THE HIGH COURT

CHANCERY

[2015 No. 9654 P]

BETWEEN

RAYMOND HOGAN

PLAINTIFF

- AND -

DELOITTE, TOM KAVANAGH, KTECH SECURITY, KEVIN MCGARRY, PEPPER ASSET SERVICING, SHORELINE RESIDENTIAL LIMITED, MADDEN PROPERTY CONSULTANTS and FERGAL MADDEN

DEFENDANTS

[2016 No. 4186 P]

BETWEEN

TOM KAVANAGH

PLAINTIFF

- AND -

RAYMOND HOGAN and PAUL WALSH

DEFENDANTS

JUDGMENT of the Hon. Ms. Justice Stewart delivered on 10th day of November, 2017.

1. There are two sets of proceedings currently before the Court, which have given rise to two notices of motion related to properties in Thurles, County Tipperary. Mr. Hogan resides with his family in the first of these properties, which is located in Athnid More. Mr. Walsh resides in the second property under a tenancy agreement operating between him and Mr. Hogan. In the first matter, the plaintiff, Mr. Hogan, issued a notice of motion dated 10th May, 2016, in which he seeks interlocutory relief preventing the defendants from trespassing on or taking unlawful possession of both properties. In the second matter, the receiver, Mr. Kavanagh, issued a notice of motion dated 12th May, 2016, in which he seeks interlocutory relief necessary in order to carry out his functions as receiver over the second property.

Affidavits sworn in the First Set of Proceedings

2. On 9th May, 2016, Mr. Hogan swore an affidavit in which he sets out the following background facts. Following his mother's death in 2002, Mr. Hogan acquired the fee simple in his parents' family home, subject to a life interest for his father. This is the property in which Mr. Walsh now resides and to which the second set of proceedings relate. Mr. Hogan's father was in debt brought about by the cost of Mr. Hogan's mother's end-of-life care, so Mr. Hogan took a mortgage out on the second property in 2005 to assist in relieving that debt. During the recent economic downturn, Mr. Hogan encountered financial difficulties and was in regular contact with his mortgagee throughout this time. Over the course of these contacts, he was informed that Shoreline Residential Limited ("Shoreline") and, subsequently, Pepper Asset Servicing (PAS) were taking over his account. Mr. Hogan responded to object to this and to make clear that he did not consent to the transfer of his account to an entity he characterised as a vulture fund that is unregulated in this jurisdiction. In May, 2015, Mr. Kavanagh was appointed by Shoreline to act as receiver for the mortgaged property.

3. Mr. Hogan challenges Shoreline's *locus standi* and privity to contract in this matter and requests proof of the validity of Mr. Kavanagh's appointment. He then summarises an interaction between his family and a representative of KTech Security that allegedly occurred at the first property, in which the Hogan family reside. He concludes by alleging that Shoreline have breached the Registration of Title and Deeds Act 2006 by incorrectly entering a charge over the second property.

4. On 1st June, 2016, Mr. Kavanagh swore a replying affidavit in which he begins by setting out the role of the various parties in these proceedings. He then adopts the contents of his affidavit sworn in the second set of proceedings, which are set out below. Mr Kavanagh sets out his understanding of the events that occurred when the representative of KTech Security attended the first property and he rejects the harmful effects of this incident alleged by Mr. Hogan. For further details, he refers to the affidavit sworn by the representative of KTech Secuirty. Mr. Kavanagh notes Mr. Hogan's failure to offer an undertaking in damages and questions his ability to pay any undertaking that he may offer in the future. He avers that damages would be an adequate remedy if Mr. Hogan were successful at the full hearing, as this is a residential investment property from which rent is being collected. As for the balance of convenience, Mr. Kavanagh avers that the status quo (the orderly continuation of the receivership) should be maintained.

5. On 1st June, 2016, John Paul Moloney swore an affidavit in which he sets out his version of events on the day he attended the first property as a representative of KTech Security. He avers that he attended the property for the purposes of serving paperwork and denies entirely the version of events put forward by the Hogans. The Hogans set out their version of events in Mr. Hogan's various affidavits and in the affidavits sworn by his wife, Jacqueline Hogan, on 16th June, 2016. On 4th July, 2016, Mr. Moloney swore a replying affidavit to Mrs. Hogan's affidavit, in which he more specifically denies her version of events.

6. On 16th June, 2016, Mr. Hogan swore an affidavit in which he challenges personal and subject matter jurisdiction in this matter. The contents of this affidavit are broadly similar, if not identical in some respects, to the affidavit of the same date sworn by Mr. Hogan in the second proceedings. Mr. Hogan repeats his contentions regarding Shoreline's lack of standing as a proper credit institution under the Credit Reporting Act 2013. PAS's attempts to characterise Mr. Hogan as their customer and themselves as adjudicators of this dispute are also denied. Mr. Hogan also avers that he has not been granted access to the original copies of various documents related to these proceedings and requests same.

7. On 4th July, 2016, Mr. Kavanagh swore a second affidavit, in which he expresses confusion regarding the jurisdictional issues to be established, as the High Court enjoys full and original jurisdiction in the matters arising from this case. Furthermore, he questions why Mr. Hogan would institute proceedings of his own in a venue that he alleges lacks jurisdiction. Regarding Mr. Hogan's consent to the

transfer of his account, Mr. Kavanagh refers to the terms of the mortgage that Mr. Hogan signed, which expressly provide for the transfer of the mortgage to any party, regulated or otherwise. Mr. Kavanagh avers that he is unaware of any claim by PAS to act as adjudicators in this matter, nor is he aware of any term that would prevent Shoreline from employing PAS as their agent. Mr. Kavanagh avers that his undertaking has not been challenged on any factual basis and denies that he is under any obligation to provide the bond demanded by Mr. Hogan. Mr. Kavanagh also avers that none of the events alleged by Mrs. Hogan would have any bearing on his entitlement to act as receiver, regardless of their accuracy.

8. On the 14th July, 2016, Mr. Hogan swore a supplemental affidavit in which he challenges Mr. Moloney's, KTech Security's and Deloitte's qualifications, licencing and entitlements to act as they have, both on the date that Mr. Moloney visited the first property and throughout the currency of these proceedings. He also exhibits documentation that he alleges proves that IBRC were aware and did consent to the creation of a tenancy agreement over the second property. Mr. Hogan challenges Mr. Kavanagh's reliance on the terms of the mortgage as a basis for transfer, as the transfer of the mortgage to an unregulated entity has clear negative implications for a regulated mortgage contract, which is the contract that Mr. Hogan signed. Mr. Hogan avers that his statements regarding jurisdiction should be understood in the context of his allegedly unrebutted arguments regarding Mr. Kavanagh's invalid appointment and lack of standing in court (issues that do not apply to Mr. Hogan).

9. On 11th July, 2016, Anne Pounds swore an affidavit setting out the manner and basis on which she is assisting the Hogans in dealing with these proceedings. In this affidavit, she sets out her belief that this matter should be referred to the Financial Services Ombudsman for further review.

10. On 22nd November, 2016, Mr. Hogan swore an affidavit in which he repeats his assertion that IBRC were aware of Mr. Walsh's tenancy and avers that IBRC received payments of the rent accrued under that tenancy. He exhibits correspondence to evidence these averments. Thus, he alleges that Shoreline is estopped from reneging on an agreement that their interest in the mortgage was subject to when they purchased it, both in terms of the tenancy and alleged arrears arrangements between himself and IBRC. He avers that Shoreline have breached his statutory consumer protections by failing to engage with him in the manner required under the Consumer Protection Code 2015. He then sets out a history of complaints made by him in respect of his loan(s). He refers to various specific complaints made regarding the transfer of his account to an unregulated entity and the consumer complaints procedure, or alleged lack thereof, in place with PAS. He also avers that it would be inappropriate for a receiver to take possession of the property while he has a complaint outstanding with the Financial Services Ombudsman regarding his consumer rights.

11. On 28th November, 2016, Jeffrey Johnston swore an affidavit as a director of Shoreline. He avers that the individual who executed the deed of appointment for Mr. Kavanagh did hold the requisite power of attorney to do so. Mr. Johnston avers that IBRC's awareness of the purported tenancy agreement is insufficient to create a legal relationship between Mr. Walsh and IBRC. But, even if such a relationship did exist, Mr. Johnston avers that he does not understand how this would assist the plaintiff in securing an injunction against the receiver. Mr. Johnston avers that he can find no evidence that IBRC received payments from Mr. Walsh. He also questions the allegation that Shoreline has failed to honour arrears agreements with Mr. Hogan in circumstances where no specifics have been set out and all previous reliefs offered to Mr. Hogan expired in August, 2014. The allegations of failure to engage and establish an alternative repayment schedule are wholly denied, as Mr. Johnston avers that the Hogans were properly assessed and denied alternative repayments due to their clear inability to repay the loan on a sustainable basis. Mr. Johnston confirms that the Financial Services Ombudsman is the proper forum for Mr. Hogan's complaints. But he also highlights that the Ombudsman's involvement has no impact on a receiver's power to take possession of the property and it contradicts Mr. Hogan's insistence that Shoreline is unregulated.

Affidavits sworn in the Second Set of Proceedings

12. On 17th May, 2016, Mr. Kavanagh swore an affidavit setting out the following background facts. Mr. Kavanagh was appointed by Shoreline. Irish Nationwide Building Society (INBS) advanced €150,000 to Mr. Hogan, under a facility letter dated 4th April, 2005, for a residential investment property. On 12th September, 2005, an indenture of mortgage was created over that property to serve as security for that loan facility. Mr. Hogan's father soon took up residence in that property but he passed away in 2011. A Transfer Order was made pursuant to s. 34 of the Credit Institutions (Stabilisation) Act 2010, which transferred all of INBS's assets and liabilities to Anglo Irish Bank Corporation, now IBRC. On 6th June, 2014, IBRC transferred the rights and interests in the above facility to Shoreline. On 30th March, 2015, Shoreline's solicitors contacted Mr. Hogan seeking immediate repayment of the monies, with arrears, and advising him that failure to repay could result in the appointment of a receiver. Following on from that failure, Mr. Kavanagh was appointed under a deed of appointment dated 16th June, 2015.

13. Mr. Kavanagh then chronicles a series of interactions between the parties, involving varying degrees of hostility, the cumulative effect of which (intentional or otherwise) was to prevent Mr. Kavanagh from dealing with the property. These interactions include the issuance of the first set of proceedings and the discovery of Mr. Walsh as a tenant in the property. Mr. Kavanagh avers that this tenancy is invalid because consent to its creation was not sought from any of the parties holding the position of mortgagee at the relevant time, as required under the terms of the charge. He avers that damages will not be an adequate remedy in lieu of interlocutory relief because he is completely incapable of carrying out the receivership in a timely and effective manner and the losses stemming from that incapability cannot be recovered from litigants of such questionable financial strength as Mr. Hogan and Mr. Walsh. Regarding the balance of convenience, Mr. Kavanagh avers that the status quo (the orderly continuation of the receivership) should be maintained. Mr. Kavanagh then concludes by offering the usual undertaking as to damages. Errors were made regarding the documents exhibited to this affidavit but these were remedied by Mr. Kavanagh's supplemental affidavit of 4th July, 2016.

14. On 16th June, 2016, Mr. Hogan swore an affidavit in which he avers that there are outstanding issues regarding personal and subject matter jurisdiction, as Mr. Kavanagh has failed to establish jurisdiction in the first set of proceedings. He relies on O. 19, r. 13 of the Rules of the Superior Courts that a fact not denied is taken to be admitted, particularly in regard to various parties' failure to make submissions and rebut the specifics of his affidavits. He avers that there is no verified claim and that Mr. Kavanagh lacks *locus standi* in this matter. He avers that Shoreline and PAS are in violation of court orders, directions and undertakings by failing to file a responding and defending affidavit in the first set of proceedings. He avers that, if Shoreline fail to establish jurisdiction in the first set of proceedings, either by failing to set it out or by failing to deny lack of jurisdiction for the purposes of O. 19, then their claim in these proceedings also fails. He also challenges the sufficiency of Mr. Kavanagh's undertaking as to damages, demanding a €1 million bond undertaking in its stead with relevant proofs that such funds are available. During the hearing, the Court indicated its view that this was an unusual submission to make in circumstances where the plaintiff had all but refused to make the usual undertaking as to damages in his own affidavits. In response, the plaintiff submitted that he would give the undertaking and suggested placing the rent from the second property in escrow until the determination of the proceedings. Mr. Hogan avers that that the deed appointing Mr. Kavanagh is invalid because it is not sealed by a regularised and licensed credit institution, as allegedly required by s. 64(2)(b)(ii) of the Land and Conveyancing Law Reform Act 2009, and is not properly executed. He avers that he entered into a contract with a regularised & licensed credit institution and Shoreline's lack of status in this regard materially affects standing under the contract. He also challenges how the charge could have been transferred from a regulated to an unregulated entity without his knowledge or

consent, to the detriment of his consumer rights. Mr. Hogan further suggests that the manner of transfer in this case is in breach of Laffoy J.'s decision in *Kavanagh v. McLaughlin* [2015] IESC 27.

15. On 4th July, 2016, Caroline Shanahan swore an affidavit on behalf of Mr. Kavanagh in support of an application deeming service good on Mr. Walsh and in support of an Order for substituted service for all other documents related to this matter. Those orders were made on 4th July, 2016.

16. On 14th July, 2016, Mr. Walsh swore an affidavit in which he expressed confusion as to why a second set of proceedings have been issued and why he is party to proceedings that have nothing to do with him, as he has a valid tenancy with the owner of the property in question. It is his understanding that the details of his tenancy were shared with INBS and IBRC. Mr. Walsh then summarises his interactions with the various parties and the circumstances under which he began paying rent to Mr. Madden, an agent for Mr. Kavanagh, for a brief time before ceasing payment and resuming the payment of rent to Mr. Hogan.

Legal Submissions
- The Plaintiff/Mr. Hogan

17. The plaintiff submits that there are a number of serious questions to be tried in this matter. The first of these is whether para. 16.1(a) of the mortgage, which is the paragraph relied on by the mortgagee to transfer their interests to a third party, constitutes an unfair term under the Council Directive 93/33/EEC of 5th April, 1993 on Unfair Terms in Consumer Contracts O.J. L 95/29 21/4/1993. The plaintiff makes this argument within the context of his submission that he comes within the definition of a consumer, as set out in s. 2 of the Consumer Credit Act 1995. Barrett J.'s decision in *Ulster Bank v. Healy* [2014] IEHC 96 is relied on as a statement on how this section is to be interpreted. The plaintiff submits that the background facts of this case should be borne in mind when considering whether or not he is a consumer. These facts would include that 1) rent is being collected purely for the purposes of paying off the loan and not for the plaintiff's personal profit, 2) the second property, while not his family home, is his childhood home and 3) the loans were drawn down for the predominant purpose of discharging debts stemming from his mother's end-of-life care, while also fortifying some quality of life for his elderly father, and not for the Hogans' commercial benefit. If the receiver were to attempt to sidestep the issue of unfair terms by relying on s. 12 of the Irish Bank Resolution Corporation Act 2013 as the method of transfer, the plaintiff submits that s. 12 is an unconstitutional interference with his property rights. The plaintiff makes other challenges to the deeds of transfer and appointment, including that the deed of power of attorney exhibited post-dates the execution of the deed of transfer. It is also alleged that Mr. Hennessy (who purported to exercise the power of attorney) and Mr. Johnston have breached s. 142 of the Companies Act 2014 by holding an excessive number of directorships.

18. The plaintiff further submits that he had an arrears arrangement with IBRC whereby he would service the loan through rental payments. It is submitted that IBRC acquiesced to this arrangement and that Shoreline is thereby bound by it, either under the terms of the deed of transfer or subject to the equities. The plaintiff submits that a promissory estoppel has arisen in this matter, as defined by Keane J. (as he then was) in *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd* [1996] 1 I.R. 12 and Laffoy J. in The Barge *Inn Ltd v. Quinn Hospitality Ireland Operations 3 Ltd* [2013] IEHC 387.

19. The plaintiff relies on s. 8 of the Land and Conveyancing Law Reform Act 2009 in submitting that this loan is governed by that Act and not by the Conveyancing Act 1881. He submits that the loan is classified as a housing loan for the purposes of the 2009 Act, as defined in s. 2(ba)(d) of the Consumer Credit Act 1995 (as amended by the Central Bank and Financial Services Authority Act 2004). It is submitted that this classification is relevant because the receiver has therefore breached s. 97 of the Act and his proceedings are fundamentally flawed. This argument is also predicated on the submission that Mr. Hogan is a consumer. The receiver stated in oral submissions that s. 97 has no bearing on these proceedings because it relates to situations where a mortgagee (i.e. Shoreline) is seeking possession, rather than situations where a receiver is seeking possession, as is the case here

20. With regard to the receiver's submissions that the mortgagee is not bound by Mr. Walsh's lease because they did not consent to it, plaintiff relies on s. 112 of the 2009 Act, which states that the mortgagee cannot unreasonably withhold its consent to the creation of a lease over the land while the mortgagor is in possession. The plaintiff submits that the bank's refusal to consent to the lease is unreasonable, as the level of rent charged is on par with the market rate and there is no evidence of a potential lessee that would pay more. The receiver submits that s. 112 has been over-ridden by the terms of the contract between the parties, which expressly require the mortgagee's consent to be sought to create such a lease.

21. With respect to the second set of proceedings, the plaintiff submits that it would be inappropriate to grant the reliefs sought by the receiver in circumstances where there are a number of factual disputes outstanding from his complaints, most significantly his complaints to the Financial Services Ombudsman and the Data Protection Commissioner. Reliance is placed on *Kinsella & Ors v. Wallace* [2013] IEHC 112 in making this argument.

22. The plaintiff submits that damages would not be an adequate remedy because the property in question is his parents' family home, which renders his considerations and interests more than merely financial. Conversely, the plaintiff submits that damages would clearly be an adequate remedy for any losses suffered by the defendants because their loss, in interest or otherwise, is quantifiable and based on a liquidated sum. The rent collected would also be placed into escrow until the determination of the proceedings. The plaintiff also submitted that there is no evidence before the Court that specifies exactly what loss the receiver believes he will not be able to recover upon the determination of the proceedings.

23. The plaintiff submits that the least risk of injustice lies with the grant of the reliefs sought by him, therefore tipping the balance of convenience in his favour.

24. Mr. Walsh was granted the opportunity to make submissions to the Court. To that end, he made submissions regarding his personal circumstances and the conduct of the receiver & his agents. He submitted that he is party to a valid and registered tenancy agreement. While he made some rental payments to the receiver, he submits that he resumed paying rent to Mr. Hogan when it became apparent to him that the receiver had no intention of honouring the tenancy agreement.

- The Receiver's Submissions

25. The receiver submits that the plaintiff's *bona fides* in bringing these proceedings has been undermined. If Mr. Hogan were correct in his submission that the loan was invalidly transferred to Shoreline, it is submitted that the debt remains due and owing to IBRC and there is no evidence before the Court that the plaintiff has made any effort to repay said debt to IBRC.

26. Regarding the submission that Mr. Hogan is a consumer, the receiver challenges this assertion on three grounds: 1) The facility letter refers to the security as a residential investment property, 2) the manner in which a third party (Mr. Hogan's father) applied the

monies forwarded under the loan has no impact in determining the loan's purpose, as taken down by Mr. Hogan (who took down the loan and has treated the property on an investment basis) and, 3) the *Healy* decision has been departed from in other High Court cases, namely O'Regan J.'s decision in *McCambridge v. Anglo Irish Bank Corp. Ltd*. [2016] IEHC 327. The receiver submits that the plaintiff is not a consumer and, therefore, all arguments related to consumer legislation, protection and caselaw have no bearing on this matter.

27. Even if Mr. Hogan were classified as a consumer, the receiver maintains that para. 16.1(a) of the mortgage remains valid. He submits that there is no relevance to be found in the fact that the plaintiff did not specifically consent to the transfer of the mortgage from IBRC to Shoreline, as there is no term in statute, the mortgage or the facility letter that precluded IBRC from selling the mortgage to an unregulated entity. On the contrary, it is submitted that alienation of interest has been statutorily provided for under the Supreme Court of Judicature Act (Ireland) 1877 and the Irish Bank Resolution Corporation Act 2013. Regarding this new and unpleaded submission that the 2013 Act is unconstitutional, the receiver notes that the Attorney General has not been made a party to these proceedings or been put on notice that the constitutionality of a piece of legislation is being challenged.

28. It is submitted that the plaintiff's case rests on there being an implied term in the mortgage that the financial instrument could only be transferred to a credit institution licensed under the Central Bank Act 1971. The receiver submits that such an implied term directly clashes with para. 16.1(a) of the mortgage and the contents of the facility letter. Regarding the plaintiff's reliance on the Consumer Protection Code, the receiver refers the Court to Birmingham J.'s decision in *Zurich Bank v. McConnon* [2011] IEHC 75. The receiver notes that, while the plaintiff repeatedly refers to a change in the operation of the contract by virtue of an unregulated entity assuming the position of mortgagee, he has failed to specify how his protections and rights would operate differently if Shoreline were a regulated entity. The receiver also highlights that, under the terms of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015, unregulated entities must employ an authorised credit servicing firm to service their loans, so as to maintain consumer protections. It is submitted that Shoreline has met this legal obligation by engaging the services of PAS, who are regulated by the Central Bank under s. 28(3) of the Central Bank Act 1997 (as amended). In response, the plaintiff submits that the offending behaviour in this case (the transfer of the mortgage to Shoreline) occurred before the 2015 Act came into effect. He also submits that the operation of the Act and the remedying effect of PAS's involvement were never communicated to him. In oral submissions, it was stated that this lack of disclosure is central to the plaintiff's case.

29. The receiver draws the Court's attention to an unapproved copy of McKechnie J.'s decision in *Launceston Property Finance Ltd. v. Burke*, which was delivered on 15th March, 2017, and specifically states that PAS is a retail credit firm duly regulated by the Central Bank that fully remedies any concerns regarding the 2015 Act and the loan transfer from a regulated to an unregulated entity. In any event, the receiver submits that this matter has been referred to the Financial Services Ombudsman and, in the absence of a diagnosed failure to comply with regulatory requirements, this referral has no effect on the appointment of the receiver or the reliefs sought by him.

30. Regarding the plaintiff's submission that the deed of appointment is defective for lack of execution under seal, the receiver highlights s. 24(1) of the Conveynacing Act 1881, which states that appointment may occur by writing under the hand of the mortgagee. The receiver relies on Cregan J.'s definition of writing under hand, as set out in *McCleary v. McPhillips* [2015] IEHC 591 and submits that the facts of this case clearly meet that definition, as the deed was executed by a director of Shoreline.

31. Regarding the position of Mr. Walsh, the receiver refers to Clause 11(L) of the mortgage, which requires prior written consent before any lease or tenancy over the property comes into being. The receiver notes that no evidence has been put before the Court to suggest that a mortgagee consented to, or was even aware of, the creation of the tenancy dated 1st April, 2015 (as opposed to the 2012 tenancy exhibited to Mr. Hogan's affidavits). On that basis, the receiver relies on Dunne J.'s decision in *Fennell & ACC Bank v. N17 Electrics Ltd* [2012] IEHC 228 and Peart J.'s decision in *Murphy v. Hooton* [2014] IEHC 266. The receiver submits that Mr. Walsh has continually refused to make rent payments to the receiver and no agent of the mortgagee has ever consented to or accepted the tenancy. Thus, it is submitted that Clause 11(L) of the mortgage remains valid. The plaintiff submits that, under the N17 Electrics case, the lease is still binding on him, even if it is not binding on the bank or Shoreline. It is submitted that, as an agent of Mr. Hogan, the receiver is also bound by the lease. In response, the receiver highlights that the first-named plaintiff in *N17 Electrics* was a receiver, thereby proving that the tripartite relationship between receiver, mortgagor and mortgagee does not operate in the manner suggested by the plaintiff.

32. The receiver submits that the incident between Mrs. Hogan and Mr. Moloney has no relevance to the matter that the Court must determine. Keane J.'s decision in *McCarthy v. Murphy* [2016] IEHC 391 is relied on in this regard.

33. With regard to the reliefs that Mr. Hogan and Mr. Kavanagh seek against each other, Mr. Kavanagh submits that the orders sought are prohibitory in nature and therefore the classic *Campus Oil* test applies. With regard to the reliefs sought against Mr. Walsh, Mr. Kavanagh concedes that it could be argued that those orders are mandatory in nature, as evidenced by the Court of Appeal's decision in *Governor and Company of the Bank of Ireland v. O'Donnell* [2015] IECA 73. This concession is made on the grounds that the receiver is effectively requiring Mr. Walsh to vacate the property.

34. In addressing the reliefs sought by Mr. Hogan for the second property, which is occupied by Mr. Walsh, the receiver submits that they must be denied on foot of Mr. Hogan's failure to make an undertaking in damages and his lack of a fair and arguable case. The receiver takes exception to any attempt by the plaintiff to make the undertaking in damages before the Court, as he is hopelessly insolvent and there would be no reality to such an undertaking. It is submitted that the placing of rent in escrow is also not a viable solution because the amount of rent being collected is dwarfed in comparison to the amount of damages that will accrue. With regard to the reliefs sought by Mr. Hogan over the first property, his family home, the receiver submits that these reliefs are *quia timet* in nature. This is allegedly so because the relief is sought solely in light of the incident with Mr. Moloney, an incident which is emphatically denied on affidavit. It is submitted that there is no evidence of repeated incidents and no evidence indicating a strong probability of harm occurring in the future. In those circumstances, it is submitted that the plaintiff has failed to meet the test for *quia timet* relief, as set out by Henchy J. in *C&A Modes v. C&A (Waterford) Ltd* [1976] IR 198. Even if he had met that standard, it is submitted that damages would be an adequate remedy for any loss suffered.

35. With regard to the reliefs sought by the receiver, it is submitted that arguable and strong grounds for an injunction have been made out, damages would be an adequate remedy and a substantive undertaking in damages has been given.

Decision

36. It seems to me that a large part of the plaintiff's case rests on the submission that he acted as a consumer, as defined by s. 2 of the Consumer Credit Act 1995, during his interactions with the mortgagee, so the Court will address this submission first. In submitting that he is a consumer, the plaintiff relies on Barrett J.'s decision in *Healy*. In submitting that the plaintiff is not a consumer, the receiver relies on O'Regan J.'s decision in *McCambridge*, which was delivered after *Healy* and heavily favours a more traditional

interpretation of Kelly J.'s (as he then was) decision in *AIB v. Higgins* [2010] IEHC 219. Both of these cases rely on *Higgins*, so it seems to me that the crux of this argument regarding a fair *bona fide* issue to be tried rests in the interpretation and application of the *Higgins* decision to the facts at hand. In *Higgins*, Kelly J. delivered an extensive judgment that considers the matter in great detail. He reviews the 1995 Act and the EU Directive that gave rise to it, as well the CJEU's decision in *Benincasa v. Dentalkit* (C-269-95) 1997 I-03767. In my view, all of these factors can be reduced down to the following quote from p. 28 of the Higgins judgment, which should be considered in full:-

> *"The European Court of Justice clearly envisaged that the concept of the consumer was confined to a person acting in a private capacity and not engaged in trade or professional activities. The self same person can be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. Only contracts concluded for the purpose of satisfying an individual's needs in terms of private consumption are protected by the Directive. There is nothing in the Act suggesting that the legislature here sought to go further than the Directive, still less to confine the interpretation of the term "business" in the definition of "consumer" to a single business activity."*

I would adopt Kelly P.'s review and assessment of the CJEU caselaw, as well as his and O'Regan J.'s position as to how the definition of a consumer is to be interpreted and applied. Although neither party relied upon or referred to it, this Court has read the decision of Baker J. in *Stapleford Finance Ltd. v. Lavelle* [2016] IEHC 385. That judgment was delivered in the context of an application to defend the entry of summary judgment and to allow the matter to proceed to a plenary hearing. Baker J. acceded to the application on the basis that the defendant had an arguable case that he was a consumer within the meaning of the Consumer Credit Act 1995. That case can be readily distinguished from the facts of the present case and, in my view, does not impact on the view that the Court has to arrive at in respect of this case. Therefore, the Court will now determine whether a fair *bona fide* question to be tried has been established within the rubric of the interpretation of *Higgins* outlined above.

37. I am of the view that the plaintiff has failed to satisfy even the low threshold of a fair *bona fide* question to be tried regarding his status as a consumer. By his own admission, the monies were not drawn down for the satisfaction of his own needs in terms of private consumption. They were drawn down and described as an investment loan. The plaintiff alleges he used some of the monies to provide for his elderly father. Following on from his father's death, the plaintiff rented out the secured property and has collected rent from it ever since. At no point were the loaned monies or the secured property ever used for private consumption, and so there can be no question that the plaintiff is a consumer. While the plaintiff made various submissions regarding his personal circumstances, the following quote from para. 16 of the *Dentalkit* decision must also be borne in mind:-

> *"It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned."*

It is clear from the contract that it relates to a residential investment property. That factor carries far more weight than Mr. Hogan's subjective situation. There is no fair bona fide question to be tried that Mr. Hogan is a consumer

38. With regard to the argument that s. 12 of the IBRC Act 2013 is unconstitutional, these proceedings are not properly constituted to advance such an argument. It has not been properly pleaded and the precise manner in which s. 12 would be an unconstitutional breach of property rights has not been set out. Therefore, I am of the view that there is no fair *bona fide* question to be tried.

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.

40. With regard to the challenges made to the deed of appointment, John Hennessy, a director of Shoreline, executed the deed. Jeffrey Johnston, Shoreline's only other director, has clearly set out on affidavit that Mr. Hennessy could bind the company and has not indicated at any point that he was opposed to the appointment of the receiver. The Court has been provided with no substantial reason as to why the deed of appointment would not be valid. Having reviewed all the material put before the Court in both of these matters, I am not convinced that there is any fair *bona fide* question to be tried regarding the validity of the deeds of transfer or appointment.

41. With regard to the plaintiff's arrears arrangement and estoppel arguments, the existence of a fair *bona fide* question to be tried is predicated on there being some piece of evidence to substantiate his claim that one of the mortgagees promised/agreed to accept the rental payments as full service of the loan. No such evidence has been put before the Court. While the plaintiff does refer to correspondence in which IBRC acknowledges receipt of Mr. Walsh's tenancy agreement, that same correspondence also requests further information from the plaintiff before a full review could occur that would formulate alternative repayment options. The results of that review have not been exhibited. No evidence has been put before the Court to suggest that any of the mortgagees proposed an alternative arrears arrangement or in any way indicated that it would accept the €400 rental payment in lieu of the €769.56 monthly instalment due under the facility letter. In the absence of such evidence, it cannot be said that there is a fair *bona fide* question to be tried on either of these issues.

42. With regard to Mr. Walsh's tenancy, a new agreement was created in April, 2015 and there is no evidence to suggest that Shoreline's consent was sought and/or granted to the creation of that new tenancy. The plaintiff has submitted that consent was unreasonably withheld, in contravention of s. 112 of the 2009 Act, and that the tenancy is therefore binding on Shoreline in any event. Setting aside for a moment that the terms of the mortgage require consent to be granted prior to the creation of the tenancy, the plaintiff's construction of s. 112 is entirely misconceived. Firstly, s. 112(5) states that the power to lease under this section applies only to mortgages created after the section came into force. Secondly, if the plaintiff had sought consent and come to the conclusion that it was withheld unreasonably, the onus rested on him to secure a court order affirming that position, rather than setting out that belief in unrelated proceedings such as these. Thirdly, the practical impact of his argument is that a mortgagor can, in some circumstances, unilaterally create a lease under s. 112, with the result of frustrating a receivership. None of these positions can be seriously contended. As for the receiver, the *N17 Electrics* has made clear that the tripartite agency relationship between mortgagor, mortgagee and receiver does not render the tenancy binding on the receiver. Therefore, I am of the view that there is no fair *bona fide* question to be tried regarding the tenancy agreement between Mr. Hogan and Mr. Walsh.

43. As should be apparent from the above, I am of the view that the plaintiff has failed, in his arguments regarding the second

property, to meet the low threshold of a fair *bona fide* question to be tried. Given that the incident between Mr. Moloney and Mr. Hogan was singular in nature, is entirely disputed on affidavit and is highly unlikely to be repeated, I am also of the view that the reliefs sought over the first property should not be granted. Thus, the interlocutory reliefs sought by the plaintiff in the first set of proceedings must be refused. However, even if I had found otherwise, I would nevertheless still have refused to grant the reliefs sought on foot of the improper manner in which the plaintiff has gone about addressing his undertaking as to damages. The undertaking as to damages is an onerous burden and a crucial ingredient in the grant of any interlocutory relief. Despite making repeated challenges to the receiver's undertaking, the plaintiff all but refused to make the proper undertaking himself on affidavit. This alone is good reason to reject the reliefs sought.

44. Turning now to the second set of proceedings, Shoreline has been validly assigned the mortgagee's interest in this loan. Following on from the letter of demand dated 30th March, 2015, the plaintiff failed to repay the debt and a receiver was duly appointed. Since then, the plaintiff has repeatedly refused to facilitate the proper administration of the receivership. Mr. Hogan and Mr. Walsh have failed to set out in any way how the tenancy agreement dated 1st April, 2015, or indeed any prior agreement, would be binding on any party to these proceedings other than themselves, thus rendering Mr. Walsh little more than a trespasser from the receiver's perspective. In short, the Court is satisfied that there is a sufficiently strong case to warrant the grant of interlocutory relief against Mr. Walsh and Mr. Hogan, regardless of its mandatory or prohibitory nature.

45. The Court is also satisfied that damages would not be an adequate remedy in this matter, for the simple reason that neither Mr. Hogan nor Mr. Walsh would be able to afford to pay them. In fact, continued interference with the receivership will exacerbate the amount of damages, while the grant of an injunction would reduce damages significantly. As regards Mr. Walsh, it has long been the case in this jurisdiction that damages are not an adequate remedy for trespass. While the Court is aware that this is not an absolute rule and that recent authorities advocate for a fact-based approach, I am of the view that no facts or circumstances arise with regard to Mr. Walsh that would render damages an adequate remedy.

46. Conversely, damages would be an adequate remedy for any loss suffered by the plaintiff and Mr. Walsh. The most probable loss suffered by Mr. Walsh would be in the form of increased rent under the tenancy agreement he will likely enter into once he has vacated the second property. Those losses are easily calculable. As for Mr. Hogan, this is a residential investment property and the losses that flow from its sale are definable and can be monetarily compensated. Mr. Hogan has submitted that the Court should find otherwise due to the fact that the second property is his childhood home. No authority has been put before the Court to support the refusal of interlocutory relief on those grounds. An individual's family home holds a special place in Irish law. The family home of Mr. Hogan is the first property, where he resides with his wife and children, and not the second property, where he resided during his childhood years.

47. Regarding the balance of convenience, the plaintiff has submitted that it would be inappropriate to grant relief while a complaint is pending before the Financial Services Ombudsman. In making this argument, reliance is placed on Laffoy J.'s decision in *Kinsella*. This is a complex and difficult decision to apply, particularly given the differing facts and the careful restraint shown by Laffoy J. in reaching her findings. The Court would have required far more detailed and convincing submissions than it received in order to apply it to these facts in the manner contended for by the plaintiff. In the absence of that analysis, I am of the view that the *Kinsella* decision is inextricably bound up in its own facts and that it should not be applied to the matter currently before the Court.

48. Independent of the Court receiving sufficient submissions on that point, its ability to assess the FSO argument has also been hindered by the plaintiff's failure to comprehensively set out the arguments and material put before the FSO. As it is, Mr. Hogan averred in his affidavit of 22nd November, 2016, that the complaint related to his consumer rights. For the reasons set out above, the Court has concluded, based on the material and arguments put before it, that there is no reality to the submission that Mr. Hogan was a consumer for the purposes of this loan. Therefore, the Court sees no reason to refuse to grant highly warranted relief on foot of a complaint that appears, based on what little material has been put before the Court, to be baseless. I accept the receiver's submission that the balance is best served by maintaining the *status quo* and that the *status quo* is the orderly administration of the receivership. I am satisfied that a proper undertaking as to damages has been made by the receiver on affidavit and that the plaintiff's challenges to this undertaking are not sufficient to find otherwise.

49. For the reasons set out above, I refuse the reliefs sought in the first set of proceedings and grant the reliefs sought in the second set of proceedings.