THE HIGH COURT

[2016 No. 789 J.R.]

BETWEEN

KARL O'DALY

PLAINTIFF

AND

EBS MORTGAGE FINANCE AND JUDGE GRIFFIN

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 24th day of October, 2017.

Nature of the case

1. This is a case in which the applicant seeks relief by way of judicial review in order to quash a decision made by the Circuit Court granting repossession of his property on foot of a mortgage loan. The application is based upon numerous complaints about the manner in which the Circuit Court hearing was conducted.

2. The application for leave came on before Humphrey J., and the matter was put back so that the respondent could be put on notice. When the matter came before me, it was entirely clear whether it was a leave application on notice, or, as the applicant contended, a 'telescoped' hearing of the judicial review itself. I am treating it as the latter, as full argument was made in relation to the issues in the case.

Relevant Background

3. In 2008, the applicant entered into a mortgage loan with the first named respondent in the sum of €312,550 in order to purchase a property in Drogheda, Co. Meath. The monies were advanced and drawn down on or about the 1st October, 2008. He became the registered owner of Folio 62366 on the 7th January, 2009, and the first named respondent's charge over the property was registered on the same day. The conditions of the loan included monthly repayment obligations. The applicant has apparently been in breach of those monthly repayments since about July 2013. As a consequence of this, the first named respondent instituted proceedings in the Circuit Court in Co. Meath in December, 2014. The civil bill asserted that the lands constituted the principal private residence of the applicant, and that the Circuit Court in Meath enjoyed a jurisdiction to hear the case by virtue of s.3 of the Land and Conveyancing Law Reform Act 2013. The appropriate procedure in such a case is set out Order 5B of the Circuit Court Rules, as amended by SI 264/2009 and SI 171/2016. The Order is entitled 'Procedure in Certain Actions for Possession or Sale of Land and Actions for Well-charging Relief'. Rule 5 provides, that in such cases, the civil bill should be accompanied by an affidavit, sworn by or on behalf of the plaintiff, and that a defendant who enters an appearance shall defend the claim by filing a replying affidavit setting out the defence.

4. An exchange of affidavits took place between the parties. Among the points raised by the applicant in opposition to the application, were that he had cancelled his contract with the first respondent pursuant to European Directive 85/577/EEC and S.I. 224/1989; that the officers of the first respondent who swore affidavits in support of the application for possession had perjured themselves; and that the first named respondent had failed to comply with the Code of Conduct for mortgage arrears. These allegations were denied on behalf of the first named respondent.

5. The applicant issued a number of motions in the Circuit Court. A motion for discovery and a motion requesting plenary hearing issued on the 4th February, 2016. A third motion issued on the 18th May, 2016, seeking a "modular hearing" involving modules relating to: (i) the cancellation of the mortgage contract; (ii) the allegations of perjury; and (iii) all other issues.

6. The motion for discovery came before Judge Reynolds on the 12th April, 2016, in Trim Circuit Court, whereupon the court ordered that the applicant should issue a written request for voluntary discovery, and a timeframe was set down for matter thereafter. By letter dated the 13th May, 2016, the first named respondent refused to discover a number of documents sought. The discovery motion was listed for hearing before the court on the 26th July, 2016, together with the application for a plenary hearing. The motion for a modular trial was also listed before the court for hearing on the 26th July, 2016.

7. The applicant issued witness summonses as against the two deponents for the plaintiff, and sought to require them to produce private employment details and documents to the court for scrutiny. He also issued a notice to cross-examine both deponents. The applicant makes complaint of what happened next.

8. On the 22nd July, 2016, which was a Friday, counsel on behalf of the first named respondent attended before Judge Griffin on an ex parte basis in Trim Circuit Court in order to have the witness summonses set aside as being improperly issued and an abuse of process. The court adjourned the application to Monday the 25th July, at 10am, and directed that the applicant be put on notice of the application. The applicant complains of the fact of the ex parte application itself, and of the fact that there was no documentation to ground the application. The applicant was made aware of the application by letter, sent by way of email, from Ivor Fitzpatrick Solicitors on behalf of the first named respondent. This letter clearly stated that the matter had been listed for 10am on Monday the 25th July, 2016, before Judge Griffin. The applicant acknowledged receipt of this correspondence by way of reply.

The hearing on the 25th July, 2016

9. The applicant complains that the case was listed as a 'special sitting' at 10am on Monday 25th July, 2016. The respondent indicates that the judge listed the matter for 10am so as not to delay the main business of the day, which apparently consisted of a long list of family cases. Apparently, the applicant was a few minutes late to the 10am application and Judge Griffin had risen to await his attendance. When the applicant arrived, a hearing took place. The Court has had the benefit of a transcript of this hearing. This indicates that the hearing proceeded as follows.

10. When the case was called, Mr. O'Daly complained that he had not seen any paperwork and that it was obviously an *ex parte* application. The judge said that this was so, and that an application had been made to him on Friday to set aside the witness summonses in the matter and that he had directed that the matter be heard this morning. He also indicated that he had taken the opportunity over the weekend to read the papers in the matter. He asked counsel for the EBS, what his application was and the latter indicated that it was to set aside or strike out the witness summonses that had been served on Mr. Ken McCutcheon and Ms. Paula Duffy, employees of the plaintiff bank. He said that the application was being moved on the basis of Order 5B of the Rules of the Circuit Court. Counsel explained that it was a case of repossession in respect of arrears of mortgage and that a number of affidavits

had been sworn by the two employees. He said that Mr. O'Daly, in response to those affidavits, had made allegations of perjury, and allegations of a conspiracy to defraud, and alleged that they had sworn false instruments under the Banker's Book Evidence Acts. Further, he had issued summonses with a view to cross examining the employees. Counsel said that Mr. O'Daly had not sought leave of the court to seek to cross-examine either of the parties. He said that he himself had also put in further affidavits outlining the precise nature of the employment with the plaintiff, and that this gave the deponents the right to serve the affidavits on the basis of their employment with the company. He also submitted that because they were summary proceedings, under the rules, oral evidence should not be adduced. He said that the notice of cross-examination had been issued without leave of the court, and that the summonses sought to compel production of documents, including documents such as: the employee's P45s and P60s.

11. Mr. O'Daly then made his submissions. He said that he had issued the notice to cross-examine under O. 5B, r. 6 (2) and that there was no discretion for the plaintiff to refuse that and that he was entitled to cross-examine his accuser. The judge intervened to say these were not criminal proceedings, to which Mr. O'Daly replied that he still had a constitutional right to know if they were saying he owed them money which he said he did not, and that he was entitled to cross examine them. At this point, the Judge said: "Do they not have a constitutional right to their good name?", to which Mr. O'Daly replied that they did, but that he had copies of the Director's report certified by the Company Registration Office, which said that these individuals were not employees of EBS. He said he had issued the witness summonses in accordance with r. 23 and that the evidence was to be given orally under that. He also said that he had papers showing that Ms. Duffy was involved in a criminal trial in which he swore that she was an AIB employee and that she could not be both and employee of AIB and EBS. He said that as far as he was concerned the whole point was "moot", that he had given his notice to cross-examine in accordance with the rules, and that the witness summonses were accepted. He also submitted that all activity had been outsourced to an AIB company, and that his mortgage had been transferred from EBS and that he had not consented to anyone in AIB to view his information, and that it had been illegally obtained and was therefore inadmissible, but the whole point was "moot" because they were not employees.

12. The judge then ruled on the matter and said that Mr. O'Daly had alleged that the employees were guilty of perjury, conspiracy, and conspiracy to defraud, and that he had taken the trouble over the weekend to carefully peruse and read all of the papers in the matter and that he could not find "any hint of any evidence of perjury or conspiracy or conspiracy to defraud on the part of Ms. Duffy and Mr. McCutcheon apart from the bald assertion" made by Mr. O'Daly. He said that counsel was correct in his interpretation of the Rules of the Circuit Court, that leave of the judge in summary matters must be sought for the issue of witness summonses and notice to cross examine. His decision under all the circumstances was to set aside the witness summonses and the two employees would not be required to attend the next day at the hearing previously set down.

The hearing on the 26th July, 2016

13. On the next day, the 26th July the matter came before the court again. Again, the Court has had the benefit of a transcript of what occurred, which is as follows.

14. Counsel on behalf of the EBS said that there was a civil bill, but that Mr. O'Daly also had two motions; one relating to discovery, and the other as to whether the matter should be remitted to plenary hearing. He also said that Mr. O'Daly had a motion seeking to split the trial into three modules. The judge said that he had considered the papers over the weekend, and that he had also looked at them again the night before. He said he thought he should deal with Mr. O'Daly's motions first.

15. The first motion dealt with was the motion for discovery. Mr. O'Daly indicated that he had sixteen items listed for discovery, but that he had reduced it from sixteen items down to eleven. He said he was willing to "put a stay on his motions" on the basis that the EBS would respond in full and better particulars. The court then asked him about his application to have the matter remitted to plenary hearing and asked counsel what he said in relation to this. Counsel indicated that this was being opposed and that repayments had stopped in October, 2015 and that there was no reason it should go to plenary hearing. He said that matters had been well canvassed on affidavit and that the plaintiffs absolutely disputed the suggestion that Mr. O'Daly had lawfully cancelled the contract. The judge asked him about the request for discovery and counsel indicated that they had replied by letter saying that none of what Mr. O'Daly had sought reflected what was pleaded or had anything to do with the case with respect to possession and that it was a fishing expedition. The judge then asked Mr. O'Daly to address the application for a plenary hearing. Mr. O'Daly said there was a significant difference of opinion and fact in relation to the events that had transpired. The judge then asked him about his discovery request, to which the reply from Mr. O'Daly was essentially that he did not agree with the other side that the documentation sought was not relevant. The judge then asked him about the request for modular hearing. To this, Mr. O'Daly replied that if they were not going to give him discovery, it would be "a significant delay to issues" and a plenary hearing would be beneficial.

16. The judge then ruled on the matters before him. He said that he had read the papers twice and despite Mr. O'Daly's very firmly held views and the manner in which he prepared his case, he was not satisfied that the case required plenary hearing. Matters had been well set out in the affidavits and there had to be a special reason why a matter would go from trial by affidavit to a plenary hearing. He refused that application.

17. He also refused the request for discovery, saying that he had gone through these in detail and that the replies were "quite fulsome". He said that Mr. O'Daly seems to have "an issue with AIB and EBS", and commented, "I would have had to be on Mars for a number of years not to realise what had gone on in our broken economy and the various takeovers required of the broken banks, and I sympathise with Mr. O'Daly in this regard, but I can find no basis in law on his requests for discovery. He said a lot of what he sought was in fact out in the open and was readily available, and a lot of what he was seeking was a fishing expedition.

18. Moving on then to the application for a modular trial, the Judge said that clearly this did not now arise and that while he agreed with Mr. O'Daly that the plaintiffs should have responded on a "more timely" basis to the three-week time limit set by Reynolds J., they were now in a position to proceed for the order for possession.

19. He then asked Mr. O'Daly did he want the opportunity of going to MABS, to which Mr. O'Daly replied that he was only here today to hear his motions and did not have other documents with him and that he was not in a position to deal with it. The judge said that the motion for possession had been adjourned from time to time. The applicant then said "we may as well deal with it now then". The judge said that there was going to be an order for possession made because there was no defence, which he had held on the basis of the motions. Again, he asked whether Mr. O'Daly wanted the opportunity to consult with MABS. Mr. O'Daly said that perhaps he probably should speak with MABS to see what help they would provide. Counsel said that the court should perhaps make an order for possession and put a stay on it and the judge decided to do that. He explained to Mr. O'Daly that if he was engaging with MABS and getting somewhere, this date could be extended, but that he had to satisfy a court that he was getting somewhere and that it was not just a hope rather than a possibility of engagement.

The applicant's judicial review proceedings

20. The reliefs sought by the applicant were stated to be as follows: an injunction "with an interim stay" on the possession order

granted by Judge Griffin on the 26th July, 2016, until the determination of the judicial review proceedings; certiorari quashing the decision of Judge Griffin on the basis that it was *ultra vires* in want of jurisdiction by virtue of the applicant's cancellation of the contract on the 5th January, 2016; a declaration that he had cancelled the mortgage contract in accordance with S.I. 224/1989 and EU Directive 85/577/EEC; an order of prohibition restraining EBS from their "legal attempt" to seize the applicant's property or enforce any other judgment in relation to it; an order of *mandamus* directing them to return the title deeds; damages for an alleged "illegal usurpation of property rights under Article 40.3 and 43 of the Constitution of Ireland, and breaches of his rights to privacy".

21. The grounds for judicial review were identified as four-fold: (i) jurisdictional error in law; (ii) that the decision-making process was flawed and in breach of national justice and constitutional principles; (iii) objective bias; and (iv) failure to provide reasons.

22. Under the heading of jurisdictional error in law, a number of matters are raised, and indeed they read more in the nature of submissions than a statement of grounds. I think it is fair to say that, in essence, two matters are raised in relation to jurisdiction. First, the applicant claims that the Circuit Court had no jurisdiction to hear the case because of his cancellation of the mortgage contract under S.I. 224/1989 and EU Directive 85/577/EEC (Statement of Grounds paragraphs 1, 2, 3, 5, 6 and 7). He also pleads that the Circuit Court had no jurisdiction because the rateable valuation of the property exceeded €75,000; in this regard he referenced *Permanent TSB v. Langan* [2016] IECA 229, section 22(1)(b) and Third Schedule of the Courts (Supplemental Provisions Act, 1961, together with a number of Circuit Court Rules and Forms (Statement of Grounds, 4). The Statement of Grounds does not set out any other ground for claiming a 'jurisdictional error of law' and I will confine myself to those two.

23. Under the heading of breach of natural justice, his complaints include: that a special sitting had been arranged for 10.00am on the 25th July, 2016, which he alleged was "away from the public". He complains that he had requested to see the paperwork and was told that there was none and alleged that this was highly irregular, and complains that there had not been four clear days' notice of the application. He alleges, *inter alia*, that the judge had refused to look at his affidavit and had not made any reference to the evidence he had lodged in his earlier affidavits and exhibits. He complains that he was not entitled to defend himself. He also refers to the *locus standi* of EBS to bring the proceedings since his mortgage was with an entity other than EBS. He alleges that Judge Griffin had stated that the banks employees had the right to their good name and that his right to cross-examine applied only in criminal trials. He complained of the decision to refuse discovery was entirely lacking in fairness. He complained that the matter proceeded on the 26th July, 2016, in circumstances where the case had not been listed for hearing.

24. Under the heading of objective bias, he complained that Judge Griffin was only prepared to hear one side of the story and that any reasonable person could see that. He complained of the actual decisions made, including the facilitating of a "special sitting" of the court, and alleges that the Judge's comment about "living on Mars", showed a sympathy towards the banks.

25. As regard the failure to provide reasons, he said that despite a number of major significant differences of fact and law, Judge Griffin merely stated he had no defence to what was a highly technical case and had displayed little or no knowledge of the case despite having claimed to read the file.

26. Among the papers furnished to the court was a letter handwritten by the applicant and dated the 5th January, 2016, in which he said that he was "electing to terminate and cancel" the contract with EBS pursuant to European Regulation/Directive 85/577/EEC. The letter continues by saying that as EBS had failed to advise his cancellation rights of contract formation, and failed to provide a cancellation form; he was now seeking to exercise this option, of which he had only recently learned.

Analysis and Decision

27. It perhaps bears stating in the present context that judicial review proceedings are limited in scope and do not consist of a merits-based appeal. In their book *Administrative Law in Ireland,* 4th Ed., (Dublin, 2010) at para. 10-08 Hogan and Morgan summarise limitations of judicial review succinctly as follows: -

> "Although the High Court possesses an inherent jurisdiction to supervise the activities of the inferior courts, tribunals, and other public authorities, the *ultra vires* doctrine means that this power of review may only be exercised in circumstances where the inferior body has exceeded its jurisdiction. The High Court, when exercising its power of judicial review, is not concerned with the merits, but rather with the legality of the decision under review. In short, a finding of *ultra vires* is a prerequisite to judicial intervention by means of judicial review."

Similarly, De Blacam, in his book *Judicial Review*, 3rd Ed., (Dublin, 2017) clearly states at para [6.19]: -

> "In conducting a review, the court is not ordinarily concerned with the merits of the decision: it is not hearing an appeal."

The Jurisdiction of the Circuit Court and EU Directive 85/577/EEC

28. The first issue raised by the applicant was that the Circuit Court lacked jurisdiction to hear the case because he had cancelled his mortgage contract with the first named respondent by virtue of EU Directive 85/577/EEC and S.I. 224/1989 in January, 2016. In response, the first named respondent points out that this statutory instrument was in any event repealed by S.I. 484/2013 which came into force on the 13th June, 2014. It is further pleaded that, in any event, S.I. 224/1989 clearly did not apply to mortgage contracts on the basis that s. 3 sub. 2(b) states that it shall not apply

> "any contract for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property; provided, however, these Regulations shall apply to contracts for the supply of goods and for their incorporation in immovable property or contracts for repairing immovable property."

This was reaffirmed in S.I. 484/2013 at s. 3. sub. 2(e).

29. There is a more fundamental problem than that identified by the EBS. The Directive sought to be relied upon by the applicant, which was implemented into Irish law via the statutory instruments referred to, is known as the "doorstep-selling" Directive. Article 1, subs 1 of the directive provides that it shall apply to:

> "contracts under which a trader supplies goods or services to a consumer and which are concluded:
>
> - during an excursion organized by the trader away from his business premises, or
>
> - during a visit by a trader:

(i) to the consumer's home or to that of another consumer;

... where the visit does not take place at the express request of the consumer."

This is an important limitation upon the contracts covered by the Directive. No evidence as adduced to this Court by or on behalf of the applicant that the mortgage loan he entered into was concluded either during a visit to his home or during an excursion organised by the trader away from his business premises. The purpose of the Directive was explained in the *Heineger v. Bayerische Hypo-und Vereinsbank AG* (C-481/99)), as follows:

> "the special feature of contracts concluded away from the business premises of the trader is that, as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared and is caught unawares; ...the consumer is often unable to compare the quality and price of the offer with other offers; ...this surprise element generally exists not only in contracts made at the doorstep but also in other forms of contract concluded by the trader away from his business premises."

30. Article 4 provides that,

> "In the case of transactions within the scope of Article 1, traders shall be required to give consumers written notice of their right of cancellation within the period laid down in Article 5, together with the name and address of a person against whom that right may be exercised."

Under Article 5 of the Directive:

> "the consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law."

The purpose of the notice requirement and the seven-day cancellation period is to give the consumer a period of time to enable him to assess the obligations to arise under the contract, in circumstances where he may have had little time to think because it was a doorstep selling situation.

31. Article 3, subs 2(a) of the Directive provides that it shall not apply to *inter alia*,

> "contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property."

The applicant focussed on this particular aspect of the Directive and sought to rely on a number of ECJ cases to establish the proposition that a mortgage loan could fall within the Directive, including *Heineger v. Bayerische Hypo-und Vereinsbank AG* (C-481/99), *Schulte v.Deutsche Bausparkasse Badenia AG* (C-350/03), Martin v. EDP Editores SL (C-227/08), and *Faber v. Autobedrijf Hazet Ochten BV* (C-497/13). This entirely overlooks the requirements of Article 1 of the Directive. Even though a mortgage loan may fall within the Directive, it is only if it was concluded in circumstances falling with Article 1 that the Directive applies. For example, in the *Heininger* case, the ECJ judgments records that the couple in question said that on several occasions that an estate agent, known to them and acting on a self-employed basis as agent for the bank, had called uninvited at their home, and there induced them to purchase a flat in question and to enter into a loan agreement for the purpose of the purchase. It was in that context, i.e. a situation of doorstep-selling, that the ECJ held that the Directive should be interpreted as applying to a secured-credit agreement such as that arising in the *Heininger* case. Similarly, in *Schulte*, C-350/03, the couple in question had been contacted at home by a representative of a company acting as an intermediary to a bank, who presented t a tax saving scheme to them. They also said that three consultations were subsequently held at their home within a short period, during which they were offered complete financing for the purchase of an apartment, which financing was provided by the bank. Both the loan agreement and real estate savings agreements were then signed at their home. They submitted that the bank should take responsibility for the doorstep selling situation, since it had worked closely with the intermediary company for many years and that the entire negotiation phase of contracts was conducted on behalf of the bank. The bank argued that it could not be liable in law because the sales representative was an employee of the intermediary company, whose role in the loan agreement was restricted to filling in the forms and the transmission of information. The questions referred to the ECJ for preliminary ruling included: a question as to whether the Directive applied to a contract for the purchase of immovable property, which was merely one component of a credit-financed investment scheme and where the contract negotiations conducted up to the conclusion of the contract were held in a door-step selling situation, both as regards the contract for the purchase of the immovable property and the loan agreement serving solely to finance that purchase. The Grand Chamber ruled that the Directive must be interpreted as excluding from the scope of the Directive contracts for the sale of immovable property even where they were merely a component of an investment scheme financed by a loan for which the negotiations were held in a door-step selling situation. Again, such comments as were made concerning ordinary mortgages in this judgment were made in the context of a doorstep-selling situation. Again, in *Martin*, C-227/08, which concerned the issue of whether a court may deal with issues under the Directive of its own motion even if the parties have not raised them, it is noted at para. 12 of the judgment that Ms. Martin had signed a contract with a representative of the company EDP Editores for the purchase of books, DVDs, and a DVD player at her home. The decision in *Faber*, C-497/13, concerns a different Directive (Directive 1999/44/EC) which concerns the sale of consumer goods and associated guarantees, and the role of the court in examining issues of its own motion. It adds nothing to the present analysis of the jurisdictional issue; the insurmountable hurdle faced by the applicant is that the Directive and Statutory Instrument he was seeking to rely on in the Circuit Court proceedings simply had no application to his situation because there was no evidence that he entered the mortgage contract in a 'doorstep-selling' situation.

32. It may also be added that even if the 'doorstep-selling' Directive applied to the applicant's situation, this would not be a matter of jurisdiction, but rather a matter of defence in the proceedings. Even if the applicant succeeded in his submissions that he had cancelled the contract, this would not have deprived the Circuit Court of jurisdiction but would rather have been a matter to be raised by way of defence.

The jurisdiction of the Circuit Court and the rateable valuation point

33. The question of the interaction between the rateable valuation of a property, its status as a principal private residence, and the jurisdiction of the Circuit Court, was considered at some length by the Court of Appeal in *Permanent TSB plc v Langan* [2016] IECA 229. The judgment of the court, delivered by Hogan J., makes it clear that where section 3 of the Land and Conveyancing Law Reform Act 2013 applies, the lender may bring proceedings for recovery in the Circuit Court. Section 3 applies to land which is the principal private residence of the mortgagor of the land and where the mortgage was created prior to 1st December, 2009. This Court is bound by the decision in the Court of Appeal. The applicant in the present case seeks to maintain that notwithstanding the provisions of the

2013 Act, the governing provision is section s. 22(1)(b) and the Third Schedule of the Courts (Supplemental Provisions) Act, 1961. This is an argument I have noticed to be very commonly used by lay litigants. In my view, the position is clearly set out by Hogan J. in the *Langan* case and there is no substance to this point. The position in the 1961 Act has been superseded by section 3 of the 2013 Act. Accordingly, the Circuit Court did not lack jurisdiction to deal with the proceedings brought for repossession of the applicant's dwelling on this basis.

Allegation of breach of natural justice in the conduct of the hearing

34. Essentially, the applicant's complaints in this regard relate to the making of the *ex parte* application on Friday the 22nd July, 2016, the listing of the matter for 10am on Monday 25th June, 2016, the absence of paperwork in support of the application to set aside his witness summonses, and the conduct of the hearings by the Judge on both the 25th and 26th July, 2016. Details of all of these events have been set out above, with particular reference to the transcripts of the hearings on the 25th and 26th July, 2016.

35. Order 5B of the Circuit Court Rules as amended sets out the procedures to be employed in actions for recovery of possession of land on foot of a legal mortgage or charge. Rule 2 provides that, save where otherwise expressly provided by the Order, in the event of any conflict between any rule of Order 5B and any other provision of the Rules, the provisions of Order 5B shall prevail. Rule 3 indicates that such proceedings should be commenced by civil bill and must include certain specified statements demonstrating jurisdiction. Rule 5 indicates that the procedure is by way of affidavit. Rule 6(1) provides that no party shall have the right in proceedings to which O. 5B applies "to adduce any evidence otherwise than by affidavit", except (a) by leave of the Judge, (b) where permitted in accordance with r. 7(4) (which is irrelevant here) or r. 8(1); or (c) where the proceedings have been adjourned for plenary hearing in accordance with r. 8(2). Rule 8(1) provides that a judge may at any stage of the proceeding, if it appears to him that the determination of any issue is necessary for the proper decision or relief as to the relief to be granted or as to any matter arising, "settle such issued to be tried", and that "evidence as to any issue of fact may be given orally or by affidavit or partly orally and party by affidavit" as the judge thinks proper. Rule 8(2) provides that the Judge may, where he considers it appropriate, adjourn a civil bill for plenary hearing, with such directions as to pleading or discovery as may be appropriate. There is extensive authority as to when it is appropriate to adjourn such a matter to plenary hearing. Accordingly, it is clear that the applicant had no automatic entitlement to a hearing where he could adduce oral evidence and that this was a matter within the discretion of the judge. It therefore also seems clear to me that the applicant had no entitlement to issue witness summonses in respect of the deponents, because such an entitlement would depend upon a prior entitlement to adduce oral evidence. Insofar as O.24 provides for the issue of a witness summons, this must be read subject to the regime set out in Order 5B which envisages a hearing on affidavit unless the judge otherwise directs. Accordingly, I am of the view that the applicant was not entitled to issue a witness summons without leave of the Judge.

36. A slightly different situation arises regarding the notice to cross-examine served by the applicant. Rule 6(2) of Order 5B provides that any party "desiring to cross-examine a deponent" who has sworn an affidavit filed on behalf of the opposite party "may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination", and that unless such deponent is produced, his affidavit shall not be used as evidence without special leave of the Court. The applicant contends that this gives him an automatic entitlement to issue a notice to cross-examine and to cross-examine deponents, and that he did not require the judge's leave in this regard. Rule 6(2) seems to me rather odd, in light of the overall emphasis in Order 5B that the orality of a hearing, in whole or in part, is a matter for the discretion of the Judge. However, on its face, it does appear to entitle the applicant to issue the notice to cross-examine without leave. This is not the end of the matter, however; it seems to me that the Judge must have a discretion as to whether such cross-examination should in fact proceed. It cannot be that the role of the Judge in deciding the appropriate form of proceedings can be ousted simply by virtue of the service of a notice to cross-examine. In my view, the Judge was entitled to consider, in light of the evidence before him in the affidavits and exhibits before him and which he had read, whether cross-examination was necessary or appropriate. Those are, in my view, the legal parameters within which the events of 22nd-26th July, 2016 took place.

37. The Judge, when faced with an *ex parte* application on Friday 22nd July 2016, seeking to set aside the (wrongly issued) witness summonses and notice to cross-examine, adjourned it on notice to the Monday in order to give the applicant an opportunity to be present and make submissions. This was an eminently fair thing to do.

38. The suggestion that the 10am sitting on Monday 25th July 2016 was some kind of irregular 'special sitting' of the court is utterly without substance. Further, when the applicant was a little late for this sitting, the Judge did not proceed and instead rose in order to give the applicant an opportunity to arrive, which again was the fair thing to do. He then heard the applicant in relation to the matter when he did arrive, and indicated his view that the applicant was not entitled to proceed as he had done, as set out earlier in this judgment. He based this decision upon the papers, including the sworn affidavits, that he had read over the weekend. I do not see anything irregular in this mode of proceeding.

39. It is true that the motion to set aside was not served four clear days in advance of the return date; but the manner in which the applicant had proceeded was irregular in the first place, a hearing date had been fixed for Tuesday 26th July which gave the matter some urgency, and the applicant was in fact present on Monday the 25th July and therefore in a position to respond to the application. In the circumstances, I fail to see how the manner in which matters proceeded on the 25th July, 2016, involved any breach of natural justice.

40. As to the decisions made by the Judge with regard to discovery, the 'modular hearing', and the question of remitting to plenary hearing on the 26th July, 2016, these were all decisions made by the Judge within jurisdiction. The question of remitting a summary matter to plenary hearing is always made by a judge on the basis of the affidavit evidence and the submissions of the parties. The Judge indicated that he had read the papers twice, and listened to the various complaints that the applicant made on the day. Having done so, he was entitled to take the view that the matter did not warrant a plenary hearing if he was so satisfied on the evidence. Having read the transcripts of the hearings, it does not seem to me that there was any want of fair procedures on the part of the Judge. Rather, what is abundantly clear is that the applicant had no understanding of the procedures involved in a summary application in respect of a mortgage loan or the legal threshold for having a case moved from summary to plenary hearing, with the result that he felt that the Judge was leaning against him, whereas in reality the procedure amounted to no more than a normal application of the summary judgment procedures.

Allegation of bias

41. In support of his allegation of bias on the part of the District Judge conducting the hearing, the applicant relies on a number of matters, including: a comment (the 'Mars' comment) that he says is suggestive of sympathy for the banks; the fact that the Judge ruled against the applicant on all matters; the 'special sitting' at 10am on the 22nd July, 2016; and that his motion was 'transformed' into a hearing of the possession application. I have read the transcript of the proceedings and am not persuaded by any of these arguments. The 'Mars' comment was merely the Judge indicating that many of bank loans had been transferred to other entities following the 2008 financial collapse, and that this was the reason that the EBS had inherited the applicant's loan and proceedings.

Indeed, he expressly said that had had sympathy for Mr. O'Daly at this point. The mere fact that he ruled against the applicant on all matters does not suggest bias, but rather that the applicant's submissions were without merit. The applicant refused to accept that this was a summary proceeding in which the evidence is placed before the court on affidavit. In such proceedings, a judge is entitled to read the affidavits and exhibits in advance of the trial, and invite the parties to make submissions in respect of them. He is entitled to take whatever view of the evidence he thinks fit, and he is not obliged to remit the matter for plenary hearing if he is not satisfied there is any arguable defence. I have already indicated my view that it was not irregular for the Judge to have heard the application to set aside the witness summonses and notices to cross-examine and therefore do not accept that this decision shows objective bias. Finally, it seems from the exchanges between counsel and the Judge that the matter had been before the court on a number of previous occasions and that the matter was listed for hearing of the repossession application as well as the various motions issued by the applicant, so that he could not in reality have been taken by surprise by the matter proceeding to the merits of the repossession application. Further, the Judge explicitly invited the applicant to engage with MABS before proceeding to a determination and the applicant declined to do so. Indeed, the applicant declined to engage with MABs at any time subsequent to the date in question even though a stay had been granted for six months to enable him to do so.

Alleged failure to give reasons

42. Having carefully reviewed the transcripts of the hearings on the 25th and 26th July, 2016, I think it would be fair to say that while the Judge did give reasons for most of the decisions he made, it is probably true to say that he did not give explicit reasons for rejecting the applicant's jurisdictional arguments, i.e. the argument relating to the 'doorstep-selling' Directive, and the argument relating to the rateable valuation of the property. There is much Irish authority on the question of how much has to be given to a litigant in summary cases by way of reasons and it is well established that in a summary proceeding, the obligation to give reasons is reasonably modest. Nonetheless, I do not think that the applicant was told even in broad terms why his jurisdictional arguments had failed. The Judge simply said that he had read the papers and that no defence was established.

43. However, the grant of judicial review reliefs is discretionary, not automatic. I have already described above how the two jurisdictional arguments raised were without merit; first, because the Directive and statutory instrument raised before the Circuit Court Judge simply had no application to the situation because there was no evidence that the mortgage had been entered into in circumstances of doorstep-selling, which in any event would not amount to a jurisdictional argument; and secondly, because of the rateable valuation decision of the Court of Appeal in *Langan*, which made it clear that the Circuit Court has jurisdiction in possession proceedings relating to a mortgage entered into in 2008 and concerning a principal private residence. In the circumstances, it would appear to me utterly inappropriate to quash the decision for failure to give reasons and to remit it for reasons; the Judge could reach no other conclusions on the two jurisdictional points for the reasons are as set out above and such an exercise would be futile.

44. In all of the circumstances, I refuse the relief sought.