THE HIGH COURT

2016 No. 6718 P.

BETWEEN

MICHAEL LEAHY

KATHLEEN LEAHY

PLAINTIFFS

AND

BANK OF SCOTLAND PLC

PENTIRE PROPERTY FINANCE LIMITED,

PEPPER FINANCE CORPORATION (IRELAND) LIMITED

TOM KAVANAGH

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 5 April 2019.

INTRODUCTION

1. This matter comes before the High Court by way of an application to dismiss proceedings on the basis that same are frivolous and vexatious and/or disclose no reasonable cause of action. The application is made by the first named defendant, Bank of Scotland plc ("*Bank of Scotland*"). The essence of the claim made by the Plaintiffs against Bank of Scotland is that the bank acted unlawfully in transferring the Plaintiffs' loans to Pentire Property Finance Ltd. ("*Pentire*") in or about 20 April 2015. More specifically, the Plaintiffs argue that the conditions of the loan agreements between Bank of Scotland and the Plaintiffs precluded the bank from transferring the loans to an *unregulated* entity such as Pentire.

2. For the reasons set out herein, I am satisfied that the Plaintiffs' claim is bound to fail. The conditions of the loan agreements entered into between the Plaintiffs and Bank of Scotland's predecessor in title, Bank of Scotland (Ireland) Ltd., expressly provided for the transfer of "the finance agreements" (as defined). Moreover, the Plaintiffs have not suffered any loss or prejudice as a result of the transfer of their loans in that the Plaintiffs continue to enjoy precisely the same rights as prior to the transfer.

3. The argument based on the alleged preclusion of a sale to an unregulated entity is misconceived. The legislative amendments introduced under the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 have remedied what was perceived to be a lacuna under the previous regime whereby there was no requirement for an unregulated entity to comply with certain provisions of the Central Bank legislation. In brief, the effect of the amendments introduced under the 2015 Act is that an entity which holds the legal title to credit granted under a credit agreement (as defined) must either (i) arrange to have credit servicing undertaken by an authorised credit servicing firm, or (ii) obtain authorisation itself. The amended legislation did not have the effect of retrospectively invalidating transfers to unregulated entities.

4. Crucially, no steps were taken to enforce the security under the Plaintiffs' loan agreements between the date upon which the loans were transferred to Pentire (20 April 2015) and the coming into force and effect of the amended legislation (8 July 2015). In particular, the appointment of a receiver over the property the subject of the loan agreements did not occur until 19 February 2016. The Plaintiffs' claim for damages against Bank of Scotland cannot succeed in circumstances where the Plaintiffs are unable to point to any loss or prejudice caused by any act on the part of Bank of Scotland.

5. The legal effect of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 has been considered in a number of recent judgments, including *Launceston Property Finance Ltd. v. Burke* [2017] IESC 62; [2017] 2 I.R. 798; *Hogan v. Deloitte* [2017] IEHC 673; *McCarthy v. Moroney; Moroney v. Property Registration Authority* [2018] IEHC 379; and *Geary v. Property Registration Authority* [2018] IEHC 727. The law in this regard is clear, and the Plaintiffs' claim against Bank of Scotland is bound to fail.

FACTUAL BACKGROUND

6. Bank of Scotland (Ireland) Ltd. entered into two loan agreements with the Plaintiffs in 2004. Both loan agreements related to commercial premises consisting of nine completed units, two shell units, and two apartments at Kilkenny Street, Castlecomer, Co. Kilkenny ("*the Property*").

7. The first loan agreement was executed by the first named plaintiff on 4 August 2004. The principal amount under the first loan agreement was €600,000. The signature page includes the following endorsement.

> "I further confirm that for the purposes of the Consumer Credit Act, 1995, in availing of the facility and drawing down of the loan I are (sic) acting within our business, trade and profession."

8. The second loan agreement was executed by both the first and second named plaintiffs on 5 October 2004. The principal amount is €140,000. The signature page includes the following endorsement.

> "We further confirm that for the purposes of the Consumer Credit Act, 1995, in availing of the facility and drawing down of the loan we are acting within our business, trade and profession."

9. Copies of both of the loan agreements have been exhibited as part of the affidavit of Hugh Catling sworn herein on 22 May 2018.

10. The loan agreements were subject to Bank of Scotland (Ireland) Ltd.'s General Conditions. A copy of these General Conditions has been exhibited by Mr. Catling in his affidavit of 22 May 2018. The following conditions are relevant to the arguments which are advanced on behalf of the Plaintiffs.

11. Condition No. 1, Definitions and Interpretation, includes *inter alia* definitions of the following terms.

"'Finance Documents' means each of 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 and any one a 'Finance Document';

'Loan' means the loan facilities made available pursuant to the Facility Letter;

'Loan Agreement' means the Facility Letter and these General Conditions which are deemed to be expressly incorporated into the terms of the Facility Letter between the Bank and the Borrower."

12. Condition 14 deals with Assignment and Transfer as follows.

"14. 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 sub-contract any of its rights or obligations under the Finance Documents."

13. Condition 27 provides as follows.

"27. Law and Jurisdiction

27.1 The Loan Agreement shall be governed by, and shall be construed in accordance with, the laws of Ireland and the Borrower hereby submits, for the benefit of the Bank, to the jurisdiction of the Courts of Ireland for all purposes in the connection with the Loan Agreement.

27.2 The Borrower further irrevocably submits to the jurisdiction of the courts in any other jurisdiction in which it has assets and hereby waives any objection to any claim that any suit, action or proceedings have been brought in any inconvenient forum."

14. By deed and charge dated 20 August 2004, the second named plaintiff, Kathleen Leahy, granted a mortgage over the Property. A copy of a Registry of Deeds search generated on 11 April 2018 has been exhibited as part of the affidavit of Mr. Catling.

15. Bank of Scotland (Ireland) Ltd. merged into Bank of Scotland plc in accordance with Directive 2005/56/EC on cross-border mergers of limited liability companies. The merger took effect at one minute to midnight on 31 December 2010. The effect of the merger was that all of the assets and liabilities of Bank of Scotland (Ireland) Ltd. transferred to Bank of Scotland. Bank of Scotland (Ireland) Ltd. was then dissolved without going into liquidation.

16. It is common case that the Plaintiffs fell into arrears in respect of the two loan agreements. The Plaintiffs allege that they had discussions in or about June 2014 with an employee of Certus in respect of the possibility of purchasing their loans from Bank of Scotland. Certus was a company which provided asset management services to Bank of Scotland. It is further alleged that an "agreement in principle" was reached in this regard between the Plaintiffs and the employee of Certus. In the event, however, no binding agreement was ever reached. Instead, ownership of the Plaintiffs' loans was transferred to Pentire Property Finance Ltd. as part of the sale of a large number of loans. This transfer was completed on 20 April 2015.

17. It is common case that a receiver was appointed over the Property in or about 19 February 2016.

THE PLENARY PROCEEDINGS

18. The within proceedings were instituted by the Plaintiffs on 25 July 2016. Four defendants are named. The first named defendant is Bank of Scotland plc. It is the entity which succeeded to the original loan agreements consequent to the cross-border merger with Bank of Scotland (Ireland) Ltd. ("*BOSI*"). The second named defendant, Pentire Property Finance Ltd. ("*Pentire*"), is the entity which purchased the Plaintiffs' loans from Bank of Scotland plc in April 2015. The third named defendant, Pepper Finance Corporation (Ireland) Ltd., is a regulated entity under the Central Bank legislation and, seemingly, acts on behalf of Pentire. The fourth named defendant, Mr. Tom Kavanagh, is an accountant who has been appointed receiver pursuant to the loan agreements. This appointment of the receiver was made on 19 February 2016. The timing of this appointment is significant in that, first, it postdates the sale of the properties by Bank of Scotland plc (20 April 2015), and, secondly, it postdates the commencement of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (8 July 2015).

19. The principal reliefs sought against Bank of Scotland in the Plenary Summons are (1) damages for breach of contract and for breach of duty (including statutory duty), and (2) damages for negligence.

20. The original version of the Statement of Claim was delivered on 24 October 2016. The Statement of Claim has since been amended twice. For the purposes of this judgment, I will refer only to the most recent version of the Statement of Claim (*"the second amended Statement of Claim"*).

21. As appears from the second amended Statement of Claim, the Plaintiffs make complaints in respect of a series of events, the most significant of which are said to have occurred over the period April 2015 to February 2016. Many of these complaints relate to alleged actions on the part of the second to fourth named defendants, which actions are said to have been taken *subsequent* to the transfer of the loans to Pentire in April 2015.

22. Insofar as Bank of Scotland, the first named defendant, is concerned, the gravamen of the Plaintiffs' case is summarised as follows at paragraphs 25 to 27 of the second amended Statement of Claim.

"25. Sub-section 14.2 of the General Conditions under the heading 'Assignment And Transfer' applicable to LN1 and L2 never intended to bestow on BOSI, or the First Defendant as it's successor in title, an express or implied absolute or conditional right to transfer inter alia the Plaintiffs' LN1 and/or LN2 to any person, firm or company (including the Second Defendant) where such a transfer would affect such a fundamental change to the loan contract between the parties bound thereby, and the contractual relationship between them, and to fundamentally change the terms and conditions attaching to that contract and contractual relationship, and to also substantially change the protections afforded to the

'Borrower' (being the Plaintiffs) by (a) the loan terms and conditions, (b) the Laws of Ireland applicable or capable of being applied thereto, and (c) the Central Bank of Ireland through its various Codes of Conduct.

26. The First Defendant had no proper legal authority at Common Law or in equity or by virtue of any Statute authority by which the First Defendant had the authority to deprive the Applicants of their statute right under section 117(1) of the 1989 Act to the protections of the 'Code of Conduct for Business Lending to Small and Medium Enterprises' (from hereinafter referred to 'CCBLSME') or/and 'Code of Conduct on Mortgage Arrears' (from hereinafter referred to 'CCMA') by transferring the Plaintiffs loans LN1 and LN2 to an unregulated entity.

27. Sub-paragraph 27.1 of Paragraph 27 of the General Conditions under the heading 'Law and Jurisdiction' which was intended to run the term of the loans by which the loan contracts were subject to the Laws of Ireland in particular section 117(1) of the 1989 Act, in particular the CCBLSME and CCMA. The First Defendant had no proper legal authority at Common Law or in equity or by virtue of any Statute authority by which to transfer inter alia the Plaintiffs' LN1 and/or LN2 to any person, firm or company (including the Second Defendant) where such a transfer would affect such a fundamental change to the loan contract between the parties bound thereby, and the contractual relationship between them, and to fundamentally change the terms and conditions attaching to that contract and contractual relationship in particular Sub-paragraph 27.1 of Paragraph 27 of the General Conditions, and to also substantially change the protections afforded to the 'Borrower' (being the Plaintiffs) by (a) the loan terms and conditions, (b) the Laws of Ireland applicable or capable of being applied thereto, and (c) the Central Bank of Ireland through it's various Codes of Conduct."

23. These complaints are repeated towards the end of the second amended Statement of Claim under the heading of "Particulars of Negligence and Breach of Duty (including Statutory Duty) and Breach of Contract against the First Defendant". In effect, it is alleged that Bank of Scotland was negligent and in breach of duty and in breach of contract in that it sold the loans to Pentire when it ought to have known that Pentire was not, as of the date of sale, regulated by the Central Bank of Ireland.

24. The second amended Statement of Claim also includes a claim for alleged breach of contract arising out of the "agreement in principle" said to have been entered into between the Plaintiffs and the employee of Certus in or about June 2014. However, Mr. Leahy has since confirmed, both on affidavit and in his written and oral submissions, that this claim is not now being pursued.

25. The Plaintiffs responded to a Notice of Particulars served by the first named defendant on 27 February 2018. Insofar as relevant, the complaints in relation to the alleged sale to an unregulated entity are repeated. See in particular para. 6(b).

"In what precise way(s) are the Plaintiffs alleging that the transfer to the Second Named Defendant fundamentally changed the loan contract between the parties?

Reply: The transfer vacated in part the governance of the Laws of Ireland over the Loan(s) Agreement(s) and the Loan(s) and in particular the application of the Rules and Regulation of the Central Bank of Ireland of which afforded the Plaintiffs their statutory protection(s) in respect of CCMA and CCBLSME, which was of such a fundamental change to the contract(s) between the Plaintiffs and the Defendants or either of them that such a change required under the applicable General Laws of Contract (which are a matter of evidence) the prior consent of the Plaintiffs."

26. See also para. 7(b).

"In what precise way(s) are the Plaintiffs alleging that the Second Defendant 'had no proper legal authority' to take over the Plaintiffs' loans?"

Reply: The Second Defendant prior to the taking over of Plaintiffs loans failed to take such steps as were necessary to obtain from the Central Bank of Ireland the necessary statutory legal standing in the Republic of Ireland to preserve the Plaintiffs statutory protections contractually afforded to the Plaintiffs by the first Plaintiff and/or the Central Bank of Ireland."

27. The first named defendant delivered a full Defence to the proceedings on 12 April 2018.

28. By Notice of Motion dated 23 May 2018, Bank of Scotland applied for the following reliefs.

"(a) An Order striking out the proceedings as against the First Defendant pursuant to the provisions of Order 19; Rule 28 of the Rules of the Superior Courts 1986, on the grounds that same are frivolous and vexatious and/or disclose no reasonable cause of action.

(b) Further or on (sic) the alternative, an order pursuant to the inherent jurisdiction of this Honourable Court dismissing the proceedings as against the First Defendant on the grounds that same are unsustainable, frivolous and vexations and/or that same constitute an abuse of process.

(c) Such further or other Order as this Honourable Court deems fit."

29. This motion came on for hearing before me on Friday, 1 March 2019. Bank of Scotland was represented by Mr. Paul Hutchinson, BL instructed by Mason Hayes and Curran Solicitors. Mr. Leahy represented himself and his wife as a litigant in person.

JUDICIAL REVIEW PROCEEDINGS

30. As appears from the summary of the second amended Statement of Claim, and of the Replies to the Notice for Particulars set out earlier, the gravamen of the Plaintiffs' complaint is that Bank of Scotland was not entitled to transfer the loans to an unregulated entity, namely Pentire. As discussed under the next heading below, the short answer to this complaint is that, first, there is no legal impediment to such a transfer, and, secondly, the legal position is now governed by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. The relevant provisions were commenced on 8 July 2015, that is, a matter of months after the transfer of the loans to Pentire on 20 April 2015.

31. In truth, it appears that the gravamen of Plaintiffs' complaint is not so much that there has been a breach of the law as it stands, but rather that the legislation itself does not go as far as the Plaintiffs would wish.

32. In this regard, it is instructive to note that Mr. Leahy, the first named plaintiff, has sought unsuccessfully, on two occasions, to institute judicial review proceedings. The first set of proceedings are entitled *Michael Leahy, Applicant and Bank of Scotland Plc,*

Respondent. These proceedings bear the Record Number "2016 No. 347 J.R.". Leave to apply for judicial review was refused by the High Court (Humphreys J.) in June 2016.

33. The second set of proceedings are entitled Michael Leahy, Applicant, and Minister for Finance, Respondent. These proceedings bear the High Court Record Number "2016 No. 500 J.R.". Leave to apply for judicial review was refused in July 2016. It appears that the matter may have proceeded to the Court of Appeal, and that leave to apply for judicial review was refused by that court also.

34. The gravamen of the complaint made in the second set of judicial review proceedings is that the Minister for Finance was in error in thinking that consumers whose loans had been sold by regulated entities to unregulated entities had lost the protections of the Codes of Practice of the Central Bank, and that, accordingly, it was necessary to introduce the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. See, in particular, paragraph 40 of Mr. Leahy's grounding affidavit of 11 July 2016, and paragraph 1 of the Statement of Grounds.

JURISDICTION TO STRIKE OUT PROCEEDINGS

35. The principles governing an application to strike out proceedings on the basis of Order 19, rule 28 or pursuant to the court's inherent jurisdiction are well established. Counsel for Bank of Scotland relied in particular on the judgment of the Supreme Court in *Lopes v. Minister for Justice Equality and Law* Reform [2014] IESC 21; [2014] 2 I.R. 301.

> "[17] The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in *Barry v. Buckley* [1981] I.R. 306, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the court to prevent abuse can be invoked."

DISCUSSION

36. The gravamen of the Plaintiffs' case against Bank of Scotland is that the bank was precluded from transferring the two loan agreements to Pentire in circumstances where Pentire is not itself a regulated entity under the Central Banks Acts. In particular, it is alleged that Pentire is not bound by Codes of Practice or Codes of Conduct issued by the Central Bank under section 117 of the Central Bank Act 1989 (as amended).

37. The Plaintiffs' case is misconceived in law. First, the two loan agreements expressly authorise the transfer and assignment of the loans to third parties. Secondly, there is no statutory restriction on the transfer of loans to unregulated entities. Thirdly, the Plaintiffs have not suffered any loss or prejudice in circumstances where no steps were taken to enforce the security under the loan agreements until well *after* the commencement of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. Each of propositions is elaborated upon under separate headings below.

38. Before turning to that task, I should refer briefly to one other aspect of the second amended Statement of Claim. It is alleged at paragraphs 14 to 17 that (i) the security for the two loan agreements is not "as purported and identified" in the facility letters; and (ii) that the Plaintiffs reside in part of the Property and that Bank of Scotland (Ireland) Ltd. ("*BOSI*") and/or Bank of Scotland acquiesced in this. It is unnecessary to address these pleas further in circumstances where no steps were ever taken by BOSI or Bank of Scotland to enforce the security under the loan agreements. If and insofar as the Plaintiffs wish to rely on any alleged defect in the security or to rely on their alleged occupation of the Property as a primary residence, these are matters which could only ever be relevant to a claim against a party seeking to enforce the security.

CONTRACTUAL POSITION

39. The relevant terms of the two loan agreements have been set out above at paragraphs 11 *et seq*. It will be recalled that General Condition 14 expressly addresses the right of the lender to transfer and assign the loans as follows.

> "14. 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 sub-contract any of its rights or obligations under the Finance Documents."

40. Bank of Scotland has succeeded to BOSI's interest under the two loan agreements as a result of the cross-border merger of 31 December 2010. Accordingly, Bank of Scotland is entitled to exercise the rights of "the Borrower" as provided for under General Condition 14 (above). The terms of General Condition 14 are clear, and there is no restriction of the sort contended for by the Plaintiffs on the transfer of the loans to an unregulated entity.

41. The High Court in *McCarthy v. Moroney; Moroney v. Property Registration Authority* [2018] IEHC 379 ("*Moroney*") considered an almost identical contractual provision. See paragraphs [79] and [80] of the judgment as follows.

> "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."

42. I respectfully agree with McDonald J.'s analysis of the legal effect of a condition of this type.

43. Insofar as the Plaintiffs seek to suggest that the terms of the various Codes of Conduct issued by the Central Bank of Ireland form part of the contractual arrangements between the parties, this suggestion is baseless. The Supreme Court in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92 rejected an argument that the Code of Conduct represents an implied term of contract.

> "[47] Clearly, as a matter of regulation, any relevant financial institution is obliged to comply with its obligations under the Code and will be answerable, in an appropriate way, to the regulator for any significant failure so to do. But that is not the question with which this court is faced. Rather, the court is concerned with the extent, if any, to which the Code can be said to impact on the legal rights and obligations as and between a lender who is a regulated financial institution, on the one hand, and a borrower, on the other hand.
>
> [48] In what way can it be said that the Code so impacts? Two possible bases were put forward in argument on behalf of the Dunnes. Counsel suggested that it was possible to argue that the Code might amount to an implied term in the relationship between the parties. In fairness, counsel did not press that argument too far. In my view, counsel was correct in adopting that position. It is very difficult to see how the contractual arrangements between a lender and a borrower must be taken to have implied into them the provisions of the Code in circumstances where the Code can change from time to time (and thus could not have been particularly in the contemplation of the parties when they entered into their contracts) and where, unlike other legislation such as, for example, the Sale of Goods and Supply of Services Act 1980, the Employment Equality Act 1998 and the Package Holidays and Travel Trade Act 1995, the relevant legislation in this case does not expressly provide that certain terms are to be implied into relevant contracts. If the Oireachtas had wanted to convert any particular provision or type of provision of the Code into an implied term then it would have been easy for the Oireachtas to adopt the same policy as was adopted in respect of other legislation and to have said so."

44. More recently, the High Court (McGovern J.) rejected an argument that a term should be implied into a loan agreement to the effect that the borrower would not transfer the loan to an unregulated entity. See Cheldon Property Finance DAC v. Hale [2017] IEHC 432.

> "11. The defendants invite the court to imply a term into the loan facility to the effect that the bank would not transfer the loan to 'an unregulated or unauthorised entity'. The loan is serviced by Pepper Assets Servicing which is a credit servicing firm within the meaning of the Consumer Protection (Regulation of Credit Servicing) Act 2015 and is regulated by the Central Bank of Ireland. The regulatory authority has made no issue of the fact that the loan is serviced in this way.
>
> […]
>
> 14. The terms which the defendants seek to have implied in the loan facility do not meet the above tests and would have the effect of contradicting an express term of the contract. As a matter of law, such a claim is bound to fail. Accordingly, this is an issue capable of being determined in an application for summary judgment. There is no warrant for implying such a term and I decline to do so."

45. I respectfully adopt the same approach in this case.

46. The Plaintiffs' reliance on General Condition 27 of the loan agreements is similarly misconceived. For the reasons explained under the next heading, a right to rely on the Codes of Conduct does not represent part of the "the laws of Ireland".

NO STATUTORY PRECLUSION ON TRANSFER TO UNREGULATED ENTITY

47. The positon under Irish law—both prior to and subsequent to—the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 is that there is no statutory preclusion on a regulated entity transferring the ownership of loans to an unregulated entity.

48. Instead, the approach adopted by the Oireachtas in enacting the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 was to ensure that an entity which holds the legal title to credit granted under a credit agreement (as defined) must either (i) arrange to have credit servicing undertaken by an authorised credit servicing firm, or (ii) obtain authorisation itself. Put otherwise, the legislation implicitly recognises that a loan may be lawfully transferred to an unregulated entity. The Oireachtas has sought to protect consumers by ensuring that "credit servicing" activities are only ever carried out by a regulated entity. "Credit servicing" is broadly defined, and includes *inter alia* communicating with the borrower in relation to matters such as the taking of any necessary steps for the purposes of collecting or recovering payments due under the credit agreement from the borrower. The definition of "credit servicing" *excludes* the taking of steps by a person who holds the legal title to credit for the purposes of enforcing a credit agreement.

49. The position in this regard has been clarified by the judgment of the Supreme Court in *Launceston Property Finance Ltd. v. Burke* [2017] IESC 62; [2017] 2 I.R. 798 ("*Launceston*"). The proceedings in *Launceston* involved an application for an order of possession pursuant to section 62(7) of the Registration of Title Act 1964. The High Court had granted an order for possession, and the matter came before the Supreme Court on appeal. As part of the appeal, the defendants sought to raise, for the first time, an argument based on the status of Launceston Property Finance Ltd. That company had acquired the loans subsequent to the application for the order for possession in the High Court. It was sought to be argued on appeal that the entity now appearing as the plaintiff in the proceedings was not authorised to conduct business within the State and, accordingly, could not move to enforce the security. This argument was rejected by the Supreme Court. See, in particular, paras. 20 and 21 of the judgment.

> "[20] The Oireachtas, in enacting the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 ('the 2015 Act'), amended, *inter alia*, Part V of the 1997 Act. It did so 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. The effect of the amendment so created, as applying to this case, is that Launceston Property, as

an unregulated body, must use an agent or an intermediary which is regulated by the Central Bank. It is argued on behalf of the defendants that no such licensed intermediary has been so appointed and, accordingly, that the underlying security relative to their loan cannot be enforced in these proceedings.

[21] It is clear from, *inter alia*, the provisions of the 2015 Act that Launceston Property is not itself obliged to be 'authorised; by the Central Bank of Ireland in order to legally operate within this State, in the sense of defending this appeal. It can do so even if unregulated, subject only to the requirement as mentioned. To facilitate this, there is a system of registration in place which is governed by Part V of the 1997 Act, as amended. The question, therefore, is whether such an agent has been appointed, for if it has, that will sufficiently support the status of Launceston Property to continue with these proceedings."

50. The Supreme Court then went on to consider the separate factual question as to whether Pepper Finance Corporation (Ireland) Ltd. had been registered, and concluded that it had been.

51. At the hearing before me, Mr. Leahy in his submissions sought to distinguish *Launceston* on the basis that on the facts of that case the transfer of loans had been completed at a time *subsequent* to the commencement of the 2015 Act. Whereas this description of the chronology of events in *Launceston* is correct as a matter of fact, it does not in any way affect the legal principles identified by the Supreme Court. It is implicit in the judgment in *Launceston* that there is no preclusion on the transfer of loans to an unregulated entity. The only statutory regulation is in relation to the servicing of such loans, which must now, since July 2015, be carried out by a regulated entity. (Alternatively, the holder of the credit must obtain authorisation itself).

52. As it happens, the very argument which Mr. Leahy wishes to make in these proceedings has been addressed—and dismissed—by the High Court (Stewart J.) in *Hogan v. Deloitte* [2017] IEHC 673 ("*Hogan*"). On the facts of that case, as in the present case, the transfer of the loan in issue had taken place prior to the commencement date of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. See, in particular, paragraph [28] of the judgment in *Hogan* where the plaintiff in that case is recorded as having submitted that the behaviour complained of, i.e. the transfer of the mortgage loan to an unregulated entity, occurred before the 2015 Act came into effect. This argument is then rejected in terms by Stewart J. at paragraph [39] of the judgment.

"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. PAS is a regulated credit institution that meets the requirements of the 2015 Act. The plaintiff has complained that Shoreline and PAS failed to appraise of him of the ameliorating effect of PAS's involvement. It is the plaintiff's responsibility to appraise himself of his legal position. Indeed, based on the contents of the affidavits put before the Court, it would appear that the plaintiff is quite capable of taking the necessary steps to ascertain the status of various entities involved in these proceedings. Therefore, there is no fair bona fide question under this heading either."

53. It is noteworthy that the proceedings in *Hogan* took the form of an application for an interlocutory injunction. The High Court (Stewart J.) concluded that the argument was so weak as to fail to meet the low standard of an arguable or *bona fide* issue to be tried.

54. The principles in *Launceston* have been applied in at least two other High Court judgments. The first in time is *McCarthy v. Moroney; Moroney v. Property Registration Authority* [2018] IEHC 379 ("*Moroney*"). The judgment in Moroney is of particular assistance in that—as in the present case—it concerns the transfer of loans which had initially been provided by Bank of Scotland (Ireland) Ltd. (The judgment in *Moroney* has already been discussed under the heading "Contractual Position" above).

55. One of the principal complaints made in Moroney was that the loans had been "sold out of regulation". The High Court (McDonald J.) rejected this argument. See, in particular, paragraph [46] of the judgment as follows.

"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."

56. McDonald J.'s analysis of the effect of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 is to be found at paragraphs [67] to [70] of the judgment as follows.

"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.

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.'

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...'

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."

57. The judgment in Launceston has also been applied by the High Court (Ní Raifeartaigh J.) in *Geary v. Property Registration Authority* [2018] IEHC 727 at [34] and [35] ("*Geary*").

"*iii. Sale to unregulated entity*

This issue has been discussed extensively in a number of authorities, most recently in *McCarthy v Moroney; Moroney v. PRA* Record No. [2017] 8108 P, where McDonald J. discussed those authorities (including *Launceton Property Finance v. Burke* [2017] 2 IR 789 (Supreme court), *Hogan v. Deloitte* [2017] IEHC 673) and concluded that the law was now clear and that there was no legal basis on which to make a case that the borrower is in some way wronged by the transfer of the loan and related security by Bank of Scotland to Ennis Property, because the effect of the 2015 Act is that the borrower has the same protections in practice as he would if he was dealing with a regulated financial service provider. Again, I am not satisfied that any significantly new dimension to this argument has been raised in any of Mr. Geary's affidavits and I consider that this issue is also bound to fail.

Accordingly, I am satisfied that although the threshold is high for exercising the 'strike out' jurisdiction, as referred to earlier, this threshold has been reached in the present case and that the Gearys are essentially seeking to re-litigate matters that have already been decided in previous decisions of the High Court and Supreme Court. I therefore propose to exercise my discretion pursuant to the inherent jurisdiction of the Court to strike out the proceedings as against Bank of Scotland."

58. In conclusion, there was no statutory restriction in force which precluded Bank of Scotland from transferring the Plaintiffs' loan agreements to Pentire on 20 April 2015. The legal position in this regard has not been changed by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. The 2015 Act did not introduce a statutory preclusion on a regulated entity transferring the ownership of loans to an unregulated entity. Still less did the 2015 Act have the effect of retrospectively *invalidating* transfers to unregulated entities which had already taken place prior to 8 July 2015.

NO LOSS OR PREJUDICE

59. Taken at its height, the Plaintiffs' case against Bank of Scotland amounts to an allegation that, for a period of three months between 20 April 2015 and 8 July 2015, the Plaintiffs were deprived of the benefit of the Codes of Conduct issued by the Central Bank. This is said to be the consequence of the transfer of the two loan agreements from Bank of Scotland to an unregulated entity, namely Pentire. The claim against Bank of Scotland is confined to a claim in damages only.

60. For the reasons outlined under the previous heading, this allegation does not disclose any actionable wrong on the part of Bank of Scotland. There was nothing in the conditions of the loan agreements nor in legislation which precluded the transfer of the loan agreements to an unregulated entity. Accordingly, there is no cause of action against Bank of Scotland.

61. Moreover, and in any event, the Plaintiffs are unable to point to any loss or prejudice said to have been suffered during the three-month interregnum between the transfer of the loan agreements and the enactment and commencement of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. The provisions of the Codes of Conduct do not form part of the contract between a borrower and a lender, and cannot be directly relied upon by a borrower. The only possible exception to this is in respect of action taken by a lender to enforce security under a loan agreement, for example, by way of an application for an order for possession.

62. The legal status of such Codes of Conduct has been explained in detail in the judgment of the Supreme Court in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92. Clarke J. (as he then was), delivering the unanimous judgment of the court, indicated that there is a distinction to be drawn from those provisions of a Code of Conduct which regulate possession proceedings, and other aspects of the Code, e.g. in terms of provision of information, communication with borrowers etc.

"[63] So far as one limited aspect of the Code is concerned, it might well be said that a court making an order for possession might be facilitating the carrying out of 'the very act' which the Code is designed to prevent. As already noted, the Code imposes a moratorium on seeking possession in certain circumstances. Presumably the purpose of the Code in that regard is to provide a window of opportunity in which there can be an exploration of whether there are other solutions to the mortgage arrears problems of the borrower in question and, if there are, to take action to put those solutions in place. A financial institution which, entirely ignoring the provisions of the Code in that regard, simply went ahead and sought possession as soon as it was legally entitled so to do would be doing the very thing which the Code is designed to prevent. For a court to entertain an application for possession which was brought in circumstances of clear breach of the moratorium would be for a court to act in aid of the actions of a financial institution which were clearly unlawful (by being in breach of the Code) and in circumstances where the very act of the financial institution concerned in seeking possession was contrary to the intention or purpose behind the Code itself.

[64] In my view a court could not properly act to consider a possession application in those circumstances. It should be recorded that the Code (being the version applicable to this case) does make some provision for the moratorium period being cut short (see step four of the M.A.R.P. provisions) or not applying (see provision 48). I am, in this section of this judgment, dealing with a situation where an application for possession has been brought at a time when the Code precludes such action. Like consideration would apply to any similar provisions in the current or any future versions of the Code.

[65] However, in respect of the other provisions of the Code, different considerations apply. There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution, in formulating its detailed policies in respect of mortgage arrears and applying those policies to the facts of individual cases, can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the Oireachtas had intended to give the courts such a role

then it would surely have required detailed and express legislation which would have established the criteria by reference to which the court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law."

63. On the facts of the present case, no measures were taken to enforce the security under the loan agreements during the three-month period between 20 April 2015 and 8 July 2015. In this regard, it will be recalled that the appointment of a receiver did not occur until 19 February 2016. As of this date, the 2015 Act was in force, and if and insofar as the Plaintiffs wish to challenge the appointment of the receiver by reference to the Codes of Conduct, then this is something they can pursue against the relevant defendants. I hasten to add that I express no view whatsoever on the strength or otherwise of the claim which the Plaintiffs wish to advance against the other defendants. That is not an issue before the court in this application.

64. What is clear, however, is that the Plaintiffs have no cause of action as against Bank of Scotland. The only relief sought against Bank of Scotland is a claim in damages. In circumstances where the Plaintiffs have been unable to identify any actionable wrong on the part of Bank of Scotland, and are unable to point to any prejudice or loss said to have been suffered during the three-month interregnum between the transfer of the loan agreements and the enactment and commencement of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015, there is simply no basis on which the Plaintiffs could succeed in obtaining damages against Bank of Scotland.

CONCLUSION

65. For the reasons set out in detail above, I am satisfied that the Plaintiffs have no reasonable cause of action against Bank of Scotland. In reaching this conclusion, I have carefully considered the case as pleaded against the bank, and have *assumed* that the facts are as asserted by the Plaintiffs in the pleadings. Even taking the Plaintiffs' case at its height, the case against Bank of Scotland is bound to fail and is vexatious. The test in *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21; [2014] 2 I.R. 301 is met.

66. I will, therefore, make an order pursuant to Order 19, rule 28 dismissing the proceedings against the first named defendant, Bank of Scotland plc. I further direct that the pleas against the first named defendant in the second amended Statement of Claim be struck out.