

THE HIGH COURT

[RECORD NO: 2013 13742]

BETWEEN

HOME FUNDING CORPORATION LIMITED

PLAINTIFF

AND

NIGEL BANNON AND MARK BANNON

DEFENDANTS

**JUDGMENT of Ms. Justice Eileen Creedon delivered on the 26th day of July 2019;**

**Introduction**

1. The plaintiff in these proceedings is Home Funding Corporation Limited who the Court was informed is now known as Elstree Mortgages Limited and is seeking the sum of €965,641.21 by way of capital and interest on foot of a loan of IR£15,000 advanced to the first named plaintiff Nigel Bannon in and around the 26th May, 1999.
2. This claim is denied by both defendants who represented themselves in these proceedings.

**Pleadings**

3. This matter was commenced by way of plenary summons dated the 16th December 2013 when the plaintiff made a claim for the following: -
  - (i) An order for specific performance of the agreement between the first named defendant Nigel Bannon and Secured Property Loans Ltd. (the original mortgagee) dated the 19th May 1999 (the commitment letter) wherein the first named defendant agreed to and indeed did, on the 26th May 1999, grant a first legal charge (the indenture of mortgage) over the lands described in the schedule hereto (the secured property) to the original mortgagee as security for a loan of IR£15,000 (the loan) which on foot of and in reliance of the commitment letter and the indenture of mortgage was advanced by the original mortgagee to the first named defendant on the 26th May 1999 and which indenture of mortgage was transferred to the plaintiff by deed of transfer dated the 15th June 2000.
  - (ii) A declaration that by virtue of the commitment letter the indenture of mortgage and the loan, the plaintiff holds an equitable charge (the equitable charge) over the secured property.
  - (iii) A declaration that the amount due and owing by the first named defendant to the plaintiff being the sum of €350,735 as of the 26th September 2013 (together with continuing interest) stands well charged against the secured property.
  - (iv) An order declaring that the equitable charge ranks in priority to any estate, interest or title (if any, which is denied) held by the second named defendant in the secured property.

- (v) A declaration that the purported transfer of the secured property by the first named defendant to the second named defendant (the purported transfer) is void for breach of Clause 14(K) of the indenture of mortgage.
  - (vi) A declaration that the purported transfer is a fraudulent conveyance and void.
  - (vii) An order setting aside the purported transfer.
  - (viii) An order for possession of the secured property.
  - (ix) Damages in addition to and/or in lieu of specific performance.
  - (x) Damages for breach of contract, negligence, breach of trust, causing loss by unlawful means, interference with the contractual relations and conspiracy.
  - (xi) Further or other order.
  - (xii) The costs of and ancillary to these proceedings.
4. By virtue of a statement of claim delivered on the 29th July 2014 the plaintiff claimed as follows: -
- (i) An order of specific performance against the first named defendant in respect of his obligations contained in the commitment letter dated the 18th May 1999 and the mortgage dated the 26th May 1999.
  - (ii) A declaration that the purported transfer by the first named defendant of his interest in the property comprised in Folio 4759F, Co. Cavan (the secure property) to the second named defendant is void and/or voidable and hereby avoided:
    - (1) For breach of the prohibition or transfer or assignment contained in Clause 14(K) of the mortgage, and/or
    - (2) On grounds that it is a fraudulent conveyance.
  - (iii) Further and/or in the alternative, a declaration that: -
    - (1) The monies advanced to the first named defendant pursuant to the terms contained in the commitment letter and mortgage created a valid legal charge and/or equitable charge on the secured property in favour of the plaintiff in respect of the loan obligations of the first named defendant, and,
    - (2) The said legal and/or equitable charge over the secured property has priority over any interests in the secured property held by the second named defendant.
  - (iv) An order directing the defendants to deliver up to the plaintiff the unencumbered title deeds to the secured property.

- (v) If necessary, an order directing the Property Registration Authority to register the mortgage dated the 26th May 1999 as a burden on the folio for the secured property.
  - (vi) A declaration that the sum of €428,754.56 as at the 26th July 2014 stands well charged against the secured property.
  - (vii) An order for possession for the secured property.
  - (viii) If necessary, an order for possession of the secured property.
  - (ix) If necessary, an order for sale of the secured property.
  - (x) An order for the taking of all necessary accounts and enquiries.
  - (xi) Damages for conspiracy and interference with contractual relations and causing economic loss by unlawful means.
  - (xii) Interest pursuant to statute.
  - (xiii) Further or other order.
  - (xiv) An order for the costs of an ancillary to these proceedings.
5. By notice dated the 18th December 2015, the plaintiff gave notice pursuant to the provisions of O. 122, r. 11 of the Rules of the Superior Courts, 1986, of its intention to proceed with the action at the expiry of one month from the date thereof.

**Plaintiff's Evidence**

6. Evidence on behalf of the plaintiff was given by two witnesses; a Mr. Mark Lonergan and a Mr. Ian Andrews, previously known as Mr. Ian Leaf.
7. Mr. Lonergan told the Court that he is a chartered accountant and practising tax adviser for over twenty years. He gave evidence that he had been a director of a company known as Elstree Mortgages Limited since July, 2017. He indicated that an order of the High Court had been made on 11th December, 2017 changing the name of the plaintiffs from Home Funding Corporation Limited to Elstree Mortgages Limited, that this order had never been appealed, but that this order had not yet been noted by the Central Office and accordingly the pleadings were still reciting Home Funding Corporation Limited as the plaintiff. A copy of this order was produced.
8. Mr. Lonergan confirmed from the documents before the Court, that folio 4759F County Cavan, which had been registered in the name of Nigel Bannon, was registered in the name of Mark Bannon on 14th February, 2006 and that no mortgage is registered as a burden on that folio.
9. Mr. Lonergan was shown a document entitled "*Secured Property Loans Limited - Short Term Loan Application*" and he identified the original application form dated 18th May,

1999 which he said is signed by Nigel Bannon and witnessed. The name of the witness is illegible. Mr Lonergan had no direct knowledge of this document but he said that this was a standard document and he gave evidence that this document showed that Mr. Nigel Bannon made an application to an entity called Secured Property Loans Limited for a loan of IR£15,000 and that the property to be mortgaged was recited in that document as Crover, Mountnugent, Co. Cavan contained in folio 4759F and used for light engineering works. He identified from that form Mr. Bannon's solicitor as being Mr. David Soden, Solicitor, 18 Villiers Road, Dublin 6. The term of the loan was recited in the document as being twelve months and the purpose of the loan was recited as being residential improvements.

10. A document entitled "*Secured Property Loans Limited - Customer Care Booklet*" was also shown to Mr. Lonergan. This document purports to set out the nature of the business conducted by Secured Property Loans Limited and the terms and conditions under which it did its business. It also set out inter alia the terms of the loan, the rate of interest and the borrower's obligation to make repayments. This document purports to contain the signature of a Nigel Bannon, witnessed by a Brendan Liddy and is dated the 14th of May 1999. Again Mr Lonergan had no direct knowledge of this document other than as Director of Elstree Mortgages Limited.
11. Mr. Lonergan went on in his evidence to refer to a document entitled "*Secured Property Loans Limited, 4 Clare Street Dublin 2 Ireland – Commitment Letter*" dated 19th May, 1999 which again was purported to be signed by Mr. Nigel Bannon as borrower, whose signature was witnessed by Mr. David Soden, 18 Villiers Road, Dublin 6 (Solicitor) and was signed by a Ronald S. Weisz Director for and on behalf of Secured Property Loans Limited who purported to have signed it on the previous day 18th day of May, 1999. The letter set out that the amount of the loan was IR£15,000 and that it was a short term loan for 12 months.
12. Further, Mr Lonergan was referred to the original mortgage document dated 26th May, 1999 between Nigel Bannon mortgager and Secured Property Loans Limited mortgagee which purports to be signed by Nigel Bannon, in the presence of David Soden, 18 Villiers Road, Dublin 6 and present when the common seal of Secured Property Loans Limited was affixed thereto, were an illegible signature being one director and Fiona Weisz being a second director. Further down on the front page "the mortgagee" is recited as being Wise Finance Company (Ireland) Limited. The Court's attention was drawn to clause 14K at page 181 which contained a clause not to let or transfer the land which is the subject of the mortgage. The period of agreement for the loan was 12 months, early redemption of the loan was permitted with no penalty, interest was to accrue on the gross loan balance outstanding at the rate of 2% per month resulting in an interest rate of 26.7%
13. Mr. Lonergan produced a copy printout to the Court, which was incorporated into the Statement of Claim and which purported to show the date of the advancement of the loan, the amounts outstanding and the payments made by Mr. Nigel Bannon. Counsel for

the plaintiff highlighted to the Court that the statement of account recorded that the loan was advanced on the 26th May 1999.

14. That printout showed that payments by Mr. Bannon ceased on 26th April, 2002 at which point he had paid IE £6932.37 and EUR €1049.99 against a net loan advanced in the sum of IE £13,800 and that the redemption value of the loan was on that date €23,267.82. It then went on to record interest due and expenses incurred by the company making the total due as of 26th December, 2017, €965,641.21. Mr Lonergan was brought through the contents of this print out but he had not prepared this document and accordingly could not verify its contents to include the initial advancement or final payment date. He gave no other evidence of the advancement of the loan to Nigel Bannon.
15. Mr. Lonergan was then brought through correspondence with W.O. Armstrong & Company Solicitors, Lyons & Company Solicitors and David Soden Solicitor and Steen O'Reilly Solicitors but indicated that he had no direct knowledge of this correspondence or the background himself as he only became director of the company Elstree Mortgages Limited in 2017.
16. The following solicitor's correspondence regarding attempts by the Plaintiff to register the mortgage were opened before the Court through the evidence of Mr. Lonergan: -
17. Letter dated *5th February, 2002* from Maurice E. Lyons & Company on behalf of their client Secured Property Loans Limited to W.O. Armstrong & Company Solicitors on behalf of their client Nigel Bannon. In this letter they confirmed that they acted for Secured Property Loans Limited who advanced a loan of IRE15,000 in 1999 to Nigel Bannon which was to be registered as a burden on the property described in folio 4759F County Cavan. They indicated in that letter that the solicitor who acted for the borrower at the time was David Soden, with whom they had been in correspondence for some considerable period of time in an attempt to deal with the Land Registry query. They said that they understood that the land certificate was lodged in the Land Registry by W.O. Armstrong & Company Solicitors to enable the application to proceed and they sought the consent to the use of the land certificate.
18. The next dated correspondence was a letter dated *23rd April, 2004* from W.O. Armstrong & Company to David Soden Esq. Solicitor referring to his letter of the 22 April 2004 indicating that their client Nigel Bannon was not agreeable to make the land certificate available for this purpose.
19. Letter dated the *28th April, 2004*, from David Soden Solicitor to Maurice G. Lyons & Company, for the attention of their client Secured Property Loans Limited, enclosed the letter from Messrs Armstrong & Co of the 23rd April, 2004.
20. Letter dated *23rd November 2004*, from Mr Jarrod Leaf of Home Funding Corporation Limited, on that company's headed note paper addressed to Maurice G. Lyons & Company Solicitors, stating that they intend to issue High Court proceedings against David Soden

Solicitor in relation to the registration of the mortgage against the property. That letter is signed by Mr. Jarrod Leaf, Manager, Home Funding Corporation Limited.

21. Letter dated *24th November, 2004*, addressed to Jarrod Leaf from Maurice G. Lyons & Company acknowledging receipt of his letter and indicating that they would now review the file to prepare the appropriate proceedings against the solicitor in the High Court.
22. Letter dated *17th June, 2005*, from Killeen Solicitors on behalf of their client David Soden, addressed to W.O. Armstrong & Company, in relation to their client Nigel Bannon. In that letter they confirmed that they acted on behalf of Mr. David Soden Solicitor and called upon W.O. Armstrong & Company Solicitors to lodge the land certificate in the Land Registry for the purposes of having the Secured Property Limited loan registered, pursuant to Nigel Bannon's written instruction to their client David Soden, under the terms of the loan agreement and under the letter of 26th May, 1999. The letter called on W.O Armstrong to;
  - (a) lodge a land certificate for the folio of land at issue.
  - (b) Furnish the plaintiffs with an undertaking that they would not release the land certificate or part with the land certificate until the conclusion of court proceedings.
  - (c) Confirm that they still acted for Nigel Bannon.
23. Letter from Steen O'Reilly Solicitors on behalf of their client, Mark Bannon, to Crowley Miller Solicitors on behalf of their client Home Funding Corporation Limited, dated 4th November, 2013. They confirmed that they had been furnished with a copy of the letter of 17th October, 2013 addressed by Crowley Miller to Mark Bannon. In this letter of 4th November, 2013 Stein O'Reilly stated: - "Our client Mark Bannon is not aware of any proceedings having been issued in 2009, nor was he ever served with same". They stated therefore that it was their view that the *lis pendens* that was registered on the property should have been immediately removed. They stated that in or around 2006, when the premises comprised in the folio was transferred from Nigel Bannon to Mark Bannon, there was absolutely no fraudulent intent by any party in relation to same. They reminded Crowley Miller that there was no security registered over the property and that they understood that at that time of the writing of the letter of 4th November 2013, there was still no security registered against the property. They called on Home Funding Corporation Limited to remove the *lis pendens* and to discontinue any proceedings and indicated that any proceedings would be strenuously defended.
24. Letter dated 20th January, 2014 from Steen O'Reilly Solicitors on behalf of their client Mark Bannon, to Crowley Miller Solicitors on behalf of their client Home Funding Corporation Limited, confirming that they acted only on behalf of Mark Bannon and not on behalf of Nigel Bannon from whom they had no instructions. They indicated that their client, Mark Bannon, was unaware of his father's borrowings and failed to see how their client was involved. They called on Crowley Miller to furnish them with copies of all loan

application documentation in order that their client could consider his position. The letter also sought confirmation as to whether or not a charge had at any stage been registered.

25. Letter dated 12th February 2014, from Steen O'Reilly Solicitors on behalf of their client Mark Bannon, to Crowley Miller Solicitors on behalf of their client Home Funding Corporation Limited, where they confirmed that their client Mark Bannon had no knowledge of any alleged funding arrangement between his father and Home Funding Corporation Limited. They enclosed documentation in respect of the transfer of land on 25th January, 2006 and confirmed that their client Mark Bannon would be fully contesting any claim in relation to this matter and that any recourse that Home Funding Corporation had would be against Mr. Nigel Bannon.
26. Mr. Lonergan was also referred to a copy of a Land Registry Transfer of Charge in respect of folio 4759F County Cavan dated 1st March, 2001 which purported to transfer from Secured Property Loans Limited, being the person entitled to be registered as owner, in consideration of IRE£15,000 the benefit of the charge to Home Funding Corporation Limited. The date of the Deed of Charge is blank on the face of this document.
27. This transfer, purports to be sealed by Secured Property Loans Limited in the presence of Fiona Weisz (Director) and a second illegible signature stated to be a director/secretary. Additionally, it also purports to be sealed by Home Funding Corporation Limited in the presence of two illegible directors' names. No evidence of registration of that transfer of charge was provided. Neither was there any evidence of this transfer of charge being notified to Mr. Nigel Bannon
28. It was highlighted to the Court by counsel for the Plaintiff that Stephen T Strong Solicitor appeared to act on behalf of both of the defendants in respect of the loan and the transfer of land from Nigel Bannon to Mark Bannon. A copy of the statutory declaration of solvency was furnished to the Court.
29. Under cross-examination, Mr. Lonergan was asked about Secured Property Loans Limited and about Wise Finance Company (Ireland) Limited. Mr. Lonergan indicated that there had been three or four changes of name for the company but stated that he had no knowledge of Wise Finance Company (Ireland) Limited. He confirmed that Elstree Mortgages Limited is the mortgagee, and that the original mortgagee was Secured Property Loans Limited. Mr Bannon put to Mr Lonergan that Wise Finance Company (Ireland) Limited was originally listed as the mortgagee on the face of the mortgage document however Mr Lonergan said he had no knowledge of this company and could not explain why this company was listed as the originator of the loan.
30. A company printout was produced showing that Elstree Mortgages Limited was previously known as Home Funding Corporation Limited and prior to that as Vivier Mortgages Limited.
31. Similarly, Mr Lonergan was also not in a position to make any further comment regarding the opened solicitor's correspondence. He told the Court that he had no knowledge of the

mechanics of the transfer of the loan from the various finance companies that had dealt with the loan since Mr Nigel Bannon took it out in 1999.

32. The second witness for the plaintiff, Mr. Ian Andrews (formally Mr Ian Leaf), was asked by counsel for the plaintiff as to his function in the plaintiff company. He said that he represented the owners of the company called Home Funding Corporation Limited and that he received monthly and quarterly reports from the people who were running the company day to day. He said he is not a director, but represents the shareholders and has responsibility for the operations of the company such as its financial running and that he also assisted with the setting up of computer systems. He said further in evidence that he gives strategic advice to the company on the appointment of lawyers. On further questioning from the Court he confirmed again that he was neither a director or employee but was more like a consultant working for a shareholder. He indicated that his family trust owns the company. No documentation was produced to underpin this evidence. He informed the Court that his professional qualifications are as a graduate of economics and business and he is a qualified accountant.
33. He said that he had reviewed the Statement of Claim "in minute detail" and had requested employees if he could see a reconciliation between the company's books, bank statements and the usual management accounts and that he would typically have done this prior to submitting the accounts to the auditor each year. None of this documentation was produced other than the printout. He was referred to the Statement of Claim at page 14, being the print out earlier shown to Mr Lonergan referred to above, and he was asked to comment on the content and format of the statement of claim based on his input. He indicated to the Court that at the time that the loan was made to Nigel Bannon, a different accounting system was in place in the company. He said he designed the statement and is "intimately familiar" with the entries on the statement. He stated that the Statement of Claim was 100% accurate. He said that he was responsible for conversion from an older software system to a more modern system. He gave no evidence in respect of the detail of the documents he said that had been reviewed by employees or the manner in which any reconciliation had been carried out. He gave no other evidence of advancement of the loan to Nigel Bannon.
34. He referred the Court to page 14 of the Statement of Claim which contained the attached printout and says that the starting balance was of IRE15,000, with an interest rate of 2% a month and that the last payment was made on 26th April, 2002. In confirming the date of the last payment he said was made by Nigel Bannon he said that "... it would be inconceivable that the company would record a payment that they had not received" as it would have been vouched against a bank statement. He gave no evidence as to the financial system in place at that time or the basis on which he made this assertion.
35. He confirmed to the Court that that Wise Finance Company (Ireland) Limited was an independent company and must have been listed in error on the face of the mortgage as the originator of the loan. He explained that Secure Property Loans Limited and Wise Finance Company (Ireland) Limited were under the same ownership. He said that Wise



Finance Company (Ireland) Limited was one of the companies that introduced the loan to Home Funding Corporation Limited. No documentary evidence was produced in this regard.

36. In cross-examination he was asked by Mr. Mark Bannon if he was originally known as Mr. Ian Leaf. He confirmed that he was and that that he had changed his name. He was asked why he had changed his name and the witness questioned the relevance of that question. This question was not answered as counsel for the plaintiff argued that neither Mr Ian Andrews change of name or his credibility had not been raised in pleadings and was not relevant to issue at hand. That evidence completed the plaintiff's case.

### **Defence Evidence**

37. Mark Bannon went into evidence. He indicated that he has to pass through the property contained in folio 4759F County Cavan to get to folio 4758F where he was currently in the process of building his house. He said that his percolation area is also on folio 4759F which services folio 4758F where the house is. Mr. Mark Bannon said that he has been on a mobile home on the property in folio 4759F since 1997 and that this would constitute it as being a family home as he lived there with his son. He said he knew nothing about the loans on the property taken out by his father and was never notified of any issue arising by Mr. Stephen Strong. He presented the Court with the receipts for stamp duty paid on the property in relation to the transfer of the property from his father to him. He said that without this second folio he cannot get to his new home. He further highlighted to the Court that his water and electricity both come across folio 4759F to get to the new house he was in the process of building at the time the matter came before this Court.
38. Counsel for the plaintiff put it to Mark Bannon that his father signed a statutory declaration indicating that the property was not a family home but Mark Bannon replied that his father was in Dublin and may not have been aware that Mark Bannon was on the site since 1997. He also claimed that he never received this document at the time of the transfer. He was also referred to the letter dated *4th November 2013* from W. O. Armstrong & Company Solicitor, acknowledging the loan, however he indicated that he had no knowledge of the loan and that his involvement was only from 2006 onwards. Furthermore, Mark Bannon stated that he had nothing to do with the original mortgage. Mark Bannon further went on to tell the Court that he was never told about the mortgage and that he was not calling Mr Strong as a witness as he was now retired and therefore he had no way of contacting him and that he had no evidence to give to the Court about the original mortgage. He confirmed that his involvement in the issue was only from 2006 onwards.
39. Mr. Nigel Bannon in his evidence stated that he was denying everything. He said that his defence was lodged in December, 2017 and he proceeded to give sworn testimony. He said that he received no loan and that whilst he conceded that he did sign a loan application form with a Mr. Ron Weisz, he was not sure where all the rest of the signatures came from that were on various other documents produced to the Court. He said that he went to Mr. Ron Weisz as he wanted a loan of IR€15,000. He said that at the time, Ron Weisz told him to sign an application and he would see what he could do but

that he did not normally lend money of that value, as it was only larger amounts of money, specifically sums over IRE50,000 that Mr. Weisz would have dealt with at that time. Nigel Bannon informed the Court that he then heard from O'Malley, Cunneen & McCarthy solicitors in December 2013 that he was being brought to court. He told the Court that he only signed the loan application and also asserted to the Court that the claim is statute barred as the plaintiffs were claiming the loan was issued in 1999.

40. He was referred to his signature on the *Customer Care Booklet* and he said that whilst it may look like his signature, he did not sign it. He said that he never heard of Mr. Brendan Liddy, the witness to the signature. When referred to the signature on the Commitment Letter he said he did not sign this. He said that it looked like his signature but it was not his signature and he also said that Mr. David Soden was only acting as his solicitor for a day and that he was only hired to explain to Mr Bannon what the documents meant.
41. An original copy of the mortgage document was produced to the Court. Mr Nigel Bannon was referred to the signing page of the mortgage document and it was put to him that this document identified him as the mortgagor. He said that it must have been a photocopy or a forgery of his signature. He did however concede that apart from the type of pen that it was signed with it did look like his signature. He confirmed to the Court once more that he never got the loan. Counsel for the plaintiff put it to Mr. Bannon that his solicitor would not witness a forged signature as this would have serious consequences for Mr Soden, including being struck of the Roll of Solicitors. Mr. Nigel Bannon claimed that he used the same pen all the time, never wrote in biro and consequently this was not his signature.
42. He was then questioned about the letter that, he Nigel Bannon, wrote to his solicitor David Soden in respect of the loan on the 26th of May 1995 when he confirmed that there were no Local Authority outgoings charged on the property. He was asked why he would have done this if there was no loan. With regard to the family home statutory declaration he stated that he was never in Mountjoy Square in his life – this was the address recorded for him on the family home statutory declaration bearing his signature.
43. The plaintiff opened the letter of 17th June, 2005 from Killeen & Company solicitors on behalf of David Soden to W.O. Armstrong and argued that it was sufficient to prove the loan, specifically he pointed to the second sentence in the second paragraph which stated, *"...we would point out that in fact your client entered into an agreement with Secured Property Loans Limited on 19th May, 1999 for a mortgage wherein your clients specifically on page 3 of the loan agreement stated that the security for this loan was unencumbered and free of liens."* Mr. Bannon was further pointed to the clause in the mortgage prohibiting the transfer or assignment of the property and Mr. Bannon replied indicating that this was an inter-generational transfer. Mr. Bannon confirmed that he never received any letter demanding payment of money.

#### **Plaintiff's Closing Arguments**

44. Counsel for the Plaintiff said that while High Court proceedings were initiated in 2009 against Mr David Soden they were never served and a notice of discontinuance was filed.

Counsel said that again in 2014, High Court proceedings were issued against the Bannons in error and that these proceedings were also discontinued. When asked by the Court as to why the 2009 High Court proceedings were discontinued, counsel for the plaintiff said that they were issued in error. He said further that it may have been due a change in solicitor and that the solicitor's file was lost. Counsel stated that none of the principles raised by the defendants meet the test of res judicata. He opened the case of *Ulster Bank Ireland Ltd. V. O'Brien* [2015] IESC 96 and quoted the following paragraphs: -

*"Where the circumstances indicated that a reasonable person would have felt compelled to respond to an allegation in the context of an appropriate commercial relationship where money was due but did not so respond, an admission against interest might be inferred. That whether a failure to answer an allegation would make a declaration against interest of what would otherwise be hearsay was entirely dependent on the factual circumstances, including, inter alia, the relationship between the parties and the circumstances under which an allegation was made. The test must be that failure to respond, in circumstances where denial would clearly be required, would amount to an admission in terms of the conduct of reasonable people."*

Counsel highlighted the judgment at para 3 which went on to deal with the swearing of affidavits and further emphasised the previous point when it was stated that;

*"...the swearing of an affidavit, and its service in court proceedings, that made allegations that a sum was due could be accepted in the absence of denial, where the form and the content of what was deposed to and the exhibits supporting it carried sufficient indications of reliability."*

Furthermore, counsel for the plaintiff said that December 2017 appeared to be the first time allegations of no money and no loan were made by the defendants and that they had solicitors acting for them at different points and times in the past. He said that on the 17th June 2005 Killeen Solicitors wrote to W.O. Armstrong and said that they wanted the Land Certificate lodged. In this letter it is stated that the Bannons borrowed money in 1999 from Secured Loans Property Limited and signed a mortgage. The letter stated that the Bannons got the money they wanted and that the plaintiffs then wanted to register the mortgage. Counsel asserted that the failure to respond to that letter and deny matters is an admission against interest, that in legal terms it is an admission and counsel asserted that there is no satisfactory explanation as to why W.O. Armstrong did not reply to these most basic of things. He said that Mr. Nigel Bannon has accepted that his signature is correct on the original loan application and he also said that this, coupled with the failure to respond to letters, proves to "*a high level*" that events occurred in the manner outlined by the plaintiff and argued that there is no really coherent basis for finding that a valid mortgage does not exist, apart from forgery and that there was no evidence of forgery.

45. The Court was pointed to s.74 of the Land and Conveyancing Law Reform Act 2009 in respect of fraudulent depositions. Counsel for the plaintiff said that this particular section

of the legislation does not amend but reflects the prior law. Counsel for the plaintiff went on to say that the mortgage deed was validly executed and asserted that the 2006 transfer to Mark Bannon is void and voidable but also stated that the Court does not need to rule upon this if the Court accepted that clause 14K of the mortgage renders the transfer void.

46. He argued that the issue about Wise Finance Company (Ireland) Limited appearing on the face of the mortgage deed is not a good point as this company only appeared in one of the relevant documents being the mortgage document and therefore the Court cannot infer a different company had the benefit of the mortgage.
47. The judgment of Judge Clarke in the case of *Moorview Developments Limited, Salthill Properties Limited, Valebrook Developments Limited, Springside Properties Limited, Drake S.C. Limited, Malldro S.C. Limited, the Poppintree Mall Limited and Blondon Properties Limited v First Active Plc, Ray Jackson and by Order Bernard Duffy v Brian Cunningham* [2011] IEHC 117 was opened to the Court. The case dealt with the issue of mistakes and counsel said that just because in 2009 there was one stray reference to another company should not be grounds to collapse the case and that all other documents such as inter alia, the Loan Application Form and the Customer Care Booklet correctly identified Secure Property Homes Limited and makes no reference to Wise Finance (Ireland) Company.
48. When questioned by the Court about the discontinuance of proceedings against the solicitor, counsel stated that advice was received as to the sustainability and viability of that claim as is necessary in all professional negligence claims and that the advice was that the actual undertaking given by the solicitor was a narrow undertaking to assist with Land Registry queries so therefore the decision was made not to sue him as he had made reasonable efforts to assist.
49. When asked as to what happened between 2005 and 2013, it was confirmed that no action at all was taken between 2005 and 2009 when High Court proceedings against Mr David Soden were commenced but discontinued. Counsel for the plaintiff said that the reason they were discontinued was because the plaintiff company obtained legal advice that they would not be successful in an action against Mr David Soden as he had not given an undertaking to them to register the charge but rather to assist them and he had made reasonable efforts to do this. When asked by the Court why when as asserted by the plaintiff payments ceased in 2002, was the first demand letter not sent until 17th Oct 2013. Counsel said that he could not provide a complete answer and could only assume that the file of correspondence from the solicitors was incomplete. However, he argued that the absence of correspondence does not give rise to the absence of a defence and that the required time limit is twelve years. He said that the twelve years runs from the last payment made which he asserts was on 26th April, 2002 and the issuing of proceedings on 16th December, 2013 stopped the statute running and these are the proceedings that are being prosecuted at trial so therefore these are the proceedings that the plaintiff is relying upon.

## **Discussion**

50. The Court has a number of concerns in respect of the evidence put before it in this case. These proceedings were fully contested.
- (i) There has been considerable delay in the bringing of these proceedings which has not been accounted for. The mortgage is dated the 26th of May 1999 and the last payment is alleged to have been made on the 26th of April 2002. Correspondence suggests that litigation was contemplated against Mr David Soden in 2004 but was not initiated until 2009 and then discontinued. A copy of these proceedings was not opened to the Court.
  - (ii) Correspondence with Nigel Bannon's solicitors continued up to 2004 and then appears to have ceased until the 17th of October 2013 which appears to be the first letter of demand sent to the defendant Nigel Bannon. If there was any intervening correspondence the plaintiff could not account for it or give any fuller account to the Court. No coherent explanation was provided to the Court as to why the first letter of demand was not sent until the 17th of October 2013 in circumstances where the plaintiff asserts that the last payment from Nigel Bannon was received in 2002.
  - (iii) The mortgage document put before the court recites Secured Property Homes Limited as the mortgagee. The mortgage document further down on page one in the interpretative provisions on its face recites Wise Finance Company (Ireland) Limited as the mortgagee. Whilst counsel for the plaintiff argued that this was a mere error, witness for the plaintiff Mr Ian Andrews formally Mr Ian Leaf indicated that Secure Property Loans Limited and Wise Finance Company (Ireland) Limited were under the same ownership. He said that Wise Finance Company (Ireland) Limited was one of the companies that introduced the loan to Home Funding Corporation Limited, but no further evidence was provided to underpin this evidence or to precisely explain the interest of Wise Finance Company (Ireland) Limited, if any, in the mortgage transaction.
  - (iv) A copy Land Registry Transfer of Charge document in respect of folio 4759F County Cavan dated 1st March, 2001 was produced which purports to transfer from Secured Property Loans Limited, as the person entitled to be registered as owner, in consideration of £15,000 the benefit of the charge to Home Funding Corporation Limited the plaintiff.
  - (v) This transfer is incomplete on its face as it leaves blank the date of the charge it purports to transfer. No account is taken of any beneficial interest Wise Property Company (Ireland) Limited may have in the loan. It is not clear to the court whether Wise Finance Company (Ireland) Limited had or has any beneficial interest in the loan or whether they should have been a party to the Transfer of Charge.
  - (vi) No evidence of registration of that transfer of charge was provided or of any attempts to register it. Neither was there any evidence of this transfer of charge being notified to Mr. Nigel Bannon as required.

- (vii) The mortgage was never registered as a burden against the property contained in Folio 4759F County Cavan. The Plaintiff argues that the first named defendant refused to consent to the use of the land certificate for that purpose in a letter from his solicitors dated the 23 April 2004 after the Solicitor David Soden had failed to discharge his undertaking in that regard.
- (viii) The Court understands that proceedings were contemplated against Mr David Soden but not pursued. No copy of the undertaking said to have been given by Mr. Soden or any other related correspondence was opened. There is no further evidence of any further action being taken to pursue this aspect after the correspondence from Maurice G Lyons and company Solicitors of the 24th of November 2004 with Mr. Jarred Leaf of Home Funding Corporation Limited and the discontinued High Court proceedings in 2009.
- (ix) Mr Mark Lonergan is a director of Elstree Mortgages Limited a company which was previously known as Home Funding Corporation Limited since 2017. While he identified the mortgage documentation as shown to him, he had very limited knowledge of the background to the case, he gave no evidence in respect of the advancement of monies to the borrower on foot of the mortgage and was not in a position to verify the contents of the statement of account which was produced in the format of printout attached to the Statement of Claim.
- (x) Mr Ian Andrews, previously known as Mr Ian Leaf, gave evidence in respect of the monies outstanding. The Court did not consider Mr Andrews to be a reliable witness. Despite direct questioning from the Court, the Court remains unclear as to precisely what his connection is with the plaintiff or these proceedings and the extent of his knowledge of the contents of the printout showing the amounts outstanding. While he indicated that he had reviewed the document and later said that he had “designed” the document and was 100% certain as to its accuracy the Court remains unsatisfied as to the provenance of this account in the format of a printout document or the veracity of its contents.
- (xi) When questioned as to the last date payment is asserted to have been made by Mr Nigel Bannon, Mr Ian Andrews was not able to go any further than to state that it would be inconceivable that the company would record a payment that it had not received as it would have been vouched against a bank statement. There was no evidence that he had any direct knowledge of any of the payments made to include the initial advancement or the asserted final payment by Mr Nigel Bannon on the 22 April 2002 and no documentation was produced to underpin the contents of the print out document.

51. Mr Nigel Bannon confirmed that he had signed the Application form and made limited admissions to signing the Mortgage deed. In a fully contested claim the plaintiff opened the case of *Ulster Bank Ireland Ltd. V. O'Brien* [2015] IESC 96 and argued that the defendant's failure to respond to the letter from Killeen Solicitors of the 17th of June 2005 to W.O. Armstrong Solicitors was an admission against interest and that this coupled with

Mr Nigel Bannon's signature on the mortgage was sufficient proof that *"events had occurred in the manner put forward by the plaintiff"*. The facts of that case were not opened to the court but the court looks to the quotation opened from the judgement of Clarke J as follows:

*"Where the circumstances indicated that a reasonable person would have felt compelled to respond to an allegation in the context of an appropriate commercial relationship where money was due but did not so respond, an admission against interest might be inferred. That whether a failure to answer an allegation would make a declaration against interest of what would otherwise be hearsay was entirely dependent on the factual circumstances, including, inter alia, the relationship between the parties and the circumstances under which an allegation was made. The test must be that failure to respond, in circumstances where denial would clearly be required, would amount to an admission in terms of the conduct of reasonable people."*

The letter relied on dated the 17th of June 2005 is a letter written by Solicitors for David Soden Solicitor to Solicitors for Nigel Bannon in which they reference inter alia the Loan Agreement dated the 19th of May 1999 for a mortgage which they state was signed by Nigel Bannon. Their letter sets out no further detail in respect of the terms of the mortgage. The plaintiff did not set out any further the basis on which it says that the test set out in *Ulster Bank Ireland Ltd. V. O'Brien* [2015] IESC 96 has been met in this case.

#### **Decision**

52. The plaintiffs seek an order for specific performance against the first named defendant in respect of his obligations contained in the Commitment Letter dated the 18th of May 1999 and the mortgage dated the 26th day of May 1999 between Secured Home Funding Corporation Limited and Nigel Bannon and is seeking the sum of €965,641.21 by way of capital and interest on foot of a loan of IRE15,000 advanced to the first named plaintiff Nigel Bannon in and around the 26th May, 1999. The plaintiffs further seek a number of ancillary reliefs. The mortgage is not registered.
53. The plaintiffs are not the original mortgagees but contend that they are the beneficial owners of the charge between Home Funding Corporation Limited and Nigel Bannon and in that regard produced the copy Transfer of Charge document above which is incomplete on its face and offered no evidence as to why this was not registered or of any attempts to register it.
54. There has been significant delay coupled with unaccounted for gaps in the chronology of events over a 20-year period.
55. The Court found Mark Lonergan to be a truthful witness but his evidence was severely curtailed by his very limited knowledge or familiarity with this transaction. His evidence went no further than to identify the original mortgage documentation between Secured Property Homes Limited and Nigel Bannon. He stated that he could not give evidence in

respect of any of the intervening transactions which the plaintiff says proves that Home Funding Corporation and now Elstree Mortgages Limited are the beneficial owners of that charge. He gave no evidence in respect of the unregistered copy Transfer of Charge document. He could give no evidence in respect of any payments made or amounts outstanding.

56. The Court did not find Mr Ian Andrews to be a reliable witness. He conceded that he had been previously known as Ian Leaf. As stated above despite questioning from the Court, the Court remains unsatisfied as to the precise nature of his role within the plaintiff company and his connection with this litigation.
57. The plaintiff relied on Mr. Ian Andrews evidence to prove the statement of account. Crucially as stated above despite his assertions of having “reviewed” and “designed” the account document he went on to say that it was generated as a result of a reconciliation carried out by employees of the company. No evidence in respect of that reconciliation or the generation of that document was produced. The Court is not satisfied that he is in a position to give evidence to prove its contents. The requirement to prove the accuracy of the statement of account is critical in this case. It recites the date of advancement of the loan to Mr Nigel Bannon, the amount that the plaintiff says is outstanding and the final payment made which goes to the running of the Statute of Limitations 1957.
58. The plaintiff agrees that the applicable limitation period in these proceedings is 12 years and that this time runs from the point of default which the plaintiff says from the printout document is the last payment made by Mr. Bannon on the 26th of April 2002. The plaintiff asserts accordingly that the issuing of proceedings on 16th December, 2013 stopped the statute running and that these proceedings were issued just inside the limitation period.
59. The Court is not satisfied on the balance of probabilities from the evidence given by Mr Ian Andrews that the last payment received by the company was on the 26th of April 2002 and accordingly is not satisfied on the balance of probabilities that these proceedings were issued within the applicable limitation period.
60. The Court considers the limitation period to be dispositive of these proceedings.
61. Accordingly, the Court dismisses the plaintiffs claim.