve written notice declaring all drawings to be immediately due and payable and calling for repayment of the total amount due.

140. The next matter which therefore falls to be considered is the extent of the evidence before the court dealing with the written notice. If the court can be satisfied that there is a strong case to be made that the written notice complies with the requirements of Clause 9 of the 2008 standard terms, then it would seem to me to follow that there must be a strong case to be made that an event of default has occurred within the meaning of the Deed of Mortgage and Charge. As outlined above, such an event will occur where the "*secured obligations*" (as defined) become immediately due and payable. It will be recalled that the definition of "*Secured Obligations*" identifies that such obligations comprise any monies or liabilities *"herein covenanted to be paid … by the Mortgagor".*

141. By Clause 3.1 of the Deed of Mortgage and Charge, the mortgagors covenanted to pay on demand the "*secured liabilities*" which, in turn, are defined by Clause 1 of the Deed as meaning all monies, obligations and liabilities "*which now are at any time hereafter maybe or become due owing or incurred by the Mortgagor … at any … account or otherwise*". That definition appears to me to clearly embrace any monies owing on foot of the facility letters described above. Thus if Ennis Property can satisfy the court that there is a strong case to make that it was entitled to serve a notice of the kind contemplated by Clause 9 of the 2008 standard conditions, it would seem to follow that there is equally a strong case to make that an event of default had occurred within the meaning of the Deed of Mortgage and Charge such that the provisions of Clause 8.1 of the Deed (and accordingly Clause 9.1 in turn) would be triggered.

142. The demand letters which are relied on were sent to each of Mr. and Mrs. Moroney on 29th February, 2016. The letters open by referring to the cross-border merger and the subsequent assignment to Ennis Property. The letters then continue in the following terms:-

> *"We are writing to advise you that you have breached the Loan Agreement in that the loan account(s) is substantially in arrears and that this,* inter alia*, constitutes an Event of Default under the terms of the Loan Agreement.*
>
> *We hereby declare all loans advanced to you to be immediate due and payable and hereby make formal demand for immediate repayment of such loans and all monies and liabilities due, owing or incurred by you to Ennis under the Loan Agreement.*
>
> *The balance due on the loan account(s) as of today's date amounts to €1,071,139.01 together with continuing interest which accrues at a daily rate of €258.51. Interest will continue to accrue until payment.*
>
> *Payment herein can be made by cheque drawn in favour of Ennis Property … which should be sent to Pepper Asset Servicing … Alternatively, the payment can be made electronically to the bank account details below.*
>
> *We further give notice that failing immediate payment of the above monies and liabilities we reserve the right, without further notice, to exercise all powers conferred by law, the Loan Agreement and all security documents executed in respect thereto including but not limited to exercising the right to appoint a Receiver over the Property … and/or issue proceedings against you with a view to seeking judgment for the full amount due under the Loan Agreement …*
>
> *You are strongly advised not to ignore this letter but to immediate seek the advices of a solicitor or accountant."*

143. This is the letter of demand which is relied upon by Ennis Property to demonstrate that the monies advanced on foot of the facilities described above were repayable prior to the decision to appoint a receiver. Mr. Moroney, however, contends that the demand is invalid in circumstances where he says the amount claimed is overstated. As noted in para. 20 above, Mr. Moroney contends that there has been an overcharge of interest of €196,000. The case made by Mr. Moroney is that surcharge interest has been levied on the account and Mr. Moroney contends that such surcharge interest is irrecoverable.

144. In response, counsel for Ennis Property has made two arguments. In the first place, he has argued that the paragraph in the letter of demand setting out the amount due is independent of the paragraph which declares, for the purposes of Clause 9(1) of the standard conditions, that all of the loans are now immediately due and payable. In my view, this is not a sufficiently strong argument to satisfy the *Maha Lingam* test. In my view, a more likely and plausible reading of the letter of demand is that both paragraphs should be read together. When read together, it seems to me that what the letter of demand in fact does is to declare that an amount of €1,071,136.01 is due as of 29th February, 2016. It will obviously be for the trial judge in due course to form a definitive view on this issue but, on the basis of the arguments made to me, I have formed the view at this interlocutory stage that this submission on behalf of Ennis Property does not meet the necessary standard.

145. The second (and in my view more straightforward) argument made by counsel for Ennis Property is that it is not essential that a non-statutory letter of demand should accurately state the amount due. Thus, even if Mr. Moroney ultimately succeeds on the surcharge issue, Ennis Property submits that the letter of demand would still be valid. In support of this proposition counsel for Ennis Property has drawn my attention to the decision of Cregan J. in *Flynn v. National Asset Loan Management Ltd*. [2014] IEHC 408. In that case, Cregan J. reviewed a number of authorities on this issue including the decision of the Supreme Court in *Murphy v. Bank of Ireland* [2014] IESC 37. He came to the conclusion (based principally on a number of English and Australian decisions cited in *County Leasing Ltd. v. East* [2007] EWHC 2907 QB) that a demand will still be valid even where the amount claimed is overstated. Cregan J. distinguished the decision of the Supreme Court in *Murphy v. Bank of Ireland* on the basis that the demand considered by the Supreme Court in that case was a statutory notice prescribed by s. 8(1) of the Bankruptcy Act 1988. Cregan J. took the view that the approach taken by the Supreme Court in that case should not be applied to a non-statutory demand.

146. In light of the approach taken by Cregan J. in *Flynn v. National Asset Loan Management Ltd*., I am of the view that there is a strong case to be made that even if the amount claimed in the letter of demand of 29th February, 2016 is overstated to the extent maintained by Mr. Moroney, this would not invalidate the demand. I stress that this expression of opinion on my part does not constitute a final judgment on this issue. It will still be open to Mr. Moroney at the trial to argue that the demand was invalid. It will also be open to Mr. Moroney in these proceedings to file a counterclaim seeking a declaration as to the true amount due by him to Ennis Property. Mr. McCarthy, as Receiver, can only lawfully recover out of the assets of the receivership, the true amount due to Ennis Property. In due course, it will be a matter for Mr. Moroney to decide whether to name Ennis Property as a defendant to any such counterclaim in accordance with the provision of O. 21, r. 10. That is a decision for Mr. Moroney to take in due course as to how he should run his defence in these proceedings.

147. It will be for the trial judge in due course to form a final view on all of these issues. At this point, my task is to consider whether Mr. McCarthy, as plaintiff, has made out a strong case. For the reasons discussed above in relation to the decision of Cregan J. in *Flynn v. National Asset Loan Management Ltd*., I am of the view that Mr. McCarthy has established a strong case that the letter of demand of 29th February, 2016 is a valid demand even if the court should ultimately hold that part of the amount demanded is irrecoverable on the basis submitted by Mr. Moroney.

148. In circumstances where I am of opinion that there is a strong case to be made that the letter of demand is valid, it seems to me to follow that there is likewise a strong case to make that an Event of Default has occurred within the meaning of the Deed of Mortgage and Charge. As a consequence of the letter of demand, there is a strong case to make that the amounts due under the loan facilities have become immediately due and payable. It therefore follows that there is equally a strong case that, under Clause 8.1 of Deed, the power of sale has become exercisable and, in turn, under Clause 9.1, that the right to appoint a receiver has also become exercisable.

149. Once a receiver has been appointed, one of the rights conferred on a receiver pursuant to Clause 9.4.1 of the Deed is the right:-

> *"To enter into, take possession of, get in and collect the Secured Assets or any part thereof …".*

150. Clause 1 of the mortgage defines the term "*Secured Assets*" as meaning:-

> *"All assets, rights and property of the Mortgagor the subject of any security created or expressed or intended to be created by or pursuant to this Deed …".*

151. In my view, it is clear from a consideration of the terms of the deed that it is intended to create security over each of the lands comprised in the folios described in para. 1 above. Therefore, it seems to me that, on the material currently before the court, a validly appointed receiver would have a strong case that he is entitled to take possession of the lands the subject matter of these proceedings from Mr. Moroney.

152. However, Mr. Moroney seeks to make the case that the Deed of Appointment of Mr. McCarthy as receiver is defective in that it merely appoints Mr. McCarthy as receiver only and does not appoint him as "*receiver and manager*". He says that under Clause 9.1 of the Deed, it is clearly contemplated that any person appointed to exercise the powers conferred by Clause 9.4 must be appointed as a "*receiver and manager*". He draws attention to the way in which the term "*receiver*" is defined as the person appointed to be such a receiver and manager. His argument is based on the following language in the opening words of Clause 9.1 of the Deed:-

> *"At any time after the power of sale has become exercisable whether or not the Bank has entered into or taken possession of the Secured Assets or at any time after the Mortgagor so requests, the Bank may from time to time appoint under seal or under hand of a duly authorised officer or employee of the Bank* any person or persons to be receiver and manager or receivers and managers (herein called "Receiver") *which expression shall where the context so admits include plural and any substituted receiver and manager or receivers and managers of the Secured Assets".* (Emphasis added).

153. Mr. Moroney's point is that when it comes to Clause 9.4 of the Deed (which is the relevant clause conferring the power to take possession of the lands), it refers back to the appointment of a person as a receiver and manager as set out in Clause 9.1. The argument that is made is that accordingly, it is only a person appointed as a receiver and manager that can exercise the powers conferred by Clause 9.4.

154. Mr. Moroney strongly relies on the decision of Gilligan J. in *The Merrow Ltd. v. Bank of Scotland* [2013] IEHC 130 where Gilligan J. referred to a number of authorities which stressed the importance of observing any formalities in a debenture or deed of mortgage when it comes to the appointment of a receiver. Among the authorities considered by Gilligan J. was the decision of the Supreme Court of Western Australia in *Wrights Hardware v. Evans* (1988) 13 A.C.L.R. 631 where Franklyn J. emphasised the importance of complying strictly with the terms of the relevant debenture. In that case, Franklyn J. said:-

> *"I am satisfied that the relevant law applying to the appointment of a receiver or receiver and manager … pursuant to the charge is as follows:*
>
> > *(1) The manner in which a receiver is to be appointed is prescribed by the debenture deed … and must be strictly followed. …*
> >
> > *(2) The existence of a power in the debenture holder to appoint in a particular manner will not relieve a de facto receiver from liability for trespass if the appropriate appointment procedure is not strictly observed. …".*

155. In his judgment in *The Merrow*, Gilligan J. also identified the rationale for the requirement of strict compliance with the terms of the relevant deed or debenture. In this context, he drew attention to what was said by Smith J. in *R. Jaffe Ltd. (in liquidation) v. Joffe (No. 2)* in New Zealand where he said:-

> *"The importance of the strict observance … is shown … by other considerations. A receiver is not an officer of the court, but, if he is duly appointed, his title is superior to that of a person interfering with the assets under his control, and the court will then grant an injunction …. If a receiver were unable to prove his title according to the terms of his contract, then I doubt whether he would be entitled to an injunction. Furthermore, while the company is a going concern, a receiver, if the conditions of the debenture so provide, may be the agent of the company, and the company will then be responsible for his contracts. This is particularly important if the debenture-holder has power to appoint not merely a receiver, but a receiver and manager. Under such circumstances the company must be entitled to insist I think, upon the fulfilment of the terms of appointment as a condition of its liability."*

156. On the basis of the authorities cited to him, Gilligan J. came to the conclusion that the terms of the debenture in that case had to be very strictly followed and the failure to seal the Deed of Appointment in that case was fatal to the purported appointment of a receiver there.

157. I was not referred to any other authorities in this context other than the decision of Gilligan J. While the decision of Gilligan J. was dealt with extensively in the oral and written submissions made by Mr. Moroney, the decision was not canvassed extensively in the submissions made on behalf of Mr. McCarthy. The oral submissions on behalf of Mr. McCarthy on this issue run from p 103 to p 105 of the transcript on Day 3.

158. I am aware that the decision of Gilligan J. has been applied and considered in a number of subsequent authorities including the decision of Cregan J. in *McCleary v. McPhillips* [2015] IEHC 591. In that case, Cregan J. summarised the applicable principles as follows:-

> *"1. The receiver's authority to act is derived from the contracts, or mortgages, or deeds of charge, entered into between the Bank and the borrower.*
>
> *2. The receiver is to be appointed according to the terms of the contract between the parties.*
>
> *3. Because a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument.*
>
> *4. The consequence of non-compliance with the formalities for the appointment of a receiver, in accordance with the terms of the instrument, is that the appointment is void.*
>
> *5. If the instrument provides that the appointment is required to be by deed, or under seal, that formality must be observed.*
>
> *6. If the instrument requires that the appointment is to be made in writing under hand, that formality must also be observed.*
>
> *7. An invalidly appointed receiver may be a trespasser on company property.*
>
> *8. Considerations of basic fairness and contractual interpretation mean that the Bank should be obliged to comply with the terms it chooses to impose in the instrument involved".*

159. It is, I believe, crucially important to observe that a receiver's authority to act is, as Cregan J. said, derived from the relevant deed entered into between the mortgagor and mortgagee. As the case law shows, it is also crucial to bear in mind that an appointment will not be valid unless it is made in accordance with the terms of the relevant Deed.

160. I have set out in paragraph 152 above what I believe to be the most relevant provisions of Clause 9.1 of the Deed put in place between BOSI and Mr. and Mrs. Moroney.

161. To paraphrase Cregan J. in *McCleary*, Clause 9 contains the terms which BOSI chose here for the purposes of setting out its entitlements in relation to the appointment of a receiver. For the reasons canvassed extensively above (in the context of Mr. Moroney's proceedings), Mr. Moroney is entitled to the same rights and entitlements as against Ennis Property as he previously had against BOSI. He therefore has an entitlement to require that Ennis Property should follow strictly the requirements set out in the Deed of Mortgage and Charge in this case relating to the appointment of a receiver.

162. Properly analysed, it seems to me that Clause 9 of the Deed contemplates the following:-

> (a) In the first place, under Clause 9.1, the power to appoint a receiver becomes exercisable at any time after the power of sale becomes exercisable;
>
> (b) Any appointment must be made under seal or under the hand of a duly authorised officer or employee of the mortgagee;
>
> (c) What Clause 9.1 expressly envisages is that the appointment will be of a receiver and manager or a number of receivers and managers. There is nothing in the text of Clause 9.1 to suggest that the mortgagee is entitled to decide to appoint a person solely to be a receiver without also appointing that person to be a manager;
>
> (d) Line 5 of Clause 9.1 says that any person appointed to be a receiver and manager will thereafter be referred to in Clause 9 as a "*Receiver*". That seems to me to have the consequence that thereafter, any references to "*Receiver*" in any of the provisions of Clause 9 must be interpreted as referring to a person appointed a "*receiver and manager*" pursuant to Clause 9.1;
>
> (e) Clause 9.2 makes clear that the power given by Clause 9.1 is to be in addition to and without prejudice to the statutory powers of a mortgagee to appoint a receiver under the Conveyancing Act, 1881 ("the 1881 Act"). Thus, it would be open to the mortgagee (here Ennis Property) to appoint a person not as a "*receiver and manager*" under Clause

9.1, but as a "*receiver*" having all of the powers under the 1881 Act. That would not be of any assistance to Mr. McCarthy here. In the first place, Ennis Property did not seek to invoke or rely on the 1881 Act. Secondly, there is no express statutory power given to a receiver under the 1881 Act to take possession of property. The only statutory power conferred on a receiver is to collect the rent or income from the property. While it may be the case that there is an implied power for such a receiver to take possession, that would appear to be so only where the property is let, and it is necessary for a receiver, in order to collect the rents, to take possession of the property (see the decision of Laffoy J. in Kavanagh v. Lynch [2011] IEHC 348);

(f) Clause 9.3 is in the usual form providing that the person appointed will be the agent of the mortgagor. However, it is important to note that Clause 9 refers to "*a Receiver so appointed*". This seems, on the face of it, to refer back to a person appointed as receiver and manager under Clause 9.1. That seems to be the natural reading of Clause 9.3;

(g) Similarly, Clause 9.4 (which is the relevant clause conferring all of the powers of the person appointed) commences with the words "*a Receiver so appointed*". Again, those words appear to me to refer back to a person appointed pursuant to Clause 9.1. Therefore, the reference to a "*Receiver*" in Clause 9.4 appears on its face to be a reference to a "*receiver and manager*" appointed under Clause 9.1;

(h) Furthermore, having regard to the language of Clause 9.4, it would appear, again on its face, that only a person appointed as a receiver and manager under Clause 9.1 that will "*have* [the] *power to do the following things* …." as thereafter described in sub-clauses 9.4.1 to 9.4.17.

163. On the basis of my analysis of the language of Clause 9 of the Deed (as set out in paragraph 162 above), it would seem to follow that unless Mr. McCarthy was appointed as receiver and manager, he could not exercise the power to take possession of the lands which is one of the "*following things*" identified in Clause 9.4.1. It is, however, clear from the Deed of Appointment in this case that Mr. McCarthy was not appointed as a "*receiver and manager*". The language used in the Deed of Appointment simply purports to appoint him as a "*receiver*". On the face of it, there is nothing in the language of Clause 9 of the Deed which suggests that the mortgagee is entitled to proceed in that way. On the contrary, the only form of appointment contemplated is that of a "*receiver and manager*". Obviously, no final conclusion can be reached in relation to this issue at this interlocutory stage. My task at this point is solely to consider whether Mr. McCarthy has established a strong case that he is entitled to the relief which he seeks in these proceedings. It is therefore necessary to consider in more detail the submissions which have been made on his behalf.

164. As noted above, I have not been addressed in any detail by counsel on behalf of Mr. McCarthy in relation to the decision of Gilligan J. in *The Merrow*. Nor have I been referred to any additional authorities by counsel notwithstanding the very extensive way in which Mr. Moroney opened the decision of Gilligan J. to me and notwithstanding the significant reliance that is placed by Mr. Moroney on this decision. I have not been referred to any decision of the Court of Appeal or of the Supreme Court which throws any doubt on the decision of Gilligan J.

165. The arguments made on behalf of Mr. McCarthy in relation to this issue were as follows:-

(a) In the first place, it was submitted that nothing of legal significance turns on any of the labels used. It was submitted that these are just a "*drafting technique*" and that while Mr. McCarthy is labelled in the Deed of Appointment as "*the Receiver*", he might equally be labelled the "*insolvency practitioner*" or "*Mr. McCarthy*". That argument is correct insofar as it relates to the way in which Mr. McCarthy is labelled "*the Receiver*" (with an upper case "R") in the Deed of Appointment. However, it is the language of the Deed of Mortgage and Charge that must be borne in mind before one ever commences to look at the Deed of Appointment. For the reasons outlined above, it seems to me that the natural meaning of Clause 9.1 of the Deed is that any person appointed will be appointed not just as a "*receiver*" but as a "*receiver and manager*". Accordingly, it seems to me (on the basis of the submissions made to date) that Clause 9.1 requires that any appointment made thereunder must be as a "*receiver and manager*".

(b) The next argument made (and this is by far the more important argument) is that one must look at what the Deed of Appointment actually does. In particular, counsel for Mr. McCarthy placed emphasis on Clause 2 of the Deed of Appointment, and in particular on the second last line of that clause where Mr. McCarthy was appointed "*….to enter upon, take possession of the property and to exercise all of the powers of a receiver given by the Mortgages by statute or otherwise*". The argument is made that Mr. McCarthy is therefore given all the powers in Clause 9, and that this is unambiguous. In other words, the argument is made that there must have been an intention to confer on Mr. McCarthy all of the powers available to a receiver and manager under Clause 9.4 of the Deed of Mortgage and Charge. However, what is notable about Clause 2 is that Mr. McCarthy is not appointed as receiver and manager. He is simply appointed as receiver. There are, in fact, no powers given to a "*receiver*" by the Deed of Mortgage. On the contrary, Clause 9 suggests that such powers are given only to a person who is appointed a "*receiver and manager*". In my view, the natural meaning of Clause 9.1 is that the appointee must be appointed as a receiver and manager. It is only someone "*so appointed*" who has the powers conferred by Clause 9.4.

(c) It is also argued that this is not an "*industrial case*" and it is suggested that it is not immediately obvious what might turn on Mr. McCarthy being "manager". However, that ignores the fact that the lands the subject matter of the charges are farmland, and it might well be necessary to manage those lands pending any sale. For example, it would be unwise for any receiver to allow the lands to become overgrown or to become waterlogged or to fail to harvest hay or silage as the case might be pending any sale.

166. In the circumstances, I am not persuaded by the submissions which have been made to me on behalf of Mr. McCarthy. I should make clear that I do not purport to suggest that that there is no substance to the arguments made on behalf of Mr. McCarthy. That would be quite inappropriate at this stage. My only task is to consider whether the argument made is sufficiently strong to satisfy the *Maha Lingam* standard. In other words, what must be shown by Mr. McCarthy here is a strong and clear case.

167. In light of what seems to me (on the basis of the submissions made to date) to be the natural meaning of Clause 9 of the Deed of Mortgage and Charge, I believe that Mr. McCarthy will have an uphill struggle in persuading the court at trial that he has been validly appointed. In this context, it appears to me to be clear from the decision of Gilligan J. in *The Merrow* that one looks to see whether there has been strict compliance with the terms of the relevant instrument under which a receiver is appointed (in this case, the Deed of Mortgage and Charge). The submissions made on behalf of Mr. McCarthy at this interlocutory stage have failed to persuade me that there is a strong case that the terms of Clause 9.1 of the Deed of Mortgage and Charge have been complied with. In *The Merrow*, an argument might equally have been made that the intention of the bank in that case was, notwithstanding the failure to seal the Deed of Appointment, to appoint a receiver with all the powers given to such a receiver under the terms of the relevant deed. Although the bank in that case failed to seal the deed of appointment there, it seems fairly clear that the bank

nonetheless intended to appoint a receiver. Nonetheless, the failure to seal the Deed of Appointment was considered by the court to be a failure to comply with the strict terms of the debenture in that case. The fact that the bank in that case had intended to appoint a receiver with all necessary powers was not ultimately relevant. What the court took into account was whether the bank had acted in accordance with the terms of the debenture which it had itself drafted. While the facts of that case are obviously different to the present case, it seems to me that the same principle applies. In that case, the bank had failed to seal the Deed of Appointment. Here, Mr. Moroney submits that Ennis Property failed to comply with the express terms of Clause 9.1. On the face of it, what Mr. Moroney has said seems to be correct. Nothing which has been submitted to the court to date on behalf of Mr. McCarthy persuades me that Mr. McCarthy has a strong case to distinguish *The Merrow*.

168. It seems to me, on the basis of the submissions that have been made to the court to date, that there has been a failure on the part of Mr. McCarthy to show that he has a strong case that he has been validly appointed in accordance with the requirements of Clause 9.1 of the Deed of Mortgage and Charge. In my view, on the basis of the submissions made to date, Mr. Moroney's case on this issue is consistent with the natural meaning of the words used in Clause 9 of the Deed of Mortgage and Charge and that his submission is consistent with the approach taken by Gilligan J. in *The Merrow*. At this interlocutory point in the proceedings, it seems to me that Mr. Moroney's case is by far the stronger argument on this issue.

169. It may seem incongruous that Mr. Moroney should be entitled to rely on a point of this kind in circumstances where he is very significantly indebted to Ennis Property. A significant question mark arises as to whether Mr. Moroney has any *de facto* equity of redemption in the lands. However, it is important to recall in this context that Ennis Property is not the plaintiff in these proceedings. Ennis Property has not itself brought proceedings seeking possession pursuant to Section 62(7) of the Registration of Title Act, 1964. Instead, it has chosen to proceed by purporting to appoint Mr. McCarthy as receiver. In turn, Mr. McCarthy in instituting these proceedings has relied on his appointment as receiver by Ennis Property. The case law which has been cited to me shows (and I have heard no submissions to the contrary) that an invalidly appointed receiver is a trespasser as against the mortgagor. If Ennis Property wished to ensure that no point could be taken against it, it was a relatively straightforward matter to proceed in accordance with the strict terms of Clause 9.1 of the Deed, or alternatively, to bring its own proceedings for possession under Section 62(7).

170. In light of the considerations discussed above, I have come to the conclusion that Mr. McCarthy has failed to satisfy me of the strength of his argument to the standard required as laid down by the Supreme Court in the *Maha Lingam* test. In expressing this view, I fully appreciate that Mr. McCarthy has an arguable case. I also wish to make it very clear that Mr. McCarthy may ultimately succeed at trial. All I hold is that at this interlocutory stage, he has not succeeded in persuading me that his case as to the validity of his appointment is sufficiently clear and strong to satisfy the *Maha Lingam* test. There may well be additional authorities cited by Mr. McCarthy at trial that will persuade the trial judge that a different view should be taken. There may also be additional submissions made to the trial judge that will be sufficient to persuade the court at trial that a different view should be taken. I must, however, decide this issue by reference to the submissions and the case law cited to me at this stage.

171. In light of the view which I have formed in relation to the strength of Mr. Moroney's argument based on the decision of Gilligan J. in *The Merrow*, I believe that the application for an interlocutory injunction by Mr. McCarthy fails. It is therefore unnecessary to consider the questions of adequacy of damages and balance of convenience.

Conclusion

172. In light of the considerations discussed above, it seems to me that the following Orders should be made:-

> (a) There should be an Order made in the proceedings brought by Mr. Moroney dismissing those proceedings on the basis that they failed to disclose a reasonable cause of action and/or are bound to fail.
>
> (b) The application for an interlocutory injunction brought by Mr. McCarthy as against Mr. Moroney should be dismissed.
>
> (c) The application by Mr. McCarthy for an interlocutory injunction as against Mrs. Moroney should be given a new date for hearing, and for that purpose, the motion should be remitted to the judge in charge of the Chancery List to fix such a date.
>
> (d) While I have not yet heard any argument in relation to what should happen to the remaining motions brought by Mr. Moroney in his proceedings, it seems to me that, subject to any submissions to the contrary that I may hear from any of the other parties, those motions should now be struck out. In my view, no useful purpose would be served in dealing with those motions in circumstances where I have concluded that Mr. Moroney has no cause of action in relation to the complaints made by him in those proceedings.

Denis McDonald