Neutral Citation Number: [2011] IEHC 7

THE HIGH COURT

2009 5503 S

BETWEEN

ACC BANK PLC

PLAINTIFF

AND
FRANK KELLY AND ANN KELLY

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 10th January, 2011

1. Introduction

1.1 In October, 2006 the plaintiff ("ACC") lent €2,105,000.00 to the defendants (respectively "the Kellys", "Mr. Kelly", and "Mrs. Kelly"). ACC now sues for the return of the balance which is said to remain outstanding on that loan which, on ACC's case, as of the time of the trial of these proceedings, amounted to €1,951,070.32. The case has a number of unusual features to which it will be necessary to turn in due course but also has, as its basic background, a set of facts with which the courts are all too familiar in the current climate.

1.2 Both of the Kellys were school teachers for many years. However, over the last decade or so Mr. Kelly became involved in auctioneering and during the course of recent years the Kellys built up a significant portfolio of buy-to-rent properties. It would appear that, as of 2008, the Kellys owned in excess of thirty such properties which were financed both by the borrowings from ACC to which I have referred and from more extensive borrowings with Ulster Bank. The total indebtedness seems to have amounted to a sum well in excess of €7,000,000.00.

1.3 Against that background, it is hardly surprising that the buy-to-rent business has run into difficulties in recent times.

1.4 There is no doubt that from an early stage some arrears had built up on the ACC loan such that, by October, 2007, the accumulated arrears on the loan was in excess of €20,000.00. Starting from around that time discussions took place between ACC, on the one hand, and initially Mr. Kelly and subsequently both of the Kellys, on the other hand. By August, 2008 the arrears had reached a figure in excess of €80,000.00 and more significant discussions began to take place. The main issue which arises in these proceedings concerns the question of what, if anything, was agreed in the course of those discussions.

1.5 In substance, the case made by the Kellys is that, on the basis of the original loan terms and additional agreements which are said to have been reached in the course of the discussions to which I have referred, ACC was not legally entitled to demand payment of the entire loan and that the current balance, while owing, is not now due. Furthermore, the Kellys argue that there remains in place a long term financing arrangement which they are entitled to avail of. As indicated earlier, there are some unusual features to this case which are at least in part caused by the fact that the Kellys were litigants in person at the trial before me. In those circumstances, it seems to me to be appropriate to start by referring to the procedural history of this case insofar as it is relevant to the issues which I now have to decide.

2. The Procedural History

2.1 The proceedings were commenced by summary summons on the 18th December, 2009. An application to have the proceedings admitted to the Commercial List was acceded to by Finlay Geoghegan J. by order of the 15th March, 2010. By the same order it was directed that a hearing of ACC's claim for summary judgment be heard on the 14th April, 2010. At that stage, Mrs. Kelly was represented by solicitor and counsel while Mr. Kelly appeared in person. By order of the 14th April, Kelly J. adjourned the proceedings for plenary hearing and gave directions for the exchange of pleadings, the seeking of discovery and the like. When that process had concluded, the matter came back before the court (Kelly J.) on the 19th July when the 14th December was fixed as the commencement date of the hearing of the action and various directions concerning the delivery of witness statements and legal submissions were given. Mr. Kelly failed to comply with his obligations under that order to file a witness statement in the time specified. On that basis, ACC brought a motion on the 1st November seeking to have Mr. Kelly's defence struck out or, alternatively, an order that Mr. Kelly not be entitled to call any evidence. Rather than make either of the orders sought, Kelly J. made an "unless" order which provided that Mr. Kelly would be precluded from tendering evidence at the trial unless he were to deliver witness statements by Wednesday 10th November, 2010. No such witness statements were delivered either within that time scale or at all. The position is, therefore, that the order of Kelly J. became operative as of the 10th November.

2.2 In that context, it does need to be noted that Mr. Kelly did raise, at the close of ACC's case, the question of whether he would be permitted to give evidence. It seemed to me that that was far too late a stage in the process to permit Mr. Kelly to revisit the question of whether he should be permitted to give evidence. It must be recalled that Mr. Kelly did not seek to appeal the order of Kelly J.. Neither did Mr. Kelly seek to go back before Kelly J. and invite the court to vary or alter the existing order. If there was any good reason why Mr. Kelly should not be subject to the order excluding him from giving evidence, then that would have been the proper course of action to adopt. Likewise, no suggestion was made at the beginning of the case to the effect that Mr. Kelly wished to invite the court in some way to depart from the order of Kelly J..

2.3 There was a significant discussion at the commencement of the proceedings as to the way in which the case would be conducted and, during that discussion, it was made clear to Mr. Kelly that there was an order in place preventing him from giving evidence. He did not demur from that suggestion at that stage. Likewise, it is clear that ACC had operated on the basis, not unreasonably, that Mr. Kelly would not be giving evidence and that it was only necessary for ACC, so far as the facts of the case were concerned, to deal with the matters set out in Mrs. Kelly's witness statement (for a witness statement from Mrs. Kelly herself was the only witness statement tendered on her behalf). It would have been a major injustice, when ACC had concluded its evidence on the uncontested assumption that Mr. Kelly would not be giving evidence, to have permitted Mr. Kelly to then give evidence without having filed a witness statement, and in circumstances where he would almost certainly have given evidence in relation to matters on which ACC witnesses would have wished to comment. As this is an aspect of the case which will have echoes in other questions which arose in the course of the hearing, I think it is appropriate at this stage to set out the principles to be applied by the court in circumstances where it is faced with a litigant in person.

2.4 A most helpful summary of the issues and principles which arise in that context is to be found in an article by Evan Bell (a Master of the Queen's Bench and Matrimonial Divisions of the Court of Judicature for Northern Ireland) in *2010 Judicial Studies Institute Journal No.1*. Under the heading "the principles to be applied" the following is stated:-

> "The primary principle applied by Judges in cases involving self represented litigants is the principle of fairness. Fairness is the touchstone which enables justice to be done to all parties. A judge in proceedings involving a self represented litigant

must balance the duty of fairness to that litigant with the rights of the other party and with the need for as speedy and efficient judicial determination as is feasible. Achieving this balance is one of the most difficult challenges a judge can face. While a trial judge's overarching responsibility is to ensure that the hearing is fair, it is not unfair to hold a self represented litigant to his choice to represent himself. A litigant who undertakes to do so in matters of complexity must assume the responsibility of being ready to proceed when his case is listed. If he embarks upon the hearing of his case, he is representing to the court that he understands the subject matter sufficiently to be able to proceed. Although it may later become patently obvious that he is not, litigants who choose to represent themselves must accept the consequences of their choice. While the court will take into account the litigant's lack of experience and training, implicit in the decision to represent himself is the willingness to accept the consequences that may flow from that lack. Indeed, to hold to the contrary would mean that any party could derail proceedings by dismissing his representatives.

It is the courts duty to minimise the self represented litigant's disadvantage as far as possible, so as to fulfil its task to do justice between the parties. However, the court should not confer upon a personal litigant a positive advantage over his represented opponent nor is it the position that the party with the greater expertise must be disadvantaged to the point at which they have the same expertise effectively as the other party. That would be a perversion of what is required, which is a fair and equal opportunity to each party to present its case."

2.5 I fully agree with the views expressed in that passage which cites as authority the cases of *Director of Child and Family Services (Man) v. J.A.* [2006] M.B.C.A. 44 (Can LII), *Wagg v. Canada (F.C.A.)* [2004] 1 F.C. 206, *R. v. Broadhead* [2006] E.W.C.A. Crim 3062, *Hussey v. Dillon & Ors* (Unreported, High Court, Costello J., 23rd June, 1995) and *Rajski v. Scitec Corporation PTY Ltd* (New South Wales, Court of Appeal, Unreported, Samuels J.A., 16th June, 1986).

2.6 No represented party who had failed to file witness statements in time, had been subject to an unless order of the type made by Kelly J. in this case, had failed either to appeal that order or seek to have it reviewed, and had allowed the case to proceed to the end of the presentation of his opponent's evidence, could remotely expect to then be allowed to give evidence. Nor, having allowed the case to proceed that far, could any such represented party have even a remote chance of suggesting that the proceedings should then be derailed by allowing a belated filing of a witness statement necessitating a significant adjournment to allow the proceedings to commence again when his opponent had had the opportunity to consider that witness statement and, certainly so far as the facts of this case are concerned, assemble witnesses who might have been necessary to deal with it. Mr. Kelly cannot expect to gain an advantage because he is a litigant in person. To have allowed him to do what he wanted would have been to give him an advantage which no represented litigant could even remotely hope to obtain and for those reasons I decline to allow him to give evidence.

2.7 I appreciate that the passage quoted from Master Bell makes reference from time to time to a person who "chooses" to self represent. It may well be that in many cases the party concerned has no real choice in the matter for they may not be able to afford legal representation. That may well be a factor to take into account in deciding precisely how to deal with difficult situations which may arise in the course of a trial. However, whether a person represents themselves of choice or of necessity does not alter the overriding requirement that the conduct of the trial must be fair to both sides, and that the fact that a person is, for whatever reason, unrepresented cannot be allowed to operate as an unfairness to the represented party.

2.8 It is next necessary to turn to the position of Mrs. Kelly. It would appear that, due to financial difficulties, Mrs. Kelly was unable to retain the services of the lawyers who had prepared the case on her behalf. I understand that those lawyers were allowed come off record in the run up to the trial and that Kelly J. declined to permit an adjournment of the proceedings thereafter. At the start of the hearing Mrs. Kelly presented a lengthy document which she asked to have treated as her defence in substitution for the document which had been filed by her lawyers. For reasons which I set out in an ex-tempore ruling given on that occasion, I did not make the order sought by Mrs. Kelly but did allow two aspects of that document to be considered as part of her case. The principal case made in the formal defence filed on behalf of Mrs. Kelly was that an arrangement or agreement had been reached between the Kellys and ACC in the course of the meetings to which I have referred, the substance of which was that, provided certain steps were taken by the Kellys, ACC would not seek to call in the loan. It will be necessary to refer in more detail to that case in due course. In its written submissions ACC made the case that even if, contrary to its evidence, any such agreement or arrangement was entered into, same could not be a legally enforceable contract because, it was said, it was not supported by any consideration given by the Kellys to ACC. In the course of the proposed amended defence which Mrs. Kelly proffered, an alternative basis for maintaining the enforceability of any such arrangements was set out, being a claim in promissory estoppel. While in the ordinary way I would have been reluctant to allow a defendant to make such an alteration at the last minute, it seemed to me that, having regard to the fact that Mrs. Kelly was a litigant in person , that the factual basis for her plea of promissory estoppel was not significantly different from the factual basis that was already on the table as a result of the defence filed, and the fact that it did not seem to me that ACC would have any difficult in putting forward whatever legal arguments it wished to on the topic, I decided to allow the defence to be amended by including in it a reference to the promissory estoppel argument.

2.9 Much of the remainder of the relevant document consisted of a recitation of facts relating to dealings between the Kellys and ACC. It did not seem to me that the matters set out in that aspect of the document consisted, in reality, of matter that should be included in a defence as such but rather amounted to material that should more properly be included in a witness statement. Neither did it seem to me that the relevant material went significantly beyond the bounds of what was already "in the case" as a result of the documents filed. In those circumstances I indicted that I would be prepared to treat that aspect of the relevant document as a supplementary witness statement which did not go beyond a reasonable and acceptable elaboration of the matters which were contained in Mrs. Kelly's original witness statement.

2.10 Finally, it should be noted that Mrs. Kelly did seek, in that document, to raise a further legal question being a contention that the original bank loan was procured by undue influence. The factual basis for that contention seemed to be an assertion that Mrs. Kelly did not fully understand, and did not have properly explained to her, material terms in ACC's facility letter. It would have been difficult, in any event, to see how such facts could constitute undue influence on the part of ACC. In addition, it was obvious that allowing a claim for undue influence to be made would have required a significant adjournment for ACC would undoubtedly have been entitled to detailed particulars of the allegation and to a further witness statement of any evidence to be tendered in support of same. ACC would then itself have to have filed additional witness statements, almost certainly from witnesses not otherwise intended to be called, for it was clear that those witnesses whom ACC intended to, and did in fact, call were those persons who were involved not in the original setting up of the loan arrangement, but rather in dealing with the loan once it became problematical. For like reasons to those which I have already addressed in respect of Mr. Kelly's suggestion that he might be allowed to give evidence, it did not seem to me that it would be fair in all the circumstances to allow an entirely new and separate element to be introduced into the defence at such a late stage particularly when there seemed little real basis for the claim.

2.11 Therefore, the case proceeded on the basis of the defence originally filed in person by Mr. Kelly but with Mr. Kelly not permitted

to give evidence. Mrs. Kelly's defence was amended to allow the plea of promissory estoppel and she was allowed to give evidence in accordance with both her original witness statement and much of the factual material contained in her proposed amended defence.

2.12 Against that background it is necessary to turn to the issues.

3. The Issues

3.1 As noted earlier, the central issue in the proceedings was as to whether an agreement or arrangement had been entered into at one or other of a series of meetings between the Kellys and ACC, the substance of which was that, provided the Kellys took certain steps designed to improve the position of the loan in question, ACC would not call in that loan. As originally pleaded in Mrs. Kelly's defence, that claim was based on contract. For the reasons just addressed, the defence was also permitted to proceed on the basis of promissory estoppel.

3.2 A second aspect of the arrangements said to have been entered into between the parties in the course of those meetings was also an issue of some substance. As will become clear when dealing with the facts, the Kellys sold two of the properties over which ACC had security. At that stage a question arose as to how the net proceeds of sale would be dealt with. At the relevant time it was clear that the properties as a whole were not generating a sufficient net rent to cover the interest anticipated to be due on the loan and that this situation would continue after the properties concerned had been sold. There is no doubt but that the Kellys put forward a suggestion that some of the net proceeds would be, as it were, ring fenced to provide a fund out of which any continuing shortfall thus arising could be met. The Kellys asserted that ACC had agreed to this proposition but ACC strongly contested that allegation.

3.3 In addition to those central issues, some other questions arose in the course of the hearing on which it is necessary for me to rule. They were as follows:-

> (a) In his defence, Mr. Kelly put forward an accusation that ACC had wrongfully put in place a receiver over the properties and that the actions of the receiver were also wrongful;
>
> (b) Mr. Kelly also raised questions concerning the proper execution of the mortgage deed; and
>
> (c) The Kellys contested the way in which ACC had added surcharge interest to their account.

3.4 Against the background of those issues, it is next necessary to turn to the facts. While there are a number of areas on which there is a conflict of evidence, it is possible to give a broad description of the dealings between the parties which is not controversial. I therefore turn to the facts.

4. The Facts

4.1 The loan agreement between the parties is dated the 6th October, 2006 and provides for the advance by ACC to the Kellys of the sum of €2,105,000. The stated purpose of the loan was to allow the Kellys to purchase two additional residential properties as investments and also to refinance borrowings which the Kellys had in respect of six other investment properties. The specified interest rate was 1.5% above EURIBOR. The loan facility is stated to be "repayable on demand". It is stated in addition that:-

> "Until demand is made or the loan facility (principle and interest) is repaid in full, repayments by the borrower of principle and interest shall be by monthly instalments by direct debit commencing one month from the due date of drawdown of the loan facility."

4.2 The same term provided that the first 36 months should be interest only but that thereafter principal and interest was to be repayable.

4.3 Security for the borrowings was stated to include a first legal mortgage and charge in favour of ACC over each of the eight properties in respect of which monies had been advanced. It is not disputed but that the relevant monies were drawn down and, subject to the execution point referred to, that the relevant security was put in place. In that context it was drawn to my attention by Mr. Kelly that the copies of the relevant mortgage and charge documents which were available in court did not appear to have been executed by ACC although same were undoubtedly signed and sealed both by Mr. and Mrs. Kelly. This a point to which I will return in due course.

4.4 There is no doubt but that significant arrears began to develop from quite an early stage on the loan facility. As indicated earlier by August 2008, the sum in arrears was in excess of €80,000.00. That sum needs to be seen in the context of the fact that the then current interest payments were just over €11,000.00 per month so that the arrears were significant by any measure. In assessing the level of arrears it also needs to be taken into account that the loan was, at that stage, interest only.

4.5 In October, 2007 a meeting had been arranged between an Aidan Cawley of ACC and Mr. Kelly to discuss the arrears which then stood at just over €20,000.00. Mrs. Kelly made, in the course of the hearing, some complaint about the fact that, at the initial stages of engagement by ACC in respect of the arrears, contact had been made solely with Mr. Kelly. There is no doubt that that is so. In that context it should be noted that the loans were at all times with both Mr. and Mrs. Kelly and it would have been totally inappropriate for ACC to seek to enter into any arrangement in respect of the loans without involving Mrs. Kelly. However, in reality, nothing of substance appears to have occurred at those earlier meetings which were not attended by Mrs. Kelly. In addition, it should be noted that, from quite an early stage (although not the beginning), correspondence from ACC was addressed to both Mr. and Mrs. Kelly at their home address. It would appear that Mrs. Kelly contends that she did not see that correspondence. Whatever may be the truth of that matter, it does not seem to me that ACC can be blamed where it addresses correspondence jointly to a married couple at their home address, if it should transpire that the correspondence was not brought to the attention of both parties unless, perhaps, ACC were aware that there were difficulties which might reasonably lead to the view that correspondence was not being shared. There is no evidence to suggest that ACC should have had any such concerns.

4.6 In any event, by the time matters came to a head in the middle of 2008, Mrs. Kelly was fully involved. The case was, from an internal ACC perspective, sent forward to its Special Asset Management Department in late July or early August 2008. A series of meetings followed the first of which occurred on the 12th August and was attended by Mr. Cawley and Mr. Darren Cranston for ACC. There are significant differences between the parties as to what actually occurred at those meetings although there is no doubt that there was, at least in general terms, a discussion about how the problem with the loan arrears should be addressed, the need for the Kellys to provide additional financial information and the need to sell at least some of the properties which were the subject of the ACC loan. The position in respect of the loan at that time (August 2008) should be recorded. The arrears had then grown to €83,456.00. The current interest payment was €11,241.00 per month so that the arrears represented between seven and eight

months interest. The loan remained interest only at that stage. In addition, and on the basis of figures given by the Kellys to Mr. Cranston, who was the official from the Special Management Agency who had carriage of their case, it appears that the total rental income on each of the eight properties which were the subject of the ACC loan was €8,250.00 per month from which it was suggested that a sum equivalent to 8% might be deducted to fund management costs leaving a net expected lodgement to the loan account of €7,590.00 per month. There was, therefore, a shortfall of €3,651.00 between the interest payment and what was anticipated to be the net rental income. It does appear that the Kellys had some proposals about other business projects which they hoped might provide additional funds to help meet that shortfall. However, none of those proposals appear to have been particularly concrete at the time when discussions commenced. There was, therefore, a significant problem with the loan. It had built up significant arrears and continued to operate on the basis that there were insufficient funds even to meet interest. There was, at a minimum, no immediate basis on which that shortfall could be bridged. Against that background, it is hardly surprising that the question of a disposal of at least of some of the properties was discussed. On ACC's case, nothing specific was decided at that original meeting although it is agreed that a discussion took place as to the sale of a number of properties.

4.7 It should be noted that the Kellys had prepared what was described as a restructuring plan prior to that first meeting on the 12th August. At para. 4 of that plan, under the title "Sale of Properties", the Kellys noted that they would reduce the size of the portfolio through the sale of less viable and more saleable properties. The relevant paragraph continues with the statement that the Kellys "will continue to reduce our debts in this manner and to ensure a continuous stream of income on these accounts until such a time as our other business interests can adequately subsidise the borrowing or the terms of the loan can be renegotiated".

4.8 That document certainly conveys a proposal that properties will continue to be sold until such a time as there was sufficient alternative income to make up any shortfall between the net rent being received and the interest payments which were required to be made. It should also be noted that, at that time, it was broadly the view of all concerned that the value of the properties was roughly the same as the outstanding debt. For example, on the basis of figures given by the Kellys at the initial meeting on the 12th August, a total suggested acceptance price on the eight properties concerned (which was the asking price less 15%) came to €2.176m while the total debt was €2.184m. A further meeting took place on 22nd August. It will be necessary to return to these August meetings again in due course.

4.9 It would appear that two of the eight properties were then put on the market being a property known as 35 Cedarfield and a property known as 4 The Park. By the 21st November, when a further meeting took place, it seemed that a sale was progressing in respect of 35 Cedarfield but a sale in respect of 4 The Park had only been agreed in the week prior to the relevant meeting. During this period, a number of issues seem to have arisen between ACC and the Kellys.

4.10 First, as has been pointed out, there was undoubtedly an acceptance by the Kellys at the August meetings that certain financial information would have to be given to ACC. ACC complained that that information either had not been provided, was being provided late or was incomplete when it was provided.

4.11 Second, ACC made complaint that the amount of net rent which was being received fell significantly short at what had been anticipated at the August meetings. It will be recalled that, having made allowance for an 8% management cost, a sum of the order of €7,500.00 per month was anticipated to become available as net rent. While the amounts which came in varied from time to time (and while the Kellys in evidence gave an account as to where any shortfall might have gone – an issue to which it would be necessary to return) there can be no doubt that the net rent actually paid to ACC during this period fell significantly short of what had been anticipated at the August meetings.

4.12 In addition, there were disputes between the parties as to whether vacant possession of any properties to be offered for a sale should be obtained. From the Kellys' perspective, the obtaining of vacant possession obviously meant that there was less rent available to service the loan. From ACC's point of view, the properties would be more easily sold with vacant possession. Both sides gave evidence as to what was said to them by the auctioneer, appointed by the Kellys, who had carriage of the sales in question. However, as neither side chose to call the relevant witness any such evidence was merely evidence of what was said and cannot be evidence of the truth of the matters communicated. It should, however, be recorded that the fact that the auctioneer concerned seems to have given an account to ACC of his advice to the Kellys which differs from what Mrs. Kelly says was, in fact, that advice (and what the Kellys undoubtedly told ACC was the advice) was a significant point of distrust at the time. I should, at this point, comment that, in the course of the hearing, Mrs. Kelly made an accusation that the auctioneer in question might have deliberately misinformed ACC as to the advice he had given to the Kellys. In circumstances where no evidence had been put forward in any of the witness statements filed which could remotely have justified such a conclusion, it was, in my view, a most improper suggestion to make in circumstances where the person concerned was, to Mrs. Kelly's knowledge, not there to defend himself. I have, in those circumstances, refrained from naming the auctioneer in this judgment.

4.13 There seems little doubt but that at the meeting of the 21st November, a proposal was put forward which was to the effect that a fund should be created from the net proceeds of sale of the two properties which were in the course of sale which could then be used to meet any shortfall between interest payments and net rental income. As this is a matter of some dispute, it is a question to which I will have to return.

4.14 By early 2009, ACC continued to have concerns about the way in which things were going. Mr. Cranston wrote on the 15th January to the Kellys outlining his continuing concerns that the sales of the relevant properties had not closed, that the full net rent was not being received by ACC, that the properties were not being vacated and that the level of arrears was increasing. A subsequent meeting took place on the 22nd January where, amongst other things, a discussion took place about why the full net rent was not being received. An explanation was given that a significant sum of money had to be spent on refurbishing a property. In addition, at that meeting, a letter dated the 22nd January was handed over by the Kellys to ACC in response to Mr. Cranston's letter of the 15th January. On at least one reading of that letter, it appears to confirm that an auctioneer had been appointed to sell all of the properties although it should be said that the Kellys contest that reading of the letter. It may well be that the letter is ambiguous and conveys a different impression to a reasonable reader than that which was intended.

4.15 At this stage, it is also necessary to note that the solicitors who acted on behalf of the Kellys in the sale of the two properties to which I have referred (O'Sullivan & Partners) were recommended to them by ACC. It must again be noted that accusations of conflict of interest were quite freely made by Mr. Kelly in the course of the hearing against that firm. However, it is absolutely clear from the contemporaneous written record that the genesis of the retention by the Kellys of O'Sullivan & Partners came from a request made by the Kellys (in fact, by email of the 23rd October, 2008, sent by a son of the Kellys who attended some of the meetings with them and who corresponded with ACC on their behalf) to ACC to recommend a firm of solicitors in circumstances where it was stated that the Kellys were not entirely happy with the service which they had received from their previous solicitors. All that ACC did was to comply with the request from the Kellys to suggest the names of some firms of solicitors who might be acceptable. In those circumstances, to suggest that there was a conflict of interest was wholly untenable.

4.16 In passing, and as this is the second occasion on which I have had to comment on accusations made in the course of the hearing, it is important that I note that court proceedings are conducted on the basis of absolutely privilege. What is said in open court can be reported quite properly by the media without any fear of being sued for defamation. There are important public policy reasons why that should be so. However, with the advantage of absolute privilege comes obligations on the part of those who become involved in court proceedings. The conduct of proceedings under absolute privilege should not and cannot be permitted to be abused. As I pointed out during the hearing, if a professional lawyer, whether solicitor or counsel, had made the sort of accusations which I have identified and which were made by both of the Kellys, in circumstances where there was no evidential basis for the accusations concerned, where persons against whom the accusations were being made were not there to defend themselves and where, at least in the main, the accusations had not even been pleaded and also having regard to the seriousness of the accusations, there can be little doubt but that such an action on the part of a professional lawyer would have amounted to significant misconduct worthy of consideration by the relevant professional body. While it is, of course, important to take significant regard of the fact that the Kellys are not trained in the court process, it nonetheless is, in my view, a matter of legitimate and significant criticism that they were both prepared to make serious accusations without any evidential basis against people who were not in court to defend themselves and where there was no reasonable expectation that those persons would have an opportunity to so defend themselves.

4.17 In any event, the sales ultimately closed and the net proceeds were, in May, applied first in clearing the arrears to date and then in reducing the principal sum owing. However, before that, on the 16th April, Mr. Cranston wrote to the Kellys informing them of ACC's decision to call in the loan. In evidence Mr. Cranston indicated that his reason for making a recommendation to ACC's credit committee (who had ultimate control in respect of these matters) to take that course of action was because of what he considered to be the continued failure on the part of the Kellys to deal adequately with the loan, and also because he had become aware of a judgment against Mr. Kelly attaching to one of the properties. In the context of attempting to close the sale of one of the properties, it became clear that there was a judgment registered as a judgment mortgage which ACC had, in substance, to clear in order to allow the relevant sale to go through. On the 12th May, O'Sullivan & Partners sent a cheque for €414,055.38 to ACC which was used to clear the arrears which were then at €128,871.58 and further to reduce the principal sum to €1,811,036.86. A further letter of demand for the new balance outstanding was made on the 20th May (by which stage the sum had grown to €1,831,824.18) and thereafter Simon Coyle of Mazars was appointed as receiver by deed of appointment dated the 28th May, 2009. I propose dealing with events subsequent to the appointment of the receiver when dealing with Mr. Kelly's claims in the respect of both the appointment of and conduct by the receiver.

4.18 It will be seen that there are two significant conflicts of evidence between the parties arising out of that broad course of dealing. The first concerns whether there was an agreement between the parties that, in the event that the Kellys took certain specified actions, ACC would not call in the loan. The second concerns the alleged agreement by ACC to create a fund from which any shortfall between net rental income and interest could be met. For reasons which I hope will be come apparent I propose dealing with the second of those issues first.

5. The Contingency Fund

5.1 As indicated earlier, there is no dispute but that Mrs. Kelly put forward such a proposal at the meeting of the 21st November, 2008. It is also clear that O'Sullivan & Partners put forward a similar proposal on the Kellys' behalf by letter of the 16th February, 2009. However, it is equally clear that ACC did not accept that proposal and that O'Sullivan & Partners ultimately accepted ACC's view that the monies should be paid to discharge firstly the arrears with the balance being used to reduce the principal sum. That such an agreement was reached between O'Sullivan & Partners, on behalf of the Kellys, and ACC is evidenced by a letter from ACC to O'Sullivan & Partners of the 20th February, 2009. It is, therefore, clear that there was no agreement to create a contingency fund to meet any shortfall between net rent and interest.

5.2 In the course of the hearing I invited Mrs. Kelly to indicate what evidence there might be to suggest that ACC had agreed to the creation of such a fund. Mrs. Kelly did not give evidence that ACC had agreed to this matter at the meeting of the 21st November, 2008. Indeed, if there had been an agreement at that meeting, it would have been surprising if Mrs. Kelly had not instructed O'Sullivan & Partners that there was already in place an agreement to that effect which would have led to an entirely different line of correspondence when the matter was raised by O'Sullivan & Partners in the lead up to the closing of the sales. Mrs. Kelly indicated that there was "an email" from O'Sullivan & Partners which, in her view, indicated that ACC had agreed to the arrangement. However, she was unable to produce any such email. In addition, no reference to any such email was made in the documents disclosed by her under oath as part of the discovery process. If there was such an email, it is surprising in the extreme that it would not have been referred to in discovery or even if an omission had been made in that regard, that it was not available in court given the importance attached to the issue by the Kellys. In any event, even if something had been said by O'Sullivan & Partners to the Kellys, same would not amount to evidence of agreement by ACC to such a course of action unless the person from O'Sullivan & Partners were called to give evidence that ACC actually agreed to the course of action proposed. There was, of course, no such evidence.

5.3 On this point the evidence is overwhelming. The Kellys sought, but were refused, the facility to create a contingency fund. All of the contemporaneous documentation is consistent with that fact. There is just no evidence (let alone insufficient evidence) for the contention which is put forward on behalf of the Kellys that ACC agreed to such a suggestion.

5.4 That conclusion leads to an obvious further question. Mrs. Kelly maintained in evidence that there was such an agreement. She persisted in that point of view despite having all of the contemporaneous documents drawn to her attention and despite her inability to point to any evidence to the contrary. In the course of an entirely legitimate cross examination of Mrs. Kelly by counsel on behalf of ACC, it was put to her that her account of these matters (and indeed other matters) could not be believed. Mrs. Kelly, despite having made many serious accusations against others herself, took significant umbrage at that suggestion. However, on balance I have come to the view that Mrs. Kelly was not deliberately misleading the court when she indicated that she believed that ACC had agreed to create a contingency fund. However, it is absolutely clear on the evidence that ACC did not so agree. The only reasonable conclusion to draw is that Mrs. Kelly has come to believe something which did not, in fact, happen. I am afraid that this has to be put down to wishful thinking. It would have been a nice thing from the Kellys point of view if such a contingency fund could have been created. The situation that pertained at the relevant time needs to be analysed. Two properties had been sold. ACC's security was, therefore, being reduced from eight properties to six properties. However, there was not a proportionate reduction in the principal sum owing. This was partly due to the fact that there were significant arrears which had to be cleared first. It was also due to the fact that the properties had not achieved as good a sale price as might have been anticipated the previous August. There is no suggestion that the properties were in any way sold at an under value. It is just that the market was worsening. However, the overall position was that there were now to be only six properties generating rent thus significantly reducing the net rental income that might be anticipated while the principal sum would only be reduced by a much smaller percentage. It was clear that there would continue to be a significant shortfall between net rent and interest against which the Kellys had no additional income to put up. Without a

contingency fund, there was a real risk that arrears would begin to build up again quickly and significantly.

5.5 However, from ACC's point of view allowing a contingency fund to be created would mean that ACC would, in effect, be advancing more money (by foregoing its entitlement to have that money paid against principal) to pay off interest on its own loan. In circumstances where the number of properties over which it held security was being reduced that would not seem to make sense from ACC's point of view.

5.6 Having had the opportunity to review all the evidence, I have come to the view that Mrs. Kelly has persuaded herself, contrary to all the evidence, that ACC did agree to that proposal. It is, in effect, as I have said, wishful thinking. I do not accept that she deliberately told untruths in her evidence. However, I do accept that her evidence is significantly at variance with what actually happened. As indicated, I put that down to her having persuaded herself, through wishful thinking, that things happened when they did not in fact happen and when all of the contemporaneous records indicate the opposite. It seems to me that that finding has some relevance to the other issue which is as to whether an agreement was reached in August, 2008 to the effect that ACC would not, provided certain steps were taken by the Kellys, exercise any right which it might have to call in the loan. I turn to that issue.

6. The Alleged August Agreement

6.1 As will be recalled there were two meetings in August 2008. The evidence give by ACC's witnesses was clear and was to the effect that no concluded agreement was reached at either or both of those meetings. Rather it was said that there was a general discussion on how the undoubted problem concerning arrears on the Kelly's loan would be addressed. It was accepted by each of the relevant bank witnesses that amongst the matters under discussion was the possibility that some of the properties would be put up for sale. Indeed that possibility was first broached by the Kellys in the restructuring plan document to which I have already referred. Likewise, it was accepted by the ACC officials present that there had been a discussion about the available net rent to be paid to meet interest accruing. In some of the contemporaneous records and correspondence there is reference to the Kellys "agreeing" to pay what was anticipated to be the rent less an 8% management charge. However, it does not seem to me that any agreement to pay that sum could, certainly of itself, amount to a contract or binding agreement. The Kellys were already obliged to pay the full interest on the loan. By agreeing to pay over the net rent, the Kellys were doing no more than agreeing to do what they were already obliged to do.

6.2 In addition, it is clear that ACC requested and the Kellys agreed to provide additional financial information. Again, such an arrangement is hardly surprising in the context of a situation where a borrower is in significant and increasing arrears and where it is in the interest of all concerned to see how that matter might be addressed. Likewise, I have no doubt that it was in the interest of both ACC and the Kellys to explore whether the problems with the loan arrears could be addressed without ACC taking any form of enforcement action. There is no doubt but that, from the perspective of a financial institution, the taking of enforcement action carries with it a cost. Apart from the costs of enforcement which the financial institution may itself have to bear both in time and in money there are also many circumstances in which the financial return from matters such as the sale of property is likely to be less on foot of a forced sale when compared with a voluntary action on the part of the borrower.

6.3 In cross examination, Mrs. Kelly was pressed to be specific about both when the alleged agreement was reached and the precise terms of it. After some hesitation, Mrs. Kelly ultimately indicated that it was her evidence that an agreement was reached at the first of the August meetings being that of the 12th. It seems to me to be highly improbable that this could be the case. A short number of days after that meeting (on the 14th) Mr. Cranston wrote to the Kellys. The whole tenor of that letter is completely inconsistent with the suggestion that any form agreement had been reached. The first substantive paragraph seeks detailed further information under seven separate bullet points. The next two paragraphs refer to a discussion about putting a number of properties for sale so as to reduce the debt burden to a manageable level but Mr. Cranston goes on to state "if this is your preferred option I would need details of the properties…along with asking price and details of any capitals gains tax…".

6.4 In addition, one of the matters on which further information was required was as to how the shortfall between the interest payment and the net rent was to be bridged.

6.5 That letter is wholly inconsistent with any agreement having been reached on the 12th, indeed it points in the opposite direction. If the Kellys or either of them had really believed that they had an agreement in place at that time, it is most surprising that they did not reply to that letter making at least some reference to the fact that, rather than matters being subject to discussion, further information being required and the like, there was actually an agreement in place. No such response was sent. Immediately prior to the second meeting, an email was sent by a son of the Kellys (Diarmuid Kelly) on the 21st August to Mr. Cranston referring to progress on some of the information which had been sought and also indicating that the arrears were to be cleared through sale of properties. The only correspondence which immediately followed that meeting related to the setting up of an account which was designed to facilitate the payment of monies in respect of net rent to ACC. There is no contemporaneous record on either side of the meeting itself.

6.6 Having considered all of the evidence, I have come to the view that, on the balance of probabilities, no agreement was reached at either of the August meetings (or at any other time) whereby ACC agreed that it would not enforce its entitlements under the letter of loan sanction provided that certain steps were taken by the Kellys. In my view, what occurred was that there was a discussion on various ways in which the Kellys might be able to improve their situation in respect of their loan. It was, after all, the Kellys who proposed selling property in the restructuring plan. In my view, ACC accepted that it would go along with the attempts of the Kellys to regularise matters by allowing the properties to be sold, by assessing the additional financial information which was anticipated, and by seeing how things developed. There was, at that stage, a prospect of the Kellys having potentially some other sources of funds, at least some time in the future, to meet any shortfall between interest and net rent. Clearly, if that shortfall could be reduced by the sale of some of the properties (particularly if they were well chosen) and if some such additional income could arise, it might be possible to bridge the gap.

6.7 I have no doubt but that the relevant ACC officials gave the impression that, provided that that gap could be bridged, it was unlikely that ACC would take any precipitated action. There is, however, a significant difference between a general discussion about how arrears might be addressed, on the one hand, and a concrete binding agreement to the effect that ACC could not call in the loan provided certain steps were taken, on the other hand. For one thing, in order for there to be a binding contract between the parties, at least all important terms would need to be clear, and agreed. While the properties were to be sold, there is no suggestion that any particular level of reduction in debt was thereby to be achieved. As pointed out earlier, the fact that it took a lot longer to close sales on the two properties in question coupled with the fact that those properties did not achieve the price that might have been hoped for in respect of them led to a lesser reduction in the liabilities than might have been expected. On the basis of the acceptance prices given at the meeting on the 12th August, the combined anticipated sale price of the two properties in question was €481,000 which might have been expected to generate net proceeds of perhaps €460,000 or almost €50,000 more than was ultimately achieved. As noted earlier, no blame can be attached in respect of that shortfall but it nonetheless was there. Likewise, the arrears

had grown during the period between the August meetings and the ultimate receipt by ACC of the net proceeds of sale by a figure of over €45,000. The net position after the sales of the properties was, therefore, not far short of €100,000 worse than might have been expected the previous August.

6.8 It seems highly improbable that ACC would have committed itself to waiving any entitlement of enforcement which it might have had without at a minimum agreeing on the scale of reduction which was to be achieved by property disposal. There is no such suggestion that any such term was even discussed.

6.9 Likewise, it is difficult to see how the sale of the properties concerned was likely to provide a complete answer to the shortfall. Unless the so called contingency fund were set up then, even from the more benign perspective of the previous August, it was clear that there was likely to be something of a shortfall even after the properties had been sold. Arrears would then immediately begin to build up again. There is no suggestion in Mrs. Kelly's evidence that the question of the creation of a contingency fund was discussed back in August. How then was the sale of the properties to provide a complete answer to the problems with the loan as of August 2008. It again seems highly improbable that ACC would have agreed to an arrangement to forego its right of enforcement without there having been an agreement reached on precisely how the loan was going to be serviced after the arrears had been cleared by the sale of the properties.

6.10 Indeed, Mrs. Kelly seemed to me to have significant difficulty in identifying, with any precision, the terms of the alleged agreement. For example, it is clear that there was an acceptance at the August meetings that the Kellys would lodge net rent of €7,590.00 per month. It there was an agreement, was this a term of it? It seems highly improbable that ACC would have entered into a binding agreement without imposing such a term. If there was such a term then the Kellys were in clear breach of it. In that contest it matters not why some of the net rent was not received by ACC. If the contract required the Kellys to lodge the net rent then it would have been a breach of contract not to have done so without ACC's prior agreement. I am not satisfied that ACC gave such agreement. Indeed, all of the correspondence points in the opposite direction.

6.11 For all of these reasons and having regard to all of the evidence which I have carefully considered, I have come to the view that there was no agreement reached at the August meetings of the type suggested by the Kellys. There was, I am satisfied, an acceptance on the part of ACC that the Kellys would be given an opportunity to see if things could be remedied on the understanding that if they were remedied in a satisfactory way, it was highly unlikely that ACC would want to go through with any form of enforcement. There was no agreement to vary the contract of such. There was an understanding that the Kellys would be given an opportunity to see if they could put their house right and there was an implicit acceptance on the part of ACC that no immediate action would be taken so as to afford the Kellys such an opportunity. To the extent that Mrs. Kelly gave evidence that there was such an agreement I have concluded that this, again, can be put down to wishful thinking.

6.12 Against the background of those findings of fact it is next necessary to turn to the legal position.

7. The Legal Consequences

7.1 The starting point for any consideration of whether the Kellys owe the sum claimed by ACC must be a consideration of whether ACC was entitled to call in the loan as it purported to do on the 16th April, 2009 by means of Mr. Cranston's letter to the Kellys.

7.2 The loan was expressed to be payable on demand. Mrs. Kelly indicated in evidence, and both of the Kellys argued, that they were unaware that the loan was a demand facility. The loan is, however, clear in its terms. It says that it is repayable on demand and that the terms concerning payment of interest only for a period and interest and principal over an extended period are stated to be what is to happen in the absence of a demand. This is not exceptionally technical language. The ordinary meaning of the term demand in English is that a person insists on something happening. The ordinary meaning of a loan being repayable on demand is that a person who gives the loan is entitled to demand repayment. The terminology used in describing the other repayment terms is again clear. Those terms only applied where there is no demand. It is by no means unusual for commercial property lending facilities to be payable on demand.

7.3 I am not satisfied that any person taking the trouble to read the clause in question could have any difficulty in understanding what it meant. Even if someone had such difficulty then it is encumbent on such a person to take advice. It must be remembered that these are not consumer transactions. The Kellys were involved in quite a significant business and had borrowings in excess of €7m. This was, therefore, a commercial banking transaction. Many people in such circumstances do take professional advice whether from accountants of lawyers. There is no obligation, of course, so to do. But someone who signs commercial banking documents without taking advice on them runs a risk which they must accept. They will be bound by the terms which they sign up to.

7.4 Of course if a bank or its officials actively mislead someone as to what the terms mean then matters may be different. If the written terms of a bank facility letter do not correspond with what was discussed between the parties in the sense that something different was agreed or where the financial institution concerned misrepresents the meaning of the agreement then the situation may again be different. It is, however, no defence on the part of someone who has decided, for whatever reason, to sign a commercial banking document for that person to later turn around and say they did not understand what they were signing.

7.5 If the person does not have an opportunity to properly read the document then they should insist on such an opportunity and should not sign the document until they have been given an adequate opportunity to read it. If they sign it without adequately reading it then they must accept the consequences. If having read it there are terms or provisions which they do not properly understand then again they should not sign it unless and until they have taken advice. If they do sign a document whose terms they do not fully understand without taking advice then again they must accept the consequences. By signing a commercial banking arrangement, a borrower agrees to be bound by the terms of that arrangement and if the borrower has not taken the trouble to adequately read the document or be adequately informed as to its meaning then the borrower must accept the consequences of having signed a commercially binding agreement in those circumstances. After all, those are the terms on which the borrower gets the money. The borrower has taken the money. The borrower cannot then turn around and say that the terms were not properly understood unless the relevant financial institution has been guilty of legal wrongdoing in the way in which the contract came to be signed such as by misrepresenting its contents or the like.

7.6 To say that other financial institutions might have lent money on different terms is not an answer. If the terms matter then the borrower should compare the terms on offer from the financial institution concerned with those on offer from any other financial institution and if they be different and the difference cannot be negotiated out of the way and if it be important to the borrower, then the loan should not be taken. It is not open to a borrower to disregard the terms and then complain about them later when they do not suit. The time to see that they suit is before signing the contract.

7.7 I have no doubt, therefore, that this agreement was a demand facility, which, at least at the level of principle, entitles ACC to

demand payment at anytime. There is, in my view, a possible legal issue as to whether a financial institution, having the benefit of a demand facility, is entitled for no reason at all to call in the loan in question. Certainly that seems to be what the normal meaning of the words used imports. However, it may be possible to argue that a financial institution needs at least some reason in order to call in the loan (at least in cases where the relevant facility contemplates a term arrangement) even though it may not be a reason which amounts to a breach of a term of the relevant facility. Indeed, one of ACC's witnesses indicated that he felt that a bank might have some difficulty in justifying exercising the demand nature of a facility unless there was some good reason. However, for reasons which I hope will become apparent, it does not seem to me to be necessary to resolve that legal issue in this case.

7.8 Given my finding of fact that there was no binding agreement in place or clear understanding between the Kellys and ACC to the effect that ACC would not call in the loan then it seems to me that ACC had more than ample reason to call in the loan on the 12th April, 2009. The loan remained, at that time, in significant arrears even though there was a real prospect that the arrears would be cleared by the sale of the two properties, the closing of which was then anticipated to be imminent. However, the progress of matters since the previous August has been a long way short of satisfactory. Whatever may be the merits or the reasons given by the Kellys for the net rent paid into ACC not living up to what had been anticipated the previous August, the fact is that there was a very significant shortfall. There is no doubt but that the provision of the financial information referred to at the August meetings had been extremely slow and had been, at least in one significant aspect, inaccurate when first presented. It remained clear that there was likely to be a continuing shortfall between net rent and interest after the sale of the properties had gone through so that there was no long term solution on the table. In addition, on any view, the three year principal repayment holiday was coming to an end with less than a year to run so that the shortfall was going to increase by reason of the absence of any additional income to make repayments of principal. Furthermore, it was clear that the market had continued to worsen and that the properties no longer provided anything remotely like full cover for the loan. Some of those factors were the fault of the Kellys, some were not but overall the position which ACC faced in April 2009 was significantly worse than might have been anticipated as being the case at that time of the meetings in August 2008. Even if it be the correct interpretation of the law that ACC would have needed a reason to call in the loan in April 2009, then I am satisfied that it had such a reason. In those circumstances, it is not necessary to consider whether, as a matter of law, any such reason was required.

7.9 So far as the case in promissory estoppel is concerned, I have already indicated that I am not satisfied that any concluded arrangement (even if it be short of a contract) had been come to between the parties such as could have grounded a case in promissory estoppel. The factual basis for promissory estoppel does not, therefore, arise.

7.10 Likewise, as I am satisfied that no agreement was reached, the question as to whether any agreement might not have amounted to a contract by virtue of the absence of consideration does not arise. However, I should note that I agree with the submissions made by counsel for ACC that an agreement, whereby the only thing being agreed to on one side is a forbearance to exercise its legal rights without obtaining anything else in return, cannot amount to a contract, although such an arrangement might give rise to a promissory estoppel if the other factual requirements for a promissory estoppel were found to exist. A number of cases (*Cooke and Others against Wright (1861) 1 B&S 559, Re Montgomery, a Bankrupt* (1876) I.R. 10 Eq. 479, and *Fullerton v. Provincial Bank of Ireland* [1903] A.C. 309) were referred to by the Kellys in the course of argument as authority for the proposition that forbearance can amount to consideration. That is, of course, the case. However, forbearance is consideration given by the person forbearing, it is not consideration given to that person. In other words, where someone agrees to forebear in return for getting something else, then a binding contract exists, so that if the person does forebear they can insist on getting their side of the bargain and have whatever was promised (for example, extra security) delivered. However, none of those cases are authority for the proposition that someone who gives nothing can enforce a forbearance agreed by the other side.

7.11 For all of those reasons, I am satisfied at the level of principle that ACC was entitled to call in the full principal sum as of the 12th April, 2009, and that, subject to the other matters that arise, ACC is now entitled to recover the sum claimed. I now turn to those other matters.

8. The Surcharge

8.1 The facility letter in this case makes express reference to ACC's general conditions. ACC's general conditions at the relevant time were proved in evidence. If a borrower signs a facility letter which makes clear that that facility letter is subject to the general terms and conditions of the bank in question, then the borrower is bound by those general terms and conditions as much as by what is actually contained in the facility letter itself subject only to questions of misrepresentation or the like which I have already analysed. The relevant general conditions provide that a 6% surcharge is to be added to the interest on the loan in respect of any sums overdue. There is no doubt but that, from May 2009, ACC has added 6% to the full account outstanding. ACC's basis for doing this is that it is said that ACC was entitled to call in the loan and that once it had called it in and it had not been paid then the entire sum was overdue. It seems to me that this is a correct analysis of the situation. If ACC had not been entitled to call in the loan in April or May of 2009, then it follows that surcharge interest could only have been added to that portion of the interest on the loan which had not been paid. However, for the reasons which I have already analysed, in my view, ACC was entitled to call in the loan in April 2009 and at anytime thereafter the entire sum due was in arrears for it was due and owing immediately to ACC and had not been paid. In my view, therefore, the amount claimed by ACC is properly calculated. It is next necessary to turn to the issues arising in respect of the receiver.

9. The Receiver

9.1 Mr. Kelly argued that ACC was not entitled to put in a receiver without an order of the court. It is clear from the mortgage documentation in this case that ACC has an entitlement to put in a receiver in the event of a breach of the loan agreement. For the reasons already analysed, it is clear that there was such a breach by reason of, not least, the failure on the part of the Kellys to pay the entire sum due when it was properly demanded in April 2009. Therefore, the entitlement of ACC to put in a receiver under the terms of the mortgage is clear.

9.2 Mr. Kelly went on to argue that the receiver was precluded from seeking to go into possession of any of the properties by reason of the provisions of the Land and Conveyancing Law Reform Act 2009 (the "2009 Act"). Chapter 3, Part 10 of the 2009 Act provides for obligations, powers and rights of mortgagees. There is no doubt but that s. 97, which is part of that Chapter, precludes a mortgagee from taking possession without a court order save in the case of consent. There may well be a question as to whether s. 97 precludes a receiver from going into possession assuming the receiver to have been validly appointed. However, that question does not arise in this case for s. 96 of the 2009 Act is clear in its terms. Section 96(1)(a) specifies that the powers and rights of a mortgagee under all of the remaining sections of Chapter 3 (including s. 97) apply to "any mortgage created by deed after the commencement of this Chapter". The 2009 Act did not come into force until the end of that year. The 2009 Act, therefore, significantly post-dated the mortgage in this case. Therefore, s. 97 had no application to the mortgage in this case. On that fact being pointed to him, Mr. Kelly sought to refer to the Bill which ultimately became the 2009 Act when enacted. However, the Bill is not, of course, law – it is merely a proposal until it is passed by the Oireachtas and signed into law by the President. Likewise, Mr. Kelly sought to place reliance on unspecified provisions of previous conveyancing law such as the Victorian Conveyancing Acts.

However, it is clear that there was no equivalent to s. 97(1) in any of that legislation.

9.3 The legal position is clear. There was no barrier to a mortgagee going into possession under a mortgage provided that the necessary conditions to allow for such possession (in almost all cases a breach of the mortgage terms) had occurred, without a court order, until the passage of the 2009 Act. That Act is not retrospective and does not apply to mortgages then already in existence. Therefore, there would be no barrier to ACC going into possession of the properties, the subject of the mortgage in this case, without a court order. Even if, therefore, the section can be construed as affecting the right of a receiver to go into possession where that receiver is appointed by a mortgagee, no barrier would exist to a receiver going into possession on the facts of this case.

9.4 Likewise, I am not satisfied that the fact that there was no evidence of ACC having executed the mortgage deed is of any relevance. I am more than satisfied on the evidence that both of the Kellys executed the mortgage deed. As the appointment of the receiver against the Kellys is an action taken as against them, it is only necessary that they have signed and executed the deed in order for it to be enforceable against them.

9.5 In addition, I am satisfied that the receiver was properly appointed in accordance with the terms of the mortgage deed.

9.6 In all those circumstances, I am satisfied that there is no basis for Mr. Kelly's contentions to the effect that there was any invalidity in the appointment of the receiver or in the entitlement, at the level of principal, of the receiver to seek to go into possession of the properties in the sense of taking over the collection of rents and, where tenancies had come to an end, going into psychical possession.

9.7 Insofar as Mr. Kelly makes accusation in his defence that actions taken by or on behalf of the receiver, post the appointment of the receiver, were improper then there is just no evidence before the court of any such action.

9.8 While the various contentions made by Mr. Kelly in respect of the receiver were included in a document entitled defence, they are, perhaps, more appropriately treated as a counterclaim. Given Mr. Kelly's position as a litigant in person, no point could legitimately have been raised in respect of that aspect of the pleading. However, even treating those accusations as amounting to a counterclaim, it is clear that any such counterclaim would need to be dismissed for there is no basis either for the contention that the receiver was invalidly or improperly appointed or that anything that was done by the receiver post appointment was inconsistent with the entitlements of the receiver.

10. Conclusions

10.1 It follows that the various defences put forward to the claim by ACC must fail. No agreement was reached whereby ACC accepted that it would not enforce its loan if certain properties were sold. Rather, ACC accepted that it would go along with proposals by the Kellys to see if things could improve. There was no agreement that some of the net proceeds of sale would be ring-fenced as a contingency fund. By the time ACC called in the loan in April 2009, there was ample reason for the calling in of the loan if such reason be required. The surcharge interest was properly charged under the terms of the facility. There was nothing inappropriate in the appointment of the receiver and no evidence of any inappropriate action on the part of the receiver.

10.2 In the circumstances, it seems to me that ACC is entitled to judgment for the full sum claimed. I will invite counsel to give me an up-to-date figure for inclusion in today's order.