THE HIGH COURT

JUDICIAL REVIEW

[2016/787 J.R.]

BETWEEN

GERALDINE GRANT

AND

MARTIN GRANT

APPLICANTS

AND

THE COUNTY REGISTRAR FROM

THE COUNTY OF LAOIS

RESPONDENT

AND

PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

NOTICE PARTIES

JUDGMENT of Mr. Justice McDermott delivered on the 7th day of March, 2019

1. On 25th July, 2016 an order was made by the County Registrar at Laois Circuit Court in proceedings entitled "The Circuit Court, Midlands Circuit, County Laois record no. 2014/00425 Between/ *Pepper Finance Corporation (Ireland) designated activity company Plaintiff and Geraldine Grant and Martin Grant* Defendants", granting possession of "all that and those the property comprised in Folio 17843 County Laois" known as Bondra, Colt, Ballyroan, Portlaoise, Co. Laois with no orders to costs. The court further ordered that execution for possession be stayed for nine months from the date of the order and granted liberty to the defendants to apply to extend the stay for cause shown.

2. The order was granted following the issuing of a Civil Bill for Possession against the defendants. The special endorsement of claim recited that by loan offer dated 13th February, 2008 the plaintiff offered to advance to the defendants a loan facility in the sum of €130,500 which was accepted and signed by the defendants on 25th February, 2008. The loan agreement provided *inter alia* for a term of 22 years. Repayment of the loan facility was to be made in the form of monthly instalments of principal and interest at a variable rate of 6.95% as of the date of the letter of approval : in the event of any repayment not being paid on the due dates or any breach of the conditions or covenants of the loan the plaintiff could demand an early repayment of the principal and accrued interest. The loan was drawn down on 26th February, 2008.

3. The loan facility was subject to and secured by a first legal mortgage dated 25th April, 2008 over Bondra, Colt, Ballyroan, Portlaoise. It was an express term of the mortgage that the defendants would pay to the plaintiff on demand the secured monies and that all monies remaining unpaid by the defendants to the plaintiff and secured by the mortgage would immediately become due and payable on demand by the plaintiff on the occurrence of any event or default as defined and specified in the mortgage: this included default in making payment of any of the monthly instalments in respect of any of the secured money. It was also a term of the mortgage that the plaintiff could without any further consent from or notice to the defendants or any other person enter into possession of the mortgage property or any part thereof.

4. On 11th October, 2012 GE Woodchester Homes Loans Limited changed its name to Pepper Finance Corporation (Ireland) Limited (and subsequently to Pepper Finance Corporation (Ireland) designated activity company), the plaintiff in the Circuit Court proceedings and the notice party in these proceedings.

5. As of 5th November, 2014 the monies outstanding to the plaintiff by the defendants pursuant to the loan facility was said to amount to €138,352.53 including arrears of €22,076.39.

6. The mortgaged property was the principal private residence of the defendants within the meaning of the Land and Conveyancing Law Reform Act, 2013. The Plaintiff claimed that insofar as the Code of Conduct on Mortgage Arrears issued by the Central Bank of Ireland applied to the loan facility, it had complied with the Mortgage Arrears Resolution Process set out therein and was not precluded from seeking possession of the mortgage property. The Civil Bill seeking possession issued on 28th November, 2014.

7. Thereafter the return date for the possession proceedings was 23rd February, 2015. The case was then adjourned to 25th May, 2015 and the applicants were put on notice of the adjournment date by Eversheds Solicitors who acted on behalf of the plaintiff. The proceedings were adjourned again to 14th September, 2015 at the request of Phoenix Project Ireland, a voluntary organisation set up in 2008 to offer support to distressed families and individuals who were at risk of losing their homes, and were assisting the plaintiffs. On 20th May 2015 Phoenix Project wrote to Eversheds stating that the applicants had an appointment to meet with a Personal Insolvency Practitioner on the 28th May and seeking an adjournment of the proceedings to allow time for this option to be explored.

8. On 8th September, 2015 Phoenix Project Ireland notified Eversheds that the plaintiffs did not object to the granting of an order for possession as they considered it to be an "inevitability". The plaintiffs were notified of an intended bankruptcy application by the defendants. On 14th September the proceedings were adjourned to 23rd November, 2015 of which the defendants were again notified. On 17th November, 2015 Phoenix Project Ireland notified Eversheds of a bankruptcy adjudication in respect of the defendants. The proceedings were then adjourned to 22nd February, 2016 and the plaintiffs were again notified.

9. On 11th February, 2016 Eversheds wrote to the Official Assignee in Bankruptcy enclosing a certified copy of the Civil Bill for Possession together with the grounding affidavit of Caroline Loftus upon which the application for possession was grounded and

copies of the exhibits referred to therein by way of service and informed the Official Assignee that the matter was adjourned to 22nd February, 2016. The letter also stated that the property was the defendants' principal private residence. The letter states:

> "We would be obliged if you let us know your position in relation to these proceedings and in particular whether you are in a position to consent to our application. Alternatively, if you are in a position to Surrender the property we would be grateful if you would notify us.
>
> Finally if you propose to issue a disclaimer in respect of the property or if you have already done so, please provide us with a copy and confirm in writing that you are consenting to the Orders being sought in the Circuit Court by our client."

10. On 18th April, 2016 Mr. Mark Doheny of the bankruptcy division of the Insolvency Service of Ireland replied to Evershed Solicitors as follows:

> "I refer to your recent correspondence dated 22/04/2016. As this property is the family home of the bankrupts, the Official Assignee would need a Court Order pursuant to S. 61(4) of the Bankruptcy Act, 1988, to consent to your request for possession of the property and can therefore only confirm that the Official Assignee offers no objection to your application to Court for possession thereof.
>
> Please accept this correspondence as statement of the Official Assignee['s] position on the matter which you can produce to the Court, as the Official Assignee will not be attending any court hearing and therefore seeks your confirmation that you will not be seeking any Court Order against the Official Assignee.
>
> We hereby request that you forward to our office a copy of the Possession Order when you receive same for (sic) the Court."

In a letter of the same date Phoenix Project Ireland advised Eversheds that their clients consented to an Order for Possession but also requested that the notice party agree to a stay of six months on the order to enable them to seek alternative accommodation. This position was reiterated in a further letter of the 22nd April.

11. At the adjourned hearing on the 25th April 2016 the applicants attended with an adviser and again indicated that they were consenting to an Order for Possession. However, the case was again adjourned to the 25th July to enable the position of the Official Assignee in Bankruptcy to be confirmed and submitted to the respondent.

12. The order for possession was made by the County Registrar on 25th July 2016 pursuant to powers conferred by s.34 of the Courts and Courts Officers Act 1995 and as provided for under the Circuit Court Rules.

Judicial review proceedings

13. On 17th October, 2016 the applicants herein, were granted leave to apply for judicial review (Heneghan J.) in respect of a number of reliefs including:-

> "(a) An order of *certiorari* quashing the order of the respondent dated 25th July, 2016 to grant possession of the applicant's family home … to the notice party in proceedings with record no. 425/2014 and remitting the matter for determination to the respondent".

A number of related declarations were sought to the effect that the applicants were consumers for the purpose of the Unfair Terms in Consumer Contracts Directive 93/13/EEC (the Directive) as transposed into Irish Law by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (the Regulations): a declaration that the notice party was acting in the course of business at all times in its dealings with the applicants: a declaration that the respondent in adjudicating on the notice party's application for possession was required to consider of his own motion whether the terms in the contract between the applicants and the notice party that fall within the scope of the Directive were unfair: a declaration that when considering whether any of the terms in the contract were unfair he was obliged but failed to take into consideration the applicants' fundamental rights as set out in the Charter of Fundamental Rights and the European Convention of Human Rights and whether the granting of such an order was 'proportionate'. A declaration was also sought that lawyers for the notice party owed a duty under their professional code of conduct to consider of their own motion whether terms in the contract between the applicants and the notice party which fall within the scope of the Directive were unfair and in doing so must take into account the provisions of the Charter and the Convention. This latter relief at Paragraphs D(f) and (g) was not pursued at the hearing.

14. The grounds upon which leave was granted are set out in paragraph E of the statement of grounds.

15. The grounds relating to the order of *certiorari* and the declarations sought at paras. D (b) to (e) inclusive concerning the court's obligation to consider and apply the terms of the Directive and the Regulations cited above and the provisions of the Charter and the Convention are set out at paras. E (10) to (20) inclusive of the statement of grounds. These grounds recite that the purpose of the Directive is to compensate for a consumer's weak bargaining position both in terms of knowledge and resources vis-á-vis financial entities such as the notice party who were at all times acting within the course of their business. The applicants were consumers as defined by the Directive and Regulations. It is claimed that many of the terms of the loan and mortgage agreements were not individually negotiated and therefore the provisions of the Directive and Regulations apply to the relationship between the parties. Any non-core terms that are not individually negotiated are said to be subject to a fairness test and if any term does not pass the fairness test it is not binding on the consumer. This proposition is developed as follows:

> "14. A term is defined be unfair if, contrary to the requirement of good faith, it causes a significant imbalance on the party's rights and obligations arising under the contract to the detriment of the consumer.
>
> 15. In addition, all terms, including core terms, must be drafted in plain and intelligible language, if there is any ambiguity the interpretation most favourable to the consumer should be adopted.
>
> 16. It is for the National Court to assess, of its own motion, whether a term in the contract falling within the scope of the Directive is unfair where it has available to it the legal and factual elements necessary for that task (Case C– 415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya*.).

16. It is claimed that in breach of the provisions of the Directive and the Regulations the respondent did not carry out any fairness assessment prior to granting the Notice Party an order for Possession. This is said to be particularly important when the consumer is

not legally represented.

17. The fairness issue is developed in grounds E(17) to (20) as follows:

> "17. The provisions of the Loan dealing with the variation of the interest rate are potentially unfair. Term 1 in "Part 2 – Standard Conditions" states:
>
> *"the rate of interest applicable to this loan will be variable for the terms specified in Part 1 of the loan offer letter".*
>
> 18. Further, Term 7(a) in "Part 4 – general terms and conditions" states:
>
> "subject to clause 6(b) at all times when a variable interest rate applies to the Loan, the initial rate of interest will be the current rate charged at the date the loan cheque is issued and subsequently the interest rate charged will vary at the Lender's discretion upwards or downwards".
>
> 19. These terms will allow the Lender to vary the interest rate without limitations, controls or reference to any other factors. This is contrary to the transparency requirement in Article 5 of the Directive which requires that the term be grammatically intelligible to the consumer but also allow the consumer to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him. (Case C– 143/13 *Bogdan Mattei v. S.C. Volkspank Romania S.A.*).
>
> 20. Once the facts of the case fall within the Directive and the Regulations, the case is within the scope of EU law for the purposes of the Charter. When the national court is examining the contract between a consumer and a business for unfair terms it must do so in light of the Charter (Case C– 34/13 *Kušionová v. SMART Capital*"."

18. The grounds upon which the declarations are sought under paras. D (h) and (i) are based upon the proposition that the respondent had an obligation to take into consideration the applicants' fundamental rights under the Charter and the Convention and must review the proportionality of such an order before granting an order for possession and are addressed in paras. E(23) to E(26) as follows:

> "23. In implementing the Directive, the national court must have regard to the Charter and the rights guaranteed by the Charter, including the right to an effective remedy (Article 47). Further the right to accommodation is a fundamental right under Article 7 of the Charter. The National Court must take this into account together with the rights guaranteed by Article 8 of the Convention, when implementing the Directive and/or when any orders are being made that effect the family home (*Kusionova*).
>
> 24. The loss of a family home is one of the most serious breaches of the right to respect for the home and any victim of such a breach must have the possibility of reviewing the proportionality of this breach.
>
> 25. In addition as both the applicants are people with disabilities they have rights under Article 26 of the Charter.
>
> 26. Therefore the National Court when deciding on an application for possession must consider the proportionality of the order for possession (*Kusionova*)."

Background circumstances

19. The facts relied upon in the factual summary set out at grounds E(1) to (9) are for the most part admitted in the statement of opposition. The applicants are a married couple who have lived in their family home at Bondra, Colt, Ballyroan, Portlaoise, Co. Laois for a period of 28 years. Mr. Martin Grant had lived there since he was nine years old. He had previously been married to the first applicant's sister who died when she was 37. They had a two-year-old daughter Kathleen. Mrs Geraldine Grant moved in to care for Kathleen and she and Mr. Grant were subsequently married. She raised her niece as if she were her own daughter and now cares for her niece's two children aged one and four while she works.

20. In 2003 the applicants took out a loan of €70,000 secured by way of mortgage on the family home to pay for improvements, including a new heating system and insulation. Mr. Grant's mother was living with and dependent upon them at the time. They took out a mortgage with GE Woodchester Home Loans Limited. The first applicant describes in her affidavit how in or about late 2007 they were "cold-called" by a mortgage broker firm Moneypenny, which she understood had since ceased to trade. They refinanced their original loan which they were having difficulty repaying at the time and consolidated a number of other debts, a car loan and a credit union debt, into a new loan which was secured by the mortgage. She states that the lender knew of their repayment difficulties at that time.

21. The new loan of €130,500 was to be repaid over 22 years. The total repayable amount was estimated to be €255,063.60. The variable interest rate was initially set at 7.24% (APR 6.95%) and monthly payments were €966.15. The applicants signed the loan papers in the presence of Midlands Legal Solicitors a firm appointed by the lender. They state that they did not receive "any meaningful legal or financial advice from this firm". They did not meet a representative of the lender nor did they meet a personal representative of the broker.

22. At the time of the first mortgage in 2003 the first applicant was employed and earned approximately €400 per week. Her husband was engaged in a number of FAS community employment schemes and was in receipt of a weekly payment. Mrs Grant was made redundant in 2004. She then obtained a job in Dunnes Stores Ltd as a general operative, stacking shelves and working as a cashier. She was obliged to quit this employment in November, 2011 due to ill health. She was employed on a "zero-hour contract" and earned about €200 per week.

23. The couple had difficulty in meeting repayments to the lender in 2008 and by 26th May, 2009 had defaulted on the loan. In her affidavit Mrs Grant states that they continued to make "whatever payments we could".

24. Mrs Grant deposed that the notice party varied the interest rate on eleven occasions rising to a peak of 7.75% and falling to its current level of 4.85% (at the time of the swearing of her affidavit). Between 4th June 2008 and 12th February 2009 the rate exceeded the original rate of 6.95%: thereafter it was lower. The history of interest rate changes provided by the lender as exhibited indicates that the rate varied from 26th February, 2008 at 6.95% to a high of 7.75% on 7th August, 2008 to a rate of 5.1% on 28th May, 2009 two days after their default on the loan. Thus at the time of their default it was a lower rate than first negotiated.

Subsequent changes reduced the interest rate to 4.85% by 21st October, 2011.

25. Both applicants are now living in very difficult circumstances and suffer from various physical difficulties and disabilities. The first applicant Mrs. Grant suffers from hypertension, gout, dyslipidaemia, osteoarthritis of the lumbar spine and knee joints, obesity, anxiety, depression and non-insulin dependent diabetes. She has severe mobility issues and needs the assistance of a wheelchair or crutches. Her husband, Martin Grant suffers from hypertension, dyslipidaemia and type 2 diabetes. Dr. White, their general practitioner, wrote a letter outlining the severe health difficulties from which they suffer which was submitted to the Housing Department of Laois Co. Council on 28th September, 2015 in support of a housing application following the repossession order granted in this case. He indicated that Mrs. Grant had poor mobility and required accommodation at ground floor level as she would be unable to climb stairs.

26. Mrs. Grant states that the couple applied to Laois County Council for social housing to avoid homelessness once the order for possession is executed by the notice party. They have been informed that there is no suitable accommodation available nor can any such be guaranteed at any point in the future: at the time of swearing the affidavit there were approximately 1,700 people on the housing waiting list in County Laois and 360 individuals or families became homeless there in the previous year. There was no or little emergency accommodation in the county and many homeless people were accommodated in hostels and bed and breakfast premises in neighbouring counties.

27. On 1st November, 2015 Mr. Martin Grant was adjudged a bankrupt and Mrs Grant was adjudged a bankrupt the following week on 9th November.

28. Mrs. Grant states that when served with the Civil Bill for Possession in 2014 the couple did not have any money to pay for lawyers and were not legally represented at any of the appearances in court. It is claimed that they did not know that they had any rights under the Directive or the Regulations, the Charter or the Convention.

29. Mrs Grant acknowledged that they had received support and advice from the Phoenix Project Ireland, a registered charity. This is also clear from the exhibited correspondence to which I have already referred. A representative of the Phoenix Project with a law degree accompanied them to court on a number of occasions but at no point did they or anybody else raise issues about unfair terms during the course of the proceedings.

30. As already stated the applicants consented in correspondence and before the County Registrar to the making of the Order for Possession. At the final hearing on 25th July 2016 the notice party sought to limit any stay on the order for possession to one of six months duration. The applicants requested a longer stay for a year because Mrs Grant was wheelchair bound and their daughter was getting married the following summer. This resulted in a stay of nine months on the order.

The mortgage agreement

31. GE Woodchester Home Loans Ltd by letter dated 13th February, 2008 offered a variable interest loan of €130,500 to the applicants on the terms and conditions set out in parts 2, 3 and 4 of the letter repayable by monthly instalments over 22 years. The applicants were "strongly advised" to consult a solicitor before deciding to accept the offer. The loan included provision for the refinancing of other loans as evidenced by standard conditions 7 and 8. Under the heading "Repayment" it was provided at clause 4(d) that repayments should be made by monthly instalments comprised of principal and interest. Clause 4(b) stated:-

> "In the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in clause 2(2) the lender may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan."

32. Clause 7 states:-

> " 7. Variable interest rates
>
> (a) subject to clause 6(b), at all times when a variable interest rate applies to the Loan the initial rate of interest will be the… rate of charge on the date the loan cheque is issued and subsequently the interest rate chargeable will vary at the Lender's discretion upwards or downwards.
>
> (b) the lender shall give notice to the borrower of any variation of the interest rate applicable to the Loan…"

33. At p. 10 of the letter the borrowers were notified in block capitals under "Consumer Credit Act Notices" that their home was at risk if they did not keep up payments on the mortgage or any other loans secured upon it and that payment rates on the housing loan might be adjusted by the lender from time to time. They were further advised that legal advice should be taken before the document was signed. The applicant signed an acceptance and consent dated 25th February, 2008 which was witnessed by Midland Legal Solicitors. In doing so they confirmed that they had read and fully understood the Consumer Credit Act Notices set out in the letter and the terms and conditions contained in the offer letter and their acceptance of same.

34. The Indenture of Mortgage was also executed on 25th February, 2008. A number of the clauses of this indenture are relevant to this application. Under clause 3 the borrowers covenanted to pay the lender on demand the money secured by the mortgage. The money would be due and owing immediately on demand on the happening of any event of default.

35. Clause 8 provided that the lender might without any further consent from the borrower or any other person enter into possession of the mortgage property save that this power was not exercisable unless the events specified in clause 9.01 occurred which included a default in payment of any monthly or other periodic payment.

36. The law applicable to applications for possession based on acts of default which occurred prior to 1st December, 2009 was governed by the provisions of s. 62 of the Registration of Title Act, 1964, s. 62(7) of which provided that:-

> "When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge…may apply to the court in a summary manner for the possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land...should be deemed to be a mortgagee in possession."

37. In *Start Mortgages Limited and Others v Gunn and Others* [2011] IEHC 275 Dunne J. considered the rights of the registered owner of a charge under s.62(7) of the Registration of Title Act 1964 as follows:

> "It is clear from the authorities….that s.62(7) conferred on a registered owner of a charge the right to obtain an order for possession for the purpose of a sale out of court. …In practical terms if the principal sum due on foot of the charge has become payable the registered owner of the charge is entitled to an order for possession. That is not to say that the borrower is not entitled to an adjournment of proceedings to pay off the mortgage in full or alternatively to come to an arrangement with the lender as to the repayment of the mortgage. However, if the proofs of a plaintiff are in order and there is no other bar to an order being made, then it seems, that the court has no discretion but to make the order."

(see also *Secured Property Loans Limited v Flood* [2011] IEHC 189 *per* Laffoy J., at para 3.4).

38. This provision was repealed by s. 8(3) and Schedule 2, part 5 of the Land and Conveyancing Law Reform Act, 2009 with effect from 1st December, 2009 and replaced by s. 97 of the 2009 Act which provides:-

> 97(1) … a mortgagee shall not take possession of the mortgage property without a court order granted under this section, unless the mortgagor consents in writing to such taking not more than seven days prior to such taking.
>
> (2) A mortgagee may apply to the court for an order for possession of the mortgaged property and on such application the court may, if it thinks fit, order that possession be granted to the applicant on such terms and conditions, if any, as it thinks fit."

The requirement to obtain a court order for possession

39. It is clear that notwithstanding the provisions of Clause 8 the notice party could not have obtained possession of the applicants' family home without a court order.

40. The more recent statutory history of the jurisdiction conferred on the Circuit Court in respect of possession orders including the necessity for a court order was reviewed by Hogan J. in *Irish life and Permanent PLC v. Duff* [2013] 4 I.R. 96. The plaintiff sought an order for possession of the defendant's family home in respect of a dwelling which was partly on unregistered and partly on registered land. The defendants defaulted in their obligation to make monthly payments and a letter of demand issued prior to 1st December, 2009 , the commencement date for the relevant provisions of the 2009 Act. Hogan J. determined that in the case of registered land the court could not make an order for possession under s. 62(7) of the 1964 Act unless a plaintiff had acquired the right to seek such an order prior to the repeal of that section on 1st December, 2009. That right was acquired where repayment of the principal monies secured had become due by that date and the plaintiff was the registered owner of the charge. In addition, a court would not make such an order unless it was satisfied that it would be proper to do so, namely that the application had been made *bona fide* to realise the security under a power of sale which arose and was exercisable under the charge. In this case the act of default occurred prior to the commencement of the 2009 Act.

41. In *Duff* the act of default in respect of the registered part of the land in question had not occurred prior to the repeal of the 1964 Act. It was held that the court could not invent a power to grant relief on the basis of any contractual entitlement to possession under the mortgage deed. However, the bank could sue independently to obtain a well charging order and ask the court to exercise its inherent power of sale.

42. Hogan J. held that in respect of unregistered land the rule of law applicable to mortgages which predated the Act of 2009 which automatically entitled a mortgagee to take peaceable possession of the dwelling house of a defaulting mortgagor without notice or a court order had to be reconsidered in light of the provisions of Article 40.5 of the Constitution. The requirements of notice, foreseeability and an independent determination of the objective necessity for possession were presupposed by the guarantee of the "inviolability" of the dwelling under Article 40.5 of the Constitution, protections which could not be assured outside of a judicial process. However, the learned judge was satisfied that a court retained a discretion in such cases to make an order for possession which was not affected by the operation of the Act of 2009. The learned judge also determined that the court would not exercise its discretion to grant an order for possession of unregistered land in favour of a bank which had not complied with the requirements of the Code of Conduct of Mortgage Arrears (CCMA). The learned judge also rejected the proposition that a mortgagee was entitled to take peaceable possession of the dwelling of a defaulting mortgagor in respect of unregistered land without a court order. Though noting that under the agreement a mortgagee was entitled to take possession peaceably without a court order, in practice this never arose because even in the cases of unregistered land the practice had assimilated itself to that of registered land so that the lender would first ask the court for an order of possession and forbear to exercise the right to possession which the mortgage deed clearly gave him. Hogan J. stated:-

> "48. Th[e] assurance of security and protection inherent in the guarantee of 'inviolability'[under Article 40.5 of the Constitution] would be fundamentally compromised if peaceable possession of a dwelling could be taken by a lender at almost any time other than by means of a court order without express notice to the borrower… merely because the borrower was in default…Nor could this be assured if the determination as to whether the borrower was…actually in default was to be left to the say-so of the lender or whether there was an objective justification for the mortgagee taking possession of the dwelling without any independent determination of these questions by the judicial branch.
>
> 49. This conclusion, in any event, merely reflects the new statutory prohibition which (subject to minor exceptions) precludes a mortgagee taking possession of mortgaged property without a court order and which is now provided for in the 2009 Act: see s. 97(1) of the 2009 Act.
>
> 50. None of this is to suggest that a defaulting borrower can invoke Article 40.5 to avoid having to yield up possession where a court so orders, no more than Article 40.5 can be invoked to justify the unlawful construction of a dwelling on another's land… It is, however, to say that those elements of formal notice, foreseeability and an independent determination of the objective necessity for possession of the dwelling are presupposed by the guarantee of inviolability and these protections cannot be assured outside the judicial process or, at least, something akin to the judicial process."

The court was therefore satisfied that it retained a jurisdiction to determine whether to make an order for possession in the case of unregistered land which was not affected by the operation of the 2009 Act in the same manner as occurred in the case of registered land. I am satisfied therefore that though the wording of Clause 8 contemplates the existence of a right to take possession of the applicants' family home without a court order or process this is precluded as a matter of law : the clause could not and did not have

that effect as is clear from the protracted legal proceedings by which the notice party sought the order for possession which it ultimately obtained by consent. Furthermore, it is not disputed that the notice party was the registered holder of the charge on registered land or that the applicants were in default of payments due under the terms of the mortgage or that it was entitled to apply for an order for possession of the mortgaged property.

The Circuit Court Procedure
43. The onus of proving that an order for possession should be granted rested on the notice party in the Circuit Court as the plaintiff in those proceedings. It had to establish the relevant proofs: as noted by Dunne J there is very limited scope vested in the court to refuse such an application once the proofs have been established. In addition, in this case the notice party submits that the applicants once they had been adjudged bankrupts had no *locus standi* to appear in the Circuit Court proceedings or to challenge the Circuit Court order by way of judicial review.

44. The applicants submit that the principles adumbrated by Hogan J. which require an independent judicial determination as to whether an order for possession may be granted necessitated by the rights of the borrowers under Article 40.5 of the Constitution, also require that they have a right to be heard before the granting of any order for possession notwithstanding the fact that they applied for bankruptcy in the course of the Circuit Court proceedings. They submit that they exercised that right without objection in the Circuit Court and made submissions, *inter alia*, in respect of the 'proportionality' of making such an order.

45. I will return to the issue of the applicants' bankruptcy but it is instructive at this stage to review the engagement between the parties under the relevant court procedure and rules.

46. It is clear that there was extensive engagement between the parties prior to bankruptcy and the initiation of proceedings. For example, as will be seen the notice party, as it was obliged to do, explored the possibility of an alternative payment mechanism under the Code of Conduct on Mortgage Arrears which proved unsuccessful. It is also clear that the applicants are in default of their contractual obligations to repay the loan by monthly instalments at this stage for a period in excess of nine years.

47. The proceedings were initiated by the issuance of a Civil Bill for Possession in the Circuit Court in accordance with the provisions of the 2009 Act and the Rules of the Circuit Court (S.I.s 264 of 2009 and 358 of 2012). The applicants were entitled to file an affidavit setting out the grounds of any proposed defence to the application as required by Order 5B of the Circuit Court Rules but did not do so. It was expressly stated on their behalf that they consented to the making of the order. Thus, under the Circuit Court Rules there was no basis to send the matter forward to the Judge's List for further hearing on the basis that a *prima facie* defence was offered by the applicants. It is useful having regard to the implicit challenge made in this case to the legal process followed in this jurisdiction for the making of the possession order to set out the procedure that is followed. It is very helpfully described by Ní Raifeartaigh J. in *O'Daly v EBS Mortgage Finance and His Honour Judge Griffin* [2017] IEHC 791 at par. 35:-

> "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 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 partly 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…."
>
> It is of central importance under Order 5B r. 7(2) of the Circuit Court Rules that the County Registrar is obliged to transfer a case to the Judge's list for hearing if an affidavit lodged by the defendant discloses a *prima facie* defence: no such affidavit was filed by the applicants. The applicants confined their submissions in the Circuit Court to their application for a stay upon the order to which they consented.

48. It is also important to note that O. 5B r.8(1) provides that if in the course of the proceedings it appears to the County Registrar that the determination of any issue is necessary for the proper decision or ruling as to the relief to be granted "or as to any matter arising therein", he/she may settle an issue to be tried by consent: in the absence of such consent a judge may do so. The court may then give directions as to the manner in which any evidence relevant to that issue should be received. The wording of rule 8(1) in my view confers a very wide jurisdiction to determine the nature of any issues that necessarily fall for determination to ensure a proper and fair decision on the application for a possession order or in respect of any matters lawfully arising in the proceedings.

49. As part of this procedure the court must also consider whether the notice party adhered to the Code of Conduct on Mortgage Arrears prior to initiating the application for the possession order. This enables the parties to explore whether any reasonable arrangement can be reached concerning arrears which obviates the necessity to seek possession of a family home.

Code of Conduct on Mortgage Arrears
50. The engagement by the notice party with the applicants in respect of the arrears pursuant to the Code of Conduct on Mortgage Arrears (the CCMA) was set out in the Circuit Court proceedings in an affidavit of Caroline Loftus dated 18th November, 2014. The Code is issued under s.117 of the Central Bank Act 1989; it is intended to ensure that people in arrears on their mortgage are treated sympathetically by the lender with the objective of assisting them to meet their mortgage obligations. The Code does not have the status of legislation. It may however, inform a court when considering whether to grant an order for possession concerning the fairness of making such an order. Though it may be relevant as a matter of defence or in equity to a claim for possession it does not give rise to a justiciable cause of action (*Ryan v Danske Bank A/S* [2014] IEHC 236 *per* Baker J.; *ICS Building Society v. Lambert* [2014] IEHC 581 *per* O'Malley J).

51. Under the Code the financial circumstances of the borrowers were examined by the lender and an attempt was made to determine whether a revised payment scheme could be devised to resolve the matter. Ms. Loftus stated that following default by the defendants in making loan repayments on 26th May, 2009 and the occurrence of subsequent defaults thereafter the lender engaged with them under the terms of the scheme. However, this proved impractical and on 28th March, 2014 the lender wrote to them in accordance with paragraph 45 of the CCMA outlining that there was insufficient evidence to demonstrate that they had the financial capacity to repay the mortgage on a sustainable basis and therefore no alternative repayment arrangement could be offered to them. The lender maintained that it had complied with the Mortgage Arrears Resolution Process (MARP) set out in the CCMA but considered that no resolution was possible in accordance with that procedure.

52. The letter outlined how the mortgage had been assessed for an Alternative Repayment Arrangement (ARA) under the MARP. The borrowers had supplied a Standard Financial Statement (SFS) to enable an assessment to be made of their individual circumstances as a result of which the lenders concluded that they could not offer an alternative arrangement because:-

> (1) Based on their then income and expenditure levels as disclosed in the SFS their current monthly repayment capacity of €381.15 was insufficient evidence to demonstrate that they had the repayment capacity to pay the mortgage on a sustainable basis and they did not have a sufficient income available to the service the mortgage:
>
> (2) Since the mortgage was already at maximum term they were not in a position to extend the term of the mortgage:
>
> (3) They did not merit the eligibility criteria for a split mortgage.

The letter also detailed a number of other options available to the borrowers and that they had a right to appeal the decision to the Lenders Appeal Board. It does not appear that any appeal was made.

53. Under the terms of the CCMA a lender may only commence legal proceedings for repossession of a borrower's primary residence where the lender has made every reasonable effort under the code to agree an alternative arrangement with the borrower. The Civil Bill stated that the Code had been complied with: the respondent had evidence that this was so and that the due notice required was given before the commencement of legal proceedings for repossession of their residence as provided under para. 58. The applicants do not suggest that this was not so. I am therefore satisfied that the respondent had evidence that reasonable consideration was given by the notice party to any practical alternative solution that might have been open to avoid the making of an order for possession but none was available. This was an important protection against any potential unfair or unreasonable application for the order sought and part of the evidence considered by the respondent before granting the order.

Bankruptcy and *locus standi*

54. It is submitted that the applicants have no *locus standi* to bring this application to challenge the order for possession because at the time it was made both had been adjudicated bankrupts under the provisions of the Bankruptcy Act 1988 as amended.

55. Section 44 of the 1988 Act provides that where a person is adjudicated bankrupt all property belonging to that person shall on the date of adjudication vest in the Official Assignee in Bankruptcy for the benefit of the creditors of the bankrupt. The property which vests in the Official Assignee includes under s. 44(3)(a):-

> "all powers vested in the bankrupt which he might legally exercise in relation to any property immediately before the date of adjudication…"

56. It is the function of the Official Assignee under s. 61 of the Act to gather in and realise the property of the bankrupt and distribute his/her assets in accordance with the provisions of the Act. For that purpose, the Official Assignee has power *inter alia* to sell property. However, under s. 61(3) the Official Assignee is also vested with power *inter alia* "(d) to institute, continue or defend any proceedings relating to the property". Under s.61(4) as later inserted the Official Assignee has no power to dispose of a bankrupt's property which comprises a family home without the prior sanction of the court and any disposition made without such sanction is void. Section 61(5) provides that on the application by the Official Assignee for such an order the High Court has power to order the postponement of the disposition of the family home having regard to the interests of the creditors, and the spouse and any dependents of the bankrupt as well as the circumstances of the case. Section 61(6) provides that the Official Assignee may, in case of doubt or difficulty, seek the directions of the court in connection with the affairs of any bankrupt. As noted Mr. Grant was adjudged bankrupt on 1st November and Mrs. Grant on 9th November, 2015.

57. Following their adjudication as bankrupts, Eversheds furnished the relevant court documents in the Circuit Court proceedings to the Official Assignee. As is clear from the correspondence quoted above, the Official Assignee did not make an application seeking the directions of the court or an order for the disposal or sale of the applicants' family home and so informed Eversheds on 18th April, 2016. However, he confirmed that he had no objection to the application for a possession order. No application was made under Order 17 r.4 of the Rules of the Superior Courts or otherwise to change the nominated defendants despite the transmission of interest in their family home to the Official Assignee that occurred following their adjudication as bankrupts. In *A.A. v. B.A.* [2017] 3 I.R. 498 the Supreme Court held that causes of action vested in a bankrupt vested in the Official Assignee upon the commencement of the bankruptcy save in cases such as those claiming damages for personal injuries which were personal to him and had no immediate reference to rights of property. I am satisfied that there is no basis upon which the applicants in this case could seek to litigate in respect of property rights or interests which became vested in the Official Assignee apart from a limited right to do so in respect of a family home.

58. This is an application by way of judicial review which seeks to quash an order for possession of a family home obtained during the course of a bankruptcy in respect of which the Official Assignee could not have sold or disposed of the family home without a court order: he was not in a position to consent to the order because he had not made an appropriate application to the High Court for directions in that regard. Under the Bankruptcy code had the Official Assignee made an application for directions or for leave to sell or dispose of the family home it would have been necessary for the court to hear from the bankrupts before making such an order as a matter of fairness in order to determine whether to postpone such an order. By analogy I am satisfied that as a matter of fair procedures the applicants were entitled to be heard before an order having the same effect was made by the Circuit Court in circumstances in which the Official Assignee decided not to act and indicated no objection to such an order. I am therefore satisfied that it was entirely in accordance with the applicants' rights to fair procedures and to be heard under Articles 40.3 and/ or 40.5 of the Constitution in respect of the loss of their family home that they be given an opportunity to partake in the possession proceedings. I am also satisfied that this is in accordance with the applicants' right to respect for their home under Article 8 of the European Convention on Human Rights which is not dependent upon their legal status under Irish law (*Buckley v. United Kingdom* Application no.20348/92). Thus they were entitled to seek a postponement of the proceedings or a stay on any proposed order based on their difficult personal circumstances if that were in the interests of justice. I do not consider that the vesting of their property

rights in the Official Assignee should preclude them from appearing in court to resist the making or execution of the possession order albeit on more limited grounds than if they had not been adjudicated bankrupts. In this case they were accorded that right of audience and secured a stay on the order as a result of their submissions: indeed no objection was taken by the notice party to their doing so. I am satisfied also that if there was a want of fair procedures or grounds existed upon which the resulting order might be quashed by way of judicial review they are entitled to bring such an application as persons who have a sufficient interest based upon the very serious consequences for them of the making of the order: they had a legitimate interest to ensure that any such order was made in accordance with law. Therefore, I am satisfied that the applicants have *locus standi* to bring this application for judicial review of the order for possession and the limited stay thereon and are not excluded from doing so simply because they were adjudged bankrupt. They are entitled to litigate the issue of whether the order for possession was lawfully made and challenge the alleged failure by the respondent on his own motion to scrutinise the terms of the mortgage agreement and consider whether any of its terms are unfair under European Union and the relevant transposing national consumer law.

Council Directive 93/13/EEC

59. Council Directive 93/13/EEC on unfair terms in consumer contracts is intended to ensure that unfair terms used in a contract with a consumer should not be binding on the consumer and that the contract could only continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair term. It is accepted that the applicants were consumers.

60. The following Articles of the Directive are relevant to these proceedings:-

"Article 2

For the purposes of this Directive:

(a) 'unfair terms' means the contractual terms defined in Article 3;

(b) 'consumer' means any natural person who, in contracts covered by this

Directive, is acting for purposes which are outside his trade, business or profession;

(c) 'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

Article 3

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Article 4

1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.

Article 5

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favorable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).

Article 6

Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms...

Article 7

> 1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers…"

61. The last recital to the Directive notes that "the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts…"

62. The Annex referred to in Article 3.3 of the Directive contains an indicative but non-exhaustive list of terms which may be regarded as unfair:-

> "1. Terms which have the object or effect of…
>
> (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation; …
>
> (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
>
> (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; …
>
> (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;…"

63. Paragraph 2 of the Annex states in relation to para. 1(j) that:-

> "(b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately…"

64. The Directive was transposed into Irish domestic law under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27/1995) (the Regulations).

65. The Regulations apply to any term in a contract concluded between a seller of goods or supplier of services and a consumer which has not been individually negotiated and is not excluded from the scope of the Regulations under schedule 1 thereof. The Regulations largely follow the terms and format of the Directive and its Annex and an "unfair term" is to be construed in accordance with the provisions of the Council Directive and the Regulations. Regulation 3(2) states:-

> "For the purpose of these Regulations a contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent."

Regulation 3(3) provides that in determining whether a term satisfies the requirement of good faith regard must be had to schedule 2 to the Regulations. It states:-

> " *Guidelines for Application of the Test of Good Faith*
>
> In making an assessment of good faith, particular regard shall be had to
>
> — the strength of the bargaining positions of the parties,
>
> — whether the consumer had an inducement to agree to the term,
>
> — whether the goods or services were sold or supplied to the special order of the consumer, and
>
> — the extent to which the seller or supplier has dealt fairly and equitably with the consumer whose legitimate interests he has to take into account."

The Regulations also set out in schedule 3 an indicative but non-exhaustive list of the terms that may be regarded as unfair similar to those set out in Article 3.3 of the Council Directive. Regulation 4 provides that a term shall not of itself be considered to be unfair by relation to the definition of the main subject matter of the contract or the inadequacy of the price remuneration, as against the goods and services supplied insofar as those terms are in plain and intelligible language. Regulation 5 provides that in the case of contracts where all or certain terms offered to the consumer are in writing, the seller or supplier shall ensure the terms are drafted in plain intelligible language and where there is doubt about the meaning of a term the interpretation most favourable to the consumer must prevail. Regulation 6 provides that an unfair term with a consumer shall not be binding on the consumer but the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

66. The Director of Consumer Affairs later the National Consumer Agency and now the Competition and Consumer Protection Commission may under Regulation 8 apply to the High Court for an order prohibiting the use or continued use of any term judged by the court to be unfair. Under Regulation 8(3) any person claiming to have an interest in any such application would be entitled to be heard by the court. I am satisfied that this includes legal entities such as Central Bank of Ireland, if such an issue were to arise in respect of a standard form of contract issued by financial institutions such as mortgage contracts. This power is without prejudice to the right of the consumer to rely on the provisions of the regulations "in any case before a court of competent jurisdiction." Extensive investigative powers were conferred under the Regulations to enter a premises in which any business activity is carried on and require

the production of books, documents and records relating to the business and to inspect and take copies thereof and provide information required by an authorised officer.

67. The functions of the Director of Consumer Affairs were transferred to the National Consumer Agency pursuant to s. 37(2) of the Consumer Protection Act 2007 which was vested with additional powers which in turn was replaced by the Competition and Consumer Protection Commission under the Competition and Consumer Protection Commission Act 2014.

Grounds E(10)-(20)
68. It is clear that the Directive and Regulations have a dual purpose namely to protect a weaker party to a transaction thereby contributing to fair commercial dealings and also to facilitate the common market across the European Union by ensuring a higher level of consumer protection in cross border contracts. It is submitted on behalf of the applicants that the CJEU has consistently held that it is for a national court to determine whether any individual term is unfair. In doing so it is submitted that the court must act on the basis that any non-individually negotiated term needs to be assessed for fairness and that the onus of establishing the fairness of the term lies on the party asserting the proposition. Core terms are excluded from the test as long as they are drafted in plain and intelligible language. It is also submitted that a term which provides for the variation of price is not a core term. Unfair terms are unenforceable against the consumer and the dissuasive principle means that a term does need to have been relied upon by the business concerned in order to be deemed unfair. The court is not entitled to amend or vary a term in any way to eliminate its unfairness. In determining whether a term is unfair the court must have regard to the non-exhaustive list of terms included in the Directive's Annex and the guidance of the CJEU as to the factors to be considered when assessing its fairness. Thus far the parties do not disagree. The central issue that arises is the suggested failure by the national court, the County Registrar in this case, of its own motion to determine whether a term in a contract which falls within the scope of the Directive is unfair where it had available to it the legal and factual elements necessary for that task.

69. The applicants rely upon the decision of the CJEU in Case C-415/11 *Mohamed Aziz v. Caixa d'Estalvis de Catalunya* (14th March 2013). Mr. Aziz concluded a loan agreement in August 2007 with the defendant which was secured on his family home which he had owned since 2003. The loan was to be repaid by monthly instalments over 33 years and provided for an annual default interest of 18.75% to be applied automatically to sums not paid when due without the need for any notice. Mr. Aziz defaulted in repayments in June 2008. The lender thereafter obtained a certification of debt from a notary corresponding to the unpaid monthly instalments which included the default interest. Following a demand to pay the respondent instituted proceedings seeking recovery of the amount due. Mr. Aziz failed to appear in court and in December 2009 the court ordered enforcement of the debt. The order was sent to him for payment but he neither complied with nor objected to it. As a result, in July 2010 a judicial auction of the family home was arranged but no bid was made following which the judicial authority provided for the vesting of that property on the basis of 50% of its value and ordered that possession was to pass to the vestee in January 2011. As a result, Mr. Aziz was evicted from his home. Shortly before this, Mr. Aziz applied before a different court for a declaration seeking the annulment of clause 15 of the mortgage loan agreement which stipulated that the bank could immediately quantify the amount due by submitting an appropriate certificate indicating that sum in the course of enforcement proceedings. When considering an application for the annulment of this clause the presiding judge expressed doubts concerning the conformity of Spanish law with the legal framework established by the Directive. Apart from a number of questions concerning the fairness of the terms of the agreement, the judge sought a preliminary ruling on the question of:-

> "Whether the system of levying execution, in reliance on judicial documents, on mortgaged or pledged property, provided for…[under]… the Spanish Code of Civil Procedure with its limitations regarding the grounds of objection, may be nothing more than a clear limitation of consumer protection since it involves, both formally and substantively, a clear impediment to the consumer's exercise of rights of action or judicial remedies of such a kind as to guarantee the effective protection of his rights?"

70. In the course of its judgment the court noted in accepting the admissibility of the case:-

> "37 Under the Spanish rules of procedure, Mr Aziz was not able, in the framework of the mortgage enforcement proceedings brought… against him, to contest the unfairness of a term of the contract linking him with that lender, the party which initiated the enforcement proceedings, before… the court responsible for enforcement, but only before…the court hearing the declaratory proceedings.
>
> 38 In that regard, as pointed out correctly by the European Commission, the first question asked by the [Spanish Court]… must be understood in a broad sense as seeking to ascertain, in essence, in the light of the restricted grounds for objection permitted in the course of mortgage enforcement proceedings, the compatibility with the Directive of the powers of the court hearing the declaratory proceedings, which enjoys jurisdiction to determine the unfairness of the terms in the contract at issue in the main proceedings under which the debt claimed under those enforcement proceedings arises…
>
> 41 As stated by the Advocate General in points 62 and 63 of her Opinion, although the application for annulment sought by Mr Aziz in the main proceedings relates only to the validity of clause 15 of the loan agreement, suffice it to note that, first, in accordance with Article 4(1) of the directive, an overall analysis of the other contractual terms referred to in that question can affect the assessment of the term at issue in those proceedings and, second, the national court is bound, in accordance with the case-law of the Court, to examine of its own motion all the contractual terms falling with the scope of the directive to ascertain whether they are unfair, even in the absence of an express application to that effect, where it has available to it the legal and factual elements necessary for that task (see, to that effect, Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraphs 31 and 32, and *Banco Español de Crédito*, paragraph 43)."

71. In addressing the substance of the claim the court noted that the system of protection introduced by the Directive was based upon the fact that the consumer was in a weak position vis-à-vis the seller or supplier concerning his bargaining power and level of knowledge. The mandatory provision of Article 6(1) which provides that unfair terms were not binding on the consumer aims to redress the imbalance, which the contract establishes between the rights and obligation of the parties, with an effective balance which re-establishes equality between them. The court continued:-

> "46 In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (*Pannon GSM*, paragraphs 31 and 32, and *Banco Español de Crédito*, paragraphs 42 and 43).

> 47 Thus, in ruling on a request for a preliminary ruling submitted by a national court before which *inter partes* proceedings, initiated following an objection lodged by a consumer against an order for payment, had been brought, the Court held that the national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer falls within the scope of the directive and, if it does, assess of its own motion whether such a term is unfair (Case C-137/08 VB *Pénzügyi Lízing* [2010] ECR I-10847, paragraph 56).
>
> 48 The Court has also held that the directive precludes legislation of a Member State which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, *in limine litis* or at any other stage during the proceedings, even though it already has the legal and factual elements necessary in that regard, whether a term concerning interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, where that consumer has not lodged an objection (*Banco Español de Crédito,* paragraph 57).
>
> 49 However, the case at issue in the main proceedings can be distinguished from those which led to the abovementioned judgments… because it concerns the definition of the duties of the court hearing declaratory proceedings linked to mortgage enforcement proceedings, with the objective of ensuring the effectiveness of any judgment in the declaratory proceedings declaring unfair the contractual term on which the right to seek enforcement and thus to initiate those enforcement proceedings is based.
>
> 50 In that regard, in the absence of harmonisation of the national mechanisms for enforcement, the rules implementing the grounds of objection allowed in mortgage enforcement proceedings and the powers conferred on the court hearing the declaratory proceedings, which enjoys jurisdiction to analyse the lawfulness of the contractual clauses on the basis of which the right to seek enforcement was established, are a matter for the national legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by European Union law (principle of effectiveness) (see, to that effect, Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 24, and Case *C-40/08 Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 38)."

The court was not satisfied that it had before it any information to raise doubts as to the compliance of the Spanish legislation at issue with the principle of equivalence.

72. The court, however, stated that in respect of the principle of effectiveness the settled case law required that every case in which the question arises as to whether national procedure provisions make the application of European Union Law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole before the various national bodies. Under Spanish law the final vesting of mortgage property in a third party was always irreversible even if the unfairness of the term challenged by the consumer before the court hearing in separate declaratory proceedings resulted in an annulment of the term(s) relied upon in the mortgage enforcement proceedings, except in very limited circumstances. The court therefore held that the procedural rules impaired the protections sought by the directive insofar as they rendered it impossible for the court hearing the declaratory proceedings claiming that the contractual terms were unfair, to grant interim relief capable of staying or terminating the mortgage enforcement proceedings where that relief was necessary to ensure the full effectiveness of its final decision. Without that protection, the consumer was confined to obtaining only later protection of a purely compensatory nature which the court regarded as incomplete and insufficient and would not constitute an adequate or an effective means of preventing the continued use of the unfair term contrary to s.7(1) of the Directive. The court noted:-

> "62. That applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling.
>
> 63. In those circumstances, it must be held that the Spanish legislation at issue in the main proceedings does not comply with the principle of effectiveness, in so far as, in mortgage enforcement proceedings initiated by sellers or suppliers against consumer defendants, it makes the application of the protection which the directive seeks to confer on those consumers impossible or excessively difficult."

73. The court therefore answered the question posed by stating that the Directive must be interpreted as precluding legislation of a member state such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term in which the right to seek enforcement is based, does not permit the court for which declaratory proceedings had been brought, which does have jurisdiction to assess the unfairness of such a term, to grant interim relief, including in particular the staying of those enforcement proceedings, where granting that relief is necessary to guarantee the full effectiveness of its final decision.

74. The rationale of the requirement that a national court of its own motion examine whether a contractual term falling within the scope of Directive 93/13 is unfair was also considered in the earlier case of *Banco Español de Crédito* (Case C-618/10) [2012] ECR. In that case the bank sought to recover a sum for unpaid monthly repayments, interest and costs on a car loan, the original interest rate of which was 7.95% with an additional rate of 29% for late payments. In the first instance, the national court held the rate to be automatically unfair since it was more than 20% above the nominal charge and fixed a rate of 19%. The bank submitted that national law prevented a court assessing a term for unfairness on its own motion, emphasising that the consumer had not asked for such a review. The European Court of Justice (First Chamber) emphasised that the provisions of the Directive were based on the proposition that a consumer is in a weak position vis-à-vis the seller or supplier of goods in respect of his bargaining power and level of knowledge. As a result, the consumer agreed to terms drawn up in advance by the seller or supplier without being able to influence their contents. Having recited the well-established principles directed to redressing the imbalance between the consumer and the seller or supplier (paras 41and 42), later quoted and applied in Aziz, the court considered the dissuasive purpose of the directive:-

> "69 ….it is clear, as the Advocate General observed in points 86 to 88 of her Opinion, that, if it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms (see, to that effect, the order in *Pohotovost'*, paragraph 41 and the case-law cited), in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers."

However, it is also clear that if the unfair term can be excised from the contract, the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term (Article 6).

75. The principles set out in the cases of *Pannon, Banco Crédito de Español* and *Aziz*, have been applied on numerous occasions in this jurisdiction in cases involving bank loans and mortgages.

76. It is clear therefore from the established jurisprudence of the CJEU that legislation or rules of court which do not allow the court before which an application for an order for possession has been brought to assess of its own motion, *in limine litis* or at any other stage during the proceedings whether the term of a mortgage contract which falls within the scope of the directive is unfair do not comply with the principle of effectiveness if it makes it impossible or excessively difficult in proceedings initiated, in this instance by the bank, against the consumer to give effect to the protections which Directive 93/13 seeks to provide. This is so even though the consumer has not raised or lodged an objection during the course of the proceedings for possession where the court has before it, the legal, financial and factual elements necessary for the assessment of whether the terms of the contract are covered by the provisions of the Directive and if so, whether they are unfair.

77. The effect of this line of authority in Irish law was considered by Barrett J. in *Allied Irish Banks PLC v. Counihan and Counihan* [2016] IEHC 752. The learned judge was satisfied that the effect of the *Aziz* case contemplated that a court even in an adversarial system of justice must act in "an inquisitorial manner" in scrutinising the unfairness of any relevant terms of a loan contract. It was therefore necessary for the court when faced with an application for summary judgment to identify any terms of the loan agreement that may be unfair for the purposes of the Regulations and Directive and determine whether they gave rise to an arguable defence because they are unfair and not binding on the defendants.

78. In *EBS Limited v. Kenehan and Ryan* [2017] IEHC 604, in an appeal against an order for possession granted by the Circuit Court in respect of a family home, the defendants submitted that since they were consumer borrowers the Circuit Court was obliged to assess the relevant terms of the loan agreement for unfairness under the Regulations in accordance with the *Aziz* decision. Barrett J. stated:-

> 26. The Court of Justice, in the above-referenced observations [paragraphs 43- 46]… draws no distinction, in terms of the obligation that it perceives to arise as a matter of European Union law, between a trial court and a court that is hearing, as here, a *de novo* appeal. That is perhaps because the distinction did not arise for the Court of Justice to draw on the facts of *Aziz* (though, on the facts as described by the Court of Justice in its judgment in *Aziz*, there was an interesting interplay between what appear to have been two Spanish courts of first instance with different jurisdictions)… Given, however, the reasoning that informs the conclusions of the Court of Justice in *Aziz*, which is that *'the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge'*, the obligation that the Court of Justice perceives to arise as a matter of European Union law would appear logically to apply with as much vigour to a court that is hearing a *de novo* appeal as to the trial court (a finding not so dissimilar to that reached by the High Court in *Counihan* that an *Aziz* obligation applies to a court in a summary application for debt and to a court at any related plenary hearing which *'likewise operates in the shadow of Aziz'* (para.13))."

The court concluded that it was prevented from carrying out its obligations under the Directive because the offer letter and the mortgage conditions applicable to the agreement were not exhibited by the plaintiff, notwithstanding the fact that the issue had been raised on the affidavits submitted by the defendants. The court therefore refused to grant the possession order sought because of the failure of the plaintiff to place sufficient evidence before it to enable it to discharge its obligations as set out in *Aziz*.

79. Faherty J. in *Ulster Bank Ireland Limited v. Costelloe* [2018] IEHC 289 and *Permanent TSB PLC v. Fox* [2018] IEHC 292, also accepted that on appeals from orders granting possession in the Circuit Court, it was appropriate for the High Court, applying the principles adumbrated in *Aziz* to assess, albeit on the basis of submissions made by the defendants in those cases, whether the terms of the loans and mortgage agreements in those cases were unfair under the Regulations. It is clear that the same principles applied at first instance and that the requirement imposed upon the court arose whether submissions were made by the defendants or not. The court must, of its own motion, consider the fairness of the terms of the mortgage agreement, the subject matter of the proceedings if they fall within the scope of the directive and regulations.

80. The court is not satisfied on the evidence advanced in this case to conclude that the County Registrar reviewed whether the terms of the loan agreement or mortgage deed fell within the scope of or were unfair under the Regulations or the Directive. The order issued by the County Registrar is silent in this regard. There is nothing in the affidavits to suggest that any ruling was made by the County Registrar on the matter. Indeed the recorded note made by the notice party's solicitor suggests a very short hearing during which the applicants' consent was received and noted and the issue of the stay addressed before the order was made. The court is invited to conclude that notwithstanding the absence of any reference to such a consideration in the order or otherwise, it should presume that the County Registrar acted in accordance with law in issuing the order and considered the fairness of all terms contained in the contract for loan and mortgage in accordance with the obligation imposed under the principles set out in *Aziz*. However, it does not seem to me that the requirements of the developing jurisprudence of the CJEU on this issue had been absorbed into the respondent's practice at the time the order was made or were considered and applied in this case.

81. In Case C-488/11 *Dirk Frederik Asbeek Brusse v. Jahani BV* (30th May 2013), the CJEU held that Directive 93/13 must be interpreted as meaning that where the national court has the power under its internal procedural rules of its own motion to determine whether a term is contrary to national rules of public policy it must, in the same way where it establishes that the term falls within the scope of the Directive, assess of its own motion whether that term is unfair in light of the criteria laid down in the Directive. Thus where it has the power under its internal procedures to annul the term it must, as a rule having invited each of the parties to set out its views on the matter, with an opportunity to challenge the views of the other party, annul of its own motion a contractual term which it has found to be unfair in the light of the criteria laid down by that Directive. It is submitted on behalf of the notice party that there are no applicable internal rules under which the County Registrar could have made such a determination. Furthermore, in the United Kingdom the matter was specifically addressed by s. 71(2) of the Consumer Rights Act 2015 which provides that a court must consider whether a term of consumer contract is unfair even if none of the parties to the proceedings has raised that issue or indicated that it intends to do so provided the court has before it sufficient "legal and factual material" to enable it to consider the fairness of the terms. It is therefore submitted that the court should conclude that a similar provision would be required in this jurisdiction to enable the court to carry out the exercise required under the directive.

82. In addition, it is submitted that, if the court is to consider whether the Circuit Court was properly vested with jurisdiction to examine the unfairness of the terms it is unfair to require the notice party to address what is alleged to be a failure under national legislation to confer jurisdiction on the Circuit Court to, of its own motion, consider the unfairness of the terms under the Regulation.

It is submitted that the absence of statutory provision and/or rules of court enabling the court to carry out this assessment should be addressed by other parties who have not been joined in these proceedings such as the Attorney General: thus the order should not be quashed in the absence of those parties. I am not persuaded by these submissions.

83. I am satisfied that the jurisdiction vested in the Circuit Court to grant orders for possession requires the court to do justice between the parties. This includes the examination of its own motion of whether the terms of the contract fall within the scope of the directive and regulations and, if they do, the fairness of the relevant terms: it is a jurisdiction that has clearly been exercised on appeal in the High Court decisions cited above. It is clear that the plaintiff seeking an order for possession must establish certain fundamental proofs which are not really in issue in this case in respect of the existence of a contract for loan, a mortgage on a particular property which in this instance was registered, the granting and drawing down of a loan which is to be repaid in accordance with the terms of the contract and a default provision whereby the plaintiff is entitled to possession of the property if the mortgagor defaults on his/her obligations: a court order is required in order to obtain possession of the mortgaged property. The Circuit Court exercises its jurisdiction in that regard in accordance with the statutory provisions and Circuit Court Rules to which I have already referred. I am satisfied that the jurisdiction conferred formerly under s.62(7) of the Registration of Title Act,1964 and now by s. 97 of the 2009 Act enabled the defendants to raise any defence in law or equity which they believed to be open to them by entering an appearance and filing an affidavit under the relevant Circuit Court Rules. They did not do so. If the defendants had outlined in an affidavit a *prima facie* defence based on the unfairness of the terms, the County Registrar was obliged to transfer the case to the judges list for hearing.

84. It is also clear that the County Registrar is entitled, if he/she ascertains in the course of the proceedings, that the determination of any issue is necessary for the proper decision or ruling as to the relief to be granted "or as to any matter arising therein", he/she may settle an issue to be tried by consent or in the absence of such consent the judge may do so. I am satisfied therefore that the respondent had jurisdiction exercisable in accordance with the Rules of the Circuit Court, to discharge his obligation under the *Aziz* principles.

85. The Circuit Court, applying national law is obliged to interpret domestic law and procedure in the light of the wording and purpose of the Directive in order to achieve the result contemplated by its terms if this is possible without straining the meaning of the provisions under which it operates. The court must interpret national law, including its own powers and procedures in conformity with its obligations under the Directive in order to ensure that the appropriate consumer protections and remedies are made available to the consumer. I am satisfied that the terms s.62(7) of the 1964 Act and s. 97(2) of the 2009 Act and the Circuit Court Rules were and are sufficient to empower the Circuit Court to comply with its obligations in that regard (see also Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* and the summary of the relevant principles of interpretation summarised by Barrett J., in *OCS One Complete Solution Ltd., v. The Dublin Airport Authority and Another* [2014] IEHC 306 at par. 13).

86. I am satisfied that the existing procedures under the Circuit Court Rules already discussed enable the County Registrar to consider on his/her own motion whether the terms of the mortgage agreement are unfair under the provisions of the directive and regulations. If he/she considers that one or more of the terms falls within the scope of the directive and regulations and may be unfair, submissions or evidence should be invited from the parties prior to a ruling on the issue. If the County Registrar considers then that there may be a defence available to the defendants on the grounds that the loan contract or mortgage is void and unenforceable because a term may be unfair and that it is necessary to resolve that issue before granting the order the case should be sent forward to the Circuit Court for further consideration and determination: in that regard the County Registrar has power to direct that further affidavits be filed in relation to that issue.

87. The court is not satisfied on the evidence that it was at the time this order was made the practice of the County Registrar to consider the unfairness of terms within the scope of the directive and regulations of its own motion as required by the jurisprudence of the CJEU or that he did so in this case. Consequently, I am satisfied that the respondent failed to take a step which was a necessary pre-requisite to a lawful order for possession in the circumstances. The remaining question to be considered is whether notwithstanding this conclusion the court should exercise its discretion to refuse the relief sought by the applicants on the various grounds advanced by the notice party.

Material non-disclosure

88. It is submitted on behalf of the notice party that the court should refuse the relief claimed in exercise of its discretionary power on the ground that the applicants are guilty of material non-disclosure on the application for leave to apply for judicial review. It is accepted by the applicants that they did not at that stage inform the court that they had consented to the order for possession challenged in these proceedings. The notice party also submits that though there was a brief reference in the first named applicant's affidavit to the applicant's bankruptcy at para. 19, neither the subsisting nature of their bankruptcy at the date of swearing of the affidavit nor the position adopted by the Official Assignee in proceedings before the Circuit Court was set out.

89. It is accepted by the applicants' solicitor, Ms. Sadlier, that the fact that the applicants consented to the repossession order was not set out in the *ex parte* application even though she had been supplied with a copy of a letter from Phoenix Project to the County Registrar which had been included in the brief to counsel. She expressed appropriate regret that this had not been brought to the attention of the court at that stage. Ms. Sadlier stated that this was not done with intent to mislead the court but acting on professional legal advice. It was stated that neither counsel or the applicants' solicitor considered the issue of consent to be a material fact because it was said to be granted in circumstances where the applicants were not legally represented and did not at the time know of their rights which are now the subject of judicial review. The first named applicant accepts that she should have disclosed the applicants' consent to the High Court at the *ex parte* stage but also states that she does not consider that disclosure to be "material". The applicants accept elsewhere in their affidavits and it is clear from the evidence that they spoke to a solicitor working for Phoenix Project on at least one occasion and had attended between five and ten meetings in total with persons at Phoenix Project who conducted correspondence with the notice party on their behalf in which their consent is indicated.

90. The applicants were obliged to make full disclosure at the leave stage of the fact that they had consented to an order for possession before the County Registrar and their status as bankrupts. I am satisfied that both of these issues were relevant and should have been included in the grounding affidavits before leave was sought. In other circumstances the court would have been minded to refuse relief on the grounds of non-disclosure and the fact that the applicants had consented to the order made. However, the court has to take into account that the issue in these proceedings concerns the obligation imposed on the national judicial authority under the Directive and the Regulations. This obligation is imposed by reason of the imbalance between the consumer and the lending institution which the Directive and Regulations seek to address. Furthermore, the duty of the court to carry out the review is imposed in furtherance of the dissuasive purpose of the Directive and Regulations and is a standalone obligation irrespective of any submissions made or defence raised by the consumer(s) in any particular case. I also consider that this application invokes the court's jurisdiction as one of the effective remedies available to the applicants under Article 47 of the Charter in this jurisdiction, another being the right to appeal the order.

91. Of course, the applicants as parties to the Circuit Court proceedings were entitled to compromise them and /or to submit to an order by consent. In this instance they agreed to submit to an order for possession without raising any defence in respect of any aspect of the plaintiff's claim on condition that a stay was accepted by the plaintiffs on the possession order, and that there would be no order as to costs. In these proceedings they do not maintain that they had a *bona fide* defence which they wish to present if the case were remitted to the Circuit Court on the basis that the terms were unfair: that line of defence was open to them if they wished to assert it before the order was made. They do not maintain that they were in ignorance of that possible defence. The relevant lack of knowledge is said to relate to the obligation on the part of the County Registrar of his own motion to consider the unfairness of the terms in accordance with the obligation imposed under European Union Law. However, it is also claimed in argument that the consent given to the County Registrar was not a fully informed consent in that the applicants did not receive professional legal advice concerning the law surrounding unfair terms and consumer protection as set out in the Directive and the Regulations because they could not afford to obtain it. It is however acknowledged that they received support from Phoenix Project during the course of the proceedings. It is also clear that the applicants' financial inability to retain a solicitor and obtain legal advice in respect of all matters concerning the notice party's claim including that the terms were unfair is not a ground upon which leave was granted to challenge the order. It is relied upon, however, as a ground to resist the notice party's claim that the consent should be relied upon by the court in exercising its discretion to refuse relief because it is a further indication of the imbalance that exists in this case between the consumer and the lender.

92. In the circumstances of this case, having regard to the important underlying purpose of the Directive and Regulations to redress the imbalance between consumers and in this instance, lenders (including the dissuasive purpose of any finding of unfairness) and the importance in that context of ensuring that the standalone obligation imposed upon the national judicial authorities is observed, I am not satisfied to exercise my discretion to refuse relief on this ground.

Futility of relief
93. It is submitted on behalf of the notice party that the court should not grant the relief claimed on the basis that to do so would be futile and serve no legal purpose because if the order is quashed and the matter remitted for the further consideration of the respondent, the applicants could not possibly succeed in resisting the application for possession. It is submitted that there is no basis upon which to conclude that any of the terms of the mortgage loan agreement or deed fall within the scope of or would be regarded as unfair under the provisions of the Directive and Regulations (State

(*Shannon Atlantic Fisheries Limited) v. the Minister for Transport and Power* [1976] I.R. 93 and *State (Abenglen Properties Limited) v. Dublin Corporation* [1984] I.R. 381.

94. The notice party claims that the terms relied upon in seeking possession of the property in issue are concerned with the "main subject of the contract", within the meaning of the Directive and the Regulations. As already noted Article 4(2) requires that the assessment of the unfair nature of a term shall not relate to "the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other insofar as these terms are in plain intelligible language". Likewise, Regulation 4 provides that a term "shall not of itself be considered to be unfair by relation to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, as against the goods and services applied, insofar as these terms are in plain and intelligible language.".

95. In Case C-26/13 *Káslar v. OTP Jelzalogbank* a bank advanced a loan a condition of which was that "the amount of the loan in foreign currency will be determined at the buying rate for the foreign currency applied by the bank on the date of advance of the funds". The amount of the loan and related interest, the administration fees and default interest and other charges would also be determined in foreign currency. The borrowers claimed that the clause which permitted the lender to determine the amount of the monthly instalments payable by reference to the selling rate of exchange for the foreign currency applied by the bank on the day before the due date was unfair because it authorised the bank to calculate the monthly repayment instalments on the basis of the selling rate of exchange for the currency whereas the amount of the loan advanced was determined on the basis of the buying rate of exchange when the bank applied for the currency and that this conferred an unjustified benefit on the bank. The National Court determined that while the bank was linking the monthly repayment instalments in Hungarian Forint to the current rate for Swiss Francs it was not supplying financial services relating to the buying or selling of foreign currency to the borrowers and thus the bank was not entitled to apply an exchange rate for the repayment of the loan different from that used on the date of advance of the sum borrowed and no payment could be required for a notional provision of services. It was also held that the clause was not drafted in plain and intelligible language because it was impossible to determine the basis for the difference in the method of calculating the amount of the sum lent and the amount of the loan repayment instalments. The Hungarian Court referred a question to the CJEU as to whether "the main subject matter of the contract" under Article 4(2) covered every element of the consideration to be paid in cash by the borrower including sums resulting from the difference between the exchange rate applicable to the advance of the loan funds and the repayment of the loan and whether only the payment of a nominal rate of interest, in addition to the grant of the loan, was covered by that phrase. The CJEU held that Article 4(2) which provided an exemption to the mechanism for reviewing the substance of unfair terms must be strictly interpreted. The court stated:

> "49. However, taking account also of the fact that Article 4(2) … represents a derogation and the ensuing necessity of its being interpreted strictly, contractual terms falling within the notion of the 'main subject matter of the contract', within the meaning of that provision, must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it.
>
> 50. By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within the notion of the 'main subject-matter of the contract' within the meaning of Article 4(2) of Directive 93/13. …
>
> 59. … the answer to the first question is that Article 4(2) … must be interpreted as meaning that:
>
> - the expression the 'main subject-matter of a contract' covers a term, incorporated in a loan agreement denominated in foreign currency concluded between a seller or supplier and a consumer and not individually negotiated, such as that at issue in the main proceedings, pursuant to which the selling rate of exchange of that currency is applied for the purpose of calculating the repayment instalments for the loan, only in so far as it is found, which it is for the national court to ascertain having regard to the nature, general scheme and stipulations of the contract and its legal and factual context, that that term lays down an essential obligation of that agreement which, as such characterises it;
>
> - such a term, in so far as it contains a pecuniary obligation for the consumer to pay, in repayment of instalments of the loan, the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, cannot be considered as 'remuneration', the adequacy of which as consideration for a service supplied by the lender cannot be the subject of an examination as regards unfairness under Article 4(2) …".

96. The notice party therefore submits that the obligation to repay the secured monies coupled with the entitlement of a mortgagee to seek possession of a property pursuant to a deed of mortgage in the event of default on agreed payments by a mortgagor constitute the main subject matter of the contract in this case; the terms are the essence of any deed of mortgage or mortgage loans. Accordingly, it is submitted that the clauses which the applicants contend ought to have been the subject of a review as unfair terms by the respondent namely the clauses relating to the variable interest rate applicable to the loan, clause 4(b) which enables the lender to demand early repayment of the principal and accrued interest and all of the conditions relating to default on any repayment and clauses entitling the notice party to seek possession of the property in the event of any such default are exempt from the scope of the review for unfairness by reason of Article 4(2).

97. In *Office of Fair Trading (OFT) v. Abbey National Plc* [2009] UKSC 6 the Supreme Court of the United Kingdom considered whether various banking charges incurred when a customer deliberately or inadvertently gave an instruction to a bank or entered into a transaction by which as a matter of law and contract the bank was requested to provide facilities such as overdraft facilities formed part of the price or remuneration to be paid in exchange for the banking service provided to the holder of a current account and as such were to be regarded as "the main subject matter of the contract" or terms which concerned "the adequacy of the price or remuneration as against the goods or services sold or supplied" and were thereby excluded from review for unfairness by the Office of Fair Trading. The court accepted that it should adopt a narrow interpretation of what amounted to a core term of the agreement. It held that charges which the banks required their customers to pay as part of the price or remuneration for the package of services provided within the account and which they agree to supply in exchange amounted to monetary consideration for the package of banking services supplied to personal current account customers and were an important part of the bank's charging structure. The fact that the charges were contingent and the majority of customers did not incur them was irrelevant. The court was satisfied that the charges amounted to part of the core essential bargain entered into between the parties by way of price and remuneration.

98. It is clear that whether the terms of a contract fall within the scope of the directive and regulations will depend on the particular facts and circumstances of the agreement made and an understanding of whether any particular terms such as default penalty interest (*Aziz*), additional payments on interest which were payable based on a currency exchange rate (*Kaslar*) or contingency charges for services provided on a current account (*Office of Fair Trading v Abbey National*) constitute the main subject matter of the contract or the price or remuneration for the service provided.

99. I am satisfied that the standard conditions 1 and 2 and general terms and conditions 4, 5 and 7 of the loan agreements and clause 4 of the indenture of mortgage in respect of payment of a variable interest rate on the principal sum concern the main subject matter of the contract and/or the consideration payable for advancing the principal sum to the borrowers under Article 4. In addition, I am also satisfied that the borrowers fully understood that they were making a mortgage loan agreement in respect of their family home on terms which were clear and intelligible. The main subject matter of that agreement was that all monies advanced to the borrowers under the terms of the loan agreement would be repaid by monthly instalments and secured on their family home which is clearly referenced in part 1 of the particulars of the offer of the mortgage loan to them dated 13th February, 2008. The security was created in compliance with the terms of the agreements. I am satisfied that in the event of their default on the agreed payments plan the mortgagee had a contractual entitlement to invoke its rights under the registered charge and mortgage deed to seek possession of the mortgage property which also constituted part of the rights and obligations which are the main subject matter of such a contract and to which the applicants agreed. I am therefore satisfied that clauses relating to the interest rate, the creation of the charge, and the lender's rights to seek possession of the property on the borrowers default in complying with their obligations are all matters which are exempt from review for unfairness under the Directive and Regulations and do not fall within their scope by reason of the terms of Article 4 and Regulation 4 (see also *AIB Mortgage Bank v Cosgrove* [2017] IEHC 803 *per* Faherty J. at para.60).

100. Though the applicants also contend that the obligation to scrutinise the terms extends to all terms, I am satisfied having considered all terms of the mortgage loan and indenture of mortgage that no issue of unfairness arises or could arise outside the matters canvassed in argument before the court. Accordingly, I am satisfied for the reasons set out below that to quash the order and remit the case to the County Registrar could not be of any benefit to the applicants or advance the more general dissuasive purpose of the directive and that in the exercise of my discretion relief should be refused.

101. If the court is incorrect in its determination that a consideration of the fairness of the terms in issue is outside the scope of the Directive and Regulations and that they are indeed subject to the requirement that they ought to be reviewed for unfairness, the applicants submit that the court ought not to review the unfairness of the terms on this application in determining whether to exercise its discretion to quash the order for possession. Consequently, it is submitted that the court ought to quash the order and remit the matter for consideration afresh by the respondent in the exercise of its jurisdiction to review the fairness of the terms of its own motion. I do not accept this proposition. In the course of this application, the court has been furnished with all of the facts and materials including the terms of the mortgage loan contract and mortgage deed on the basis of which the consideration of the unfairness of the terms under the Directive and Regulations might have been considered. In exercising its discretion, the court is entitled to consider all of these matters which are relevant to whether it should make an order, namely whether to make such an order would be futile, confer no practical benefit on the applicants, serve no legitimate purpose, or simply cause further delay in the proceedings.

102. The applicants in their submissions focused upon four terms as giving rise to unfairness or potential unfairness to be considered by the respondent, namely:-

> (i) terms concerning the variable rate of interest applicable to the mortgage loan and deed;
>
> (ii) clause 7B of the mortgage deed which is said to be an acceleration clause;
>
> (iii) clauses 8 and 9 of the mortgage deed concerning the power of the lender to take possession of the property; and
>
> (iv) clause 11.07 of the mortgage which allows the lender to sell on all or part of the security to any person without notice to the borrower which is said to be a transfer of rights clause.

103. The parties are agreed that the test for fairness is set out in Article 3(1) of the Directive which states:-

> "A contractual term which has not been individually negotiated should be regarded as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

104. It is, therefore, necessary to consider whether there is any basis to conclude that (a) the term(s) causes an imbalance in the parties' rights, to the detriment of the consumer; (b) if so, whether this imbalance is significant; and (c) whether this significant

imbalance is contrary to the requirement of good faith.

105. The court must consider in this context whether the lender dealt fairly and equitably with the consumer and whether it could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations. Under Article 4(1), the unfairness of the contractual term must be assessed taking into account the nature of the service by which the contract was concluded and by referring "at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent". In that regard, it is not in dispute that the mortgage loan involved a consolidation of a number of other loans which the borrowers had difficulty in servicing at the time. It is also clear that the loan was entered into by the borrowers, having been approached by an agency acting on behalf of the lender. It is also clear from the CJEU jurisprudence that it is for the national court to determine the issue of unfairness if it has before it *inter alia* the "legal and factual elements necessary for that task". Though the plaintiff bears an onus to submit the relevant proofs, the failure by the applicants to oppose the application or make any submissions or submit any evidence and in particular, where they have consented to the making of the order, does not mean that the exercise is to be conducted in a forensic vacuum on the basis of pure hypothesis or conjecture: the court must conduct its review within an established legal and factual reality.

Variable Interest Rate
106. The applicants submit that the initial rate of interest having regard to the amount of money owed and the term of the loan is unfair within the meaning of the directive. The interest rate was initially set at 6.95% and is described as a variable rate in Part 1 of the Particulars of Offer of Mortgage Loan. Under Part 2, clause 1 and Part 4, clause 7(a) of the loan agreement, the notice party is entitled to vary the interest rate and it is submitted that the cumulative effect of the variation clauses is that the notice party could vary the interest rate at any time to any level at its absolute discretion. It is said that the terms allowed the notice party to vary the price of the loan at its absolute discretion without any parameters on that increase and that it is a price variation clause which is to the detriment of the consumer and may therefore be regarded as an unfair term in accordance with sub-paragraph (j) of paragraph 1 of the Annex to the Directive, quoted above at para. 62 of the judgment .

107. The applicants relying upon the decision in Case C-92/11 *RWE Vertrieb AG* , submitted that a contract must set out in a transparent fashion the reason and method for the variation of price so that the consumer may foresee on the basis of clear and intelligible criteria, the alteration that may be made to the charges and secondly, that the consumer must have a right to terminate the contract if the charges are, in fact, altered. It is submitted that the contract did not set out any criteria for the variation of interest rate and it was stated expressly to be at the absolute discretion of the notice party. In addition, it is submitted that the ability to cancel the contract must not be purely formal but must be capable of exercise in a practical way: thus though it was possible for a borrower to terminate a variable rate loan by simply repaying the full balance, this was not practically possible for the normal borrower who could not be expected to raise finance to repay a loan immediately and in the case of a borrower who is in arrears, it is impracticable though not always impossible to seek alternative finance to allow them to cancel the contract.

108. It is submitted on behalf of the notice party that in considering the unfairness of the variable interest clause, the court should have regard to Paragraph 2(b) to the annex to the Directive which states that:-

> "Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice whether there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately."

109. The notice party submits that the effect of clause 12(iv) of the letter of loan and clause 6 of the deed of mortgage is to allow the applicants to dissolve or cancel the contract by means of repayment of the balance owing.

110. I am satisfied that the court should take into account whether the contractual terms impugned in this case are normally and regularly included in mortgage loan contracts between consumers and mortgage loan providers. There is nothing surprising in the inclusion of a variable interest mortgage term in a mortgage loan. I am satisfied that variable interest mortgage loans have been a feature of such contracts for many years. It could not be in any sense regarded as surprising to the consumer in this case as it is of a type commonly used. They have been a feature of the provision of finance to individuals and couples seeking to set up a family home in this jurisdiction and indeed, the interest rate has fluctuated considerably over decades, reflecting for the most part a shift in the interest rate in money markets and has long been regarded as an important element in the provision of finance to families seeking to improve and/or purchase a family home. This is a well-recognised feature of family home purchase and finance in Ireland. Thus in *Millar v. Financial Services Ombudsman* [2015] IECA 126, the Court of Appeal noted that a variable interest rate is a normal term of such a mortgage loan and any abuse of the term may be the subject of complaint to the Financial Ombudsman under Part VIIB of the Central Bank Act 1942, as amended by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004 and as further amended by the Financial Services and Pensions Ombudsman Act 2017.

111. I am satisfied that the variable interest term is one that is regularly used in legal relations in similar contracts in this State and that there is an objective reason for the existence of such a term: it enables financial institutions to provide finance for mortgages on an ongoing basis to borrowers seeking to purchase and /or improve homes and, therefore, serves an important social purpose. I am also satisfied that though financial institutions are demonstrably stronger entities when compared with family home borrowers, there are protections against the abuse of such terms by the institutions. It is also clear that if a significant loan were to be advanced without the security provided by a mortgage and charge on the family home, it would likely be on the basis of a much higher rate of interest. In addition, the existence of a variable interest rate term is subject to an implied contractual term that it will not be exercised "dishonestly", for an improper purpose, capriciously or arbitrarily (*Paragon Finance plc v. Nash* [2002] 1 WLR 685).

112. Furthermore, while acknowledging that the examination of the variable interest clause for unfairness, if it fell within the scope of the Directive, would be in terms of its general, as well as specific effect, it is clear that the applicants in this case were the subject of a diminution in interest rate applicable during the period of the contract.

113. I am not satisfied that the variable interest clause was unfair even if it fell within the scope of the Directive and Regulations.

Acceleration Clause
114. The applicant submits that clause 4(b) of the general terms and conditions is an acceleration clause. It provides that in the event of any repayment not being paid on the due date, the lender may demand an early repayment of the principal and accrued interest or otherwise alter the conditions of the loan. Clause 4 is headed "repayment". It is submitted that the three factors to be considered when examining the fairness of an acceleration clause are whether the right of the lender to call in the totality of the loan is conditional upon non-compliance by the consumer with an obligation which is of essential importance to the contractual relationship, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term

and amount of the loan, whether that right derogates from the relevant applicable rules and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in (Aziz at paragraph 73).

115. Section 54 of the Consumer Credit Act 1995, provides that a creditor shall not enforce a provision of an agreement by demanding early payment of any sum or treating any right conferred on the consumer by the agreement as determined, restricted or deferred unless he has served on the consumer at least ten days before he proposes to take any action, a notice specifying the details of the agreement sufficient to identify it, the name and address of the creditor and the consumer, the term of the agreement to be enforced and a statement of the action intended to be taken to enforce the term of the agreement, the manner and circumstances in which it is intended to take such action and the date on or after which such action is intended to be taken. A similar restriction is provided in s. 54(2) which prevents the creditor from demanding early payment of any sum or seek the enforcement of any security unless he has served the same details as provided in s. 54(1) and also:-

> "(v) either—
>
> (I) if the breach is capable of remedy, what action is required to remedy it and the date before which that action is to be taken, which date shall be not less than 21 days after the date of service of the notice, or
>
> (II) if the breach is not capable of remedy, the sum, if any, required to be paid as compensation for the breach and the date before which it is to be paid, which date shall be not less than 21 days after the date of service of the notice; and
>
> (vi) information about the consequences of failure to comply with the notice."

116. Section 54(3) provides that if the consumer takes the action specified under s. 54(2)(v)(I) and (II) before the date specified for that purpose in the notice, the breach shall be treated as not having occurred. It is submitted that these statutory provisions provide the applicants with the form of appropriate remedy against an acceleration clause and that it is in compliance with the judgment of the CJEU in *Aziz* :-

> "73. In particular, with regard, first, to the term concerning acceleration, in long-term contracts, on account of events of default occurring within a limited specific period, it is for the referring court to assess in particular, as stated by the Advocate General in points 77 and 78 of her Opinion, whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the relevant applicable rules and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in."

117. I have already referred to the restrictions imposed upon a lender in issuing proceedings for possession where there is default in payment and arrears have accrued under the terms of the CCMA. The code provides for the examination of the financial circumstances of borrowers in distress in respect of repayments on their family home. It provides for an extensive process of engagement whereby an alternative resolution to the enforcement of the lender's security on the family home is explored. Thus, a single default payment or indeed the accumulation of arrears which might otherwise have entitled the lender to issue proceedings to realise the security and obtain possession of the family home must now be understood in the context of the statutory code applicable to such terms and the CCMA. It is clear from the facts of this case that CCMA was applied in order to explore viable or reasonable alternatives which might enable the borrowers to address the arears and their default without losing possession of their home. This proved impracticable having regard to the circumstances of the borrowers. However, I am satisfied that the terms of the agreement which the applicants now state might have been reviewed by the respondent as unfair could not be regarded as unfair in the light of the consumer protections available under the statute and/or the CCMA. There is no suggestion by the applicants or in the evidence that the lenders failed to comply with their duties to the borrowers as consumers under the statute or the Code. It is clear that the borrowers failed to comply with the core element of the condition of the loan to make the periodic repayments during the period of the mortgage. That default was of essential importance to the contract and was sufficiently serious having regard to the term and amount of the loan to justify a demand for its repayment and the claim for possession. I am satisfied that Irish national law and procedures provide for adequate and effective means to enable the borrowers to remedy and avoid the effects of the loan being called in. These are matters which were placed in evidence before the respondent before the order was made. No point was taken by the applicants that the clause was unfair or unfairly applied: they consented to the making of the order. It is difficult to see how they could have opposed the making of the order on this ground having regard to the history of the case. These provisions enable the court to ensure that any perceived imbalance in the acceleration term under review is appropriately addressed under the terms of the statute and the Code. I am satisfied the protections available to consumers ensure that these clauses cannot be invoked unreasonably, arbitrarily or capriciously but only after an extensive process when other reasonable or practicable options have been explored.

Power of Entry

118. There is no doubt that clause 8.01 of the mortgage deed confers a power upon the lender to enter into possession of the mortgage property without further notice or consent in the event of the occurrence of one of the events identified in clause 9. It is said that the clause could not be operated in that way because of the provisions of Article 40.5 of the Constitution and s.62(7) of the 1964 Act and now s.97 of the 2009 Act. The former conferred the right on a registered owner of a charge to apply to court in a summary manner for possession which had to consider whether it was "proper" to make the order: under the latter provision the court may order that possession be granted if it thinks fit "on such terms and conditions, if any, as it thinks fit".

119. Thus, if there is default in a monthly payment under clause 9, the lender may ostensibly appear to be entitled to enter into possession under clause 8 but is clearly not entitled to do so as a matter of law. Clause 8 exists within a wider legal framework which informs its interpretation and application: the right to possession could not be lawfully exercised in this jurisdiction without a court order unless possession is surrendered by consent. The clause must be interpreted in accordance with the provisions of s.62(7) as previously applied, s.97 of the 2009 Act and Article 40.5 of the Constitution as previously discussed: that process is imbued with procedures which require an engagement between the borrowers and the lender before a claim for possession can be initiated and the service of various notices in accordance with the 1995 Act. I am satisfied that the existence of a contractual right to possession in a mortgage agreement is a core term and that the limited circumstances in which it may be exercised and the fact that an order must be obtained from a court to enable the lender to obtain possession constitute substantial protections which address any suggested imbalance between the parties and in protecting the status of the borrowers as consumers: it was the absence of the requirement of

judicial process in the course of which the unfairness of contract terms might be considered by the court that underpins the CJEU jurisprudence on this issue. I am not satisfied that the terms of clause 8 could be regarded as unfair in all the circumstances.

The Transfer Clause
120. Clause 11.07 of the mortgage allows for the notice party to sell on the security to any person without notice to the applicants. It is submitted by the applicants that this is contrary to the type of term which is deemed to be unfair under clause (p) of the Annex referred to in Article 3(3) of the Directive, namely a term:-

> "Giving the seller or the supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement".

121. Clause 11.07 is said to be *prima facie* unfair. It is submitted that the notice party is not the entity with which the loan contract was made namely, GE Woodchester Group. It is clear that GE Woodchester Group changed its name to Pepper Finance Corporation (Ireland) Limited on 11th October 2012. There was no transfer of rights and obligations involved in this exercise. However, it is nevertheless submitted that the clause contemplates that possibility.

122. It is submitted on behalf of the notice party that there is nothing to suggest that the applicants' contractual rights to the lender are affected by any such potential transfer or that a transfer would serve to "reduce the guarantees for the consumer". It is submitted that the regulations concerning the transfer of consumer contracts and in particular the consumer protection code and the Consumer Protection (Regulation of Credit Servicing) Act 2015 operate as a guarantee for the protection of the borrowers. In addition, it is submitted that the courts have determined that securitisation is a normal banking practice that has no impact on the end user or consumer and could not amount to a defence to an action for possession (*Kearney v. KBC* [2014] IEHC 260; *Harrold Nua Mortgages* [2015] IEHC 15 and *Danske Bank v. Scanlan* [2016] IEHC 118).

123. I am not satisfied that this clause could be regarded as an unfair term because each party would remain bound to the mortgage loan and deed and the obligations and rights thereunder. The applicants and any borrowers under a loan contract containing this clause would retain the same statutory protections as heretofore and any remedy sought by the lender to enforce its rights to possession is subject to the same law applicable to the notice party. I am not satisfied that the applicants could obtain relief on a review of the clause for unfairness.

124. I am therefore satisfied that to make the declarations sought and/or to grant an order of *certiorari* could not in the circumstances of this case avail the applicants because I am not satisfied that by making the declarations or quashing the order and remitting for consideration these or any other terms of the mortgage contract loan and the indenture of mortgage deed and charge, that the applicants would or could obtain relief resulting from a finding that the terms or any one of them were void for unfairness.

Proportionality
125. It is submitted on behalf of the applicants that because the County Registrar failed to conduct the review referred to earlier there was also failure to conduct the requisite analysis of the proportionality of granting such an order. I do not consider that this necessarily follows since a finding of unfairness requires a finding that the contract is void unless the contract can survive the excising of the unfair term.

126. However, it is submitted that a proportionality assessment should have been conducted by the respondent because of the potential impact on the applicants' right to a home as protected by Article 7 of the European Union Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights. Article 7 of the Charter provides that :-

> "Everyone has the right to respect for his or her private and family life, home and communications".

and Article 52(1) which addresses limitations of rights contained in the Charter provides:

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

127. Article 8 of the European Convention on Human Rights provides *inter alia*:-

> "(1) Everyone has the right to respect for private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ……or the economic well-being of the country…or for the protection of the rights and freedom of others"

128. This submission is based, in part, on the decision of the CJEU in Case C- 34/13 *Kusionova v. Smart Capital A.S.* in which a Slovakian court considered whether under Articles 38 and 47 of the Charter, the Consumer Directive had to be interpreted as precluding national legislation which allowed the recovery of a debt that was based on potentially unfair contract terms by the extra judicial enforcement of a charge on immovable property provided as a security by the consumer (in that case a family home) and if so whether in accordance with the supremacy of European Union Law such provisions ought to be set aside. No such challenge to national legislation has been made in this case and as already stated an order for possession is subject to judicial process: thus the central issues in that case do not arise in this case. In any event the CJEU concluded that the Slovakian legislation was not incompatible with European Union Law or the Directive. The CJEU stated

> "59. In particular, according to the Court's settled case law relating to the principle of sincere cooperation,…while the choice of penalties applicable to infringements of EU law remains within their discretion, Member States must ensure in particular that they are effective, proportionate, and dissuasive…
>
> 60. With regard to the requirement that the penalty should be effective and dissuasive, first, the written observations submitted…by the Slovak Government state that during such a procedure by the extra judicial enforcement of a charge, the national court with jurisdiction may, under … the Code of Civil Procedure, adopt any interim measure to prevent such a sale from going ahead.
>
> 61. Secondly… it appears that [Slovak Law]… is applicable to all charge agreements in the process of being enforced as of

that date [and] amended the procedural rules applicable to a term such as that in issue in the main proceedings. In particular,…in the version in force, [it] allows the court, where the validity of the term providing for the charge is challenged to declare the sale void, which, retrospectively, places the consumer in a situation almost identical to his original situation and does not therefore limit the compensation for the harm caused to them, where the sale is unlawful, to mere monetary compensation".

62. With regard to the proportionality of the penalty, it is necessary to give particular attention to the fact that the property at which the procedure for the judicial enforcement of the charge should issue in the main proceedings is directed is the immovable property forming the consumer's family home"

Thus, in the context of considering the proportionality of a penalty to be applied against the Member State in that case it was necessary to consider the power of the national court to declare the sale of the family home void where the validity of the term providing for the charge is challenged and in that respect particular attention must be given to the fact that the property concerned was the consumer's family home. The importance of that factor was then summarised in paras. 63-68 of the judgment.

"63. The loss of a family home is not only such as to seriously undermine consumer rights (the judgment in Aziz… paragraph 61), but it also places the family of the consumer concerned in a particularly vulnerable position (see to that effect the Order of the President of the Court in *Sanchez Morcillo and Abrial Garcia* EU:C:2014:1388, para.11).

64. In that regard, the European Court of Human Rights has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed (see the judgments of the European Court of Human Rights in *McCann v. United Kingdom*,….and *Rousk v. Sweden*…).

65. Under EU law, the right to accommodation is a fundamental right guaranteed under article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13.

66. With regard in particular to the consequences of the eviction of the consumer and his family from the accommodation forming their principal family home, the court has already emphasised the importance, for the national court, to provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated where the grant of such measures proves necessary in order to ensure the effectiveness of the protection intended by Directive 93/13 (see to that effect the judgment in *Aziz*…).

67. In the present case, the fact that it is possible for the competent national court to adopt any interim measure, such as that described in para. 60 of the present judgment would suggest that adequate and effective means exist to prevent the continued use of unfair terms, which is a matter for the referring court to determine.

68. It follows from the forgoing consideration that Directive 93/13 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows the recovery of a debt that is based on potentially unfair contractual terms by the extra judicial enforcement of a charge on immoveable property provided as security by the consumer, insofar as that legislation does not make it excessively difficult or impossible in practice to protect the rights conferred on consumers by that directive, which is a matter for the national court to determine".

129. I am not satisfied that this decision supports the submission advanced. It is clear that the nature and extent of the judicial process and review available to the lenders prior to the granting of an order must be proportionate to the remedy and its consequences bearing in mind the potential engagement of the right to a home. The court is satisfied in this case that the remedy available under Irish law to the lender to seek recovery and possession of the family home does not permit the extra judicial seizure of the family home or the eviction of the family or the borrowers and ensures an effective remedy in accordance with the protection intended by Directive 93/13: the judicial process does not make it "excessively difficult or impossible in practice" for the consumer to protect those rights. Any alleged unfairness of the terms of any such loan may be canvassed fully by or before the court, and if necessary on the court's own motion before the making of any such order

130. I am satisfied that all relevant issues may be raised by or on behalf of the borrower in the course of such proceedings or by the court and that there are significant protective procedures requiring the pursuit of alternative remedies to possession prior to the institution of proceedings as detailed above and evidenced by the facts of this case: these measures are clearly focussed on affording a judicial process which has full regard for the right to a home and whether the granting of an order for its possession is proportionate in the circumstances of the case. The court has jurisdiction to consider all the evidence in the case including the terms of the contract, the amount and duration of the loan, the amount outstanding, the extent of the arrears, the nature and extent of default, the steps taken to facilitate the borrowers to address their default before seeking possession (e.g. under the CCMA) and the extent if any to which the borrowers have engaged with the lender or are financially capable of doing so. In that context the respondent received evidence that the lender had a right to call in the full amount of the loan upon default by the borrowers, the serious non-compliance by the borrowers over a lengthy period having regard to the term and amount of the loan, the requirements of the lenders to comply with the CCMA and their obligation to provide the borrowers with an adequate, practicable and effective means of avoiding either the calling in of the loan or the issuing of possession proceedings by engaging in an effective way with the borrowers within the code (see Aziz para. 73). The court may also receive and consider all relevant evidence concerning the financial and personal history of the borrowers before determining whether to grant the order or make such order as it thinks fit. Furthermore, the respondent is vested with jurisdiction to review the unfairness of the contractual terms prior to the making of the order. The notice party's remedy to seek possession is central to the core terms of the contract and consequently is not a remedy which of itself must be deemed to be unfair. I am also satisfied that the remedy in this jurisdiction as framed and limited under the statutes and case law already cited in this judgment takes account of the fact that the property the subject of the application for possession is a family home and the applicants' rights arising under the Charter. The court must consider the proofs required before making an order for possession and in most cases will grant an order for possession if the proofs are in order (see *Start Mortgages* quoted above): though the court is not permitted to act solely on the basis of "sympathetic factors" such as ill health or old age to refuse relief if the proofs are otherwise in order (*Bank of Ireland v Smyth* [1993] 2 I.R.102 *per* Geoghegan J.) it will have regard to all other relevant matters as set out above.

131. The jurisdiction vested in the court to grant a stay on an order for possession also demonstrates that the court may take account of the fact that the borrowers will lose their home on the making of an order for possession. The court, notwithstanding the entitlement of the lender to the order, is empowered to grant a stay on the order to enable that circumstance to be addressed, if possible, before the order takes effect. I am satisfied that this is another feature of the jurisdiction which indicates the proportionality of the remedy applicable where a family home is the subject of the application. In this case the respondent was obliged to consider

and considered evidence and submissions concerning the terms of the order such as whether a stay ought to be granted and following submissions granted a stay of nine months on the order. I am not satisfied that there has been a failure to vindicate the applicants' Article 7 right.

132. I am also satisfied for similar reasons that the procedures available to the applicants and others to protect and vindicate their rights and which leads to the granting of the order for possession enables the proportionality and reasonableness of the remedy to be determined by an impartial tribunal having due regard to the principles set out under Article 8. Borrowers are entitled under the applicable procedures to raise any relevant argument concerning the proposed interference by way of defence points which if properly raised must be examined in detail and ultimately adjudicated upon by the court. The lender has a right to a remedy to enforce its contractual and/or property rights. The provision of a judicial remedy whereby an order for possession may be sought and obtained in *inter partes* litigation is a legitimate aim. It is a measure which, I am satisfied, proportionately facilitates the vindication of both parties' rights in a way which is necessary in a democratic society and the economic well-being of this society (*Yordanova v. Bulgaria* Application no.25446/06).

133. Furthermore, I am satisfied that the judicial process applicable to claims for possession of family homes subject to mortgage agreements complies with the duty to provide an effective remedy and a fair hearing before an impartial judicial tribunal under Article 47 of the Charter and Article 6 of the European Convention on Human Rights. The process as outlined earlier enables the parties to address and the court to consider the issue in ways which are proportionate to the nature and amount of the loan, the alleged default by the borrowers, the respective rights of the parties under the contract, the circumstances of the borrowers and the fact that the application is in respect of their home thereby engaging their Article 7 Charter right and Article 8 Convention right: no points of defence were raised in this respect by the applicants to the substantive claim. This is in contrast to the case of *Orlic v. Croatia Application* no.48833/07, relied upon by the applicants in which no opportunity was permitted to raise points of defence to the eviction under review.

134. In *Donegan v. Dublin City Council* [2012] 3 I.R. 600 the Supreme Court considered s.62(1) of the Housing Act 1996 which precluded a tenant from challenging the facts upon which a demand was made for possession of his home and which required a District Judge to grant a warrant for possession on proof of the demand. It was submitted that the section should be interpreted in accordance with Article 8 of the Convention under s.2(1) of the European Convention on Human Rights Act, 2003 which required the District Court to hear and determine the issue of fact which the tenant sought to raise at the hearing before the District Court. McKenzie J., (delivering the judgment of the Court) stated:-

> "147….
>
> (6) In determining whether an interference is Article 8 compliant, the regulatory framework within which the measure has been established and operates will be assessed. Questions such as (i) is the framework procedure sufficient to afford true respect to the interests safeguarded by the article, (ii) is the decision making process fair in such a way as to respect that right, (iii) has the affected person an opportunity to have any relevant and weighty arguable issues tested before an independent tribunal and ,(iv) has that person an opportunity to have such an issue considered against the measure, to determine its proportionality."

135. I am satisfied that each of those questions when posed in respect of the remedy of possession considered in this case may be answered in the affirmative for the reasons already set out in the above assessment. In this case, unlike the situation in respect of s.62(1) there is an extensive procedure which permits the borrowers in a claim for possession to raise any factual or legal dispute which is "genuine" and "materially central" to the right to a home at issue under Article 8 (see paras. 139 and 144 of *Donegan*). In addition, though these more extensive procedural safeguards exist, it is clear that the applicants in this case did not avail of them save to seek a stay.

136. The making of an order for possession of a family home renders the borrowers and their family members homeless: some borrowers will be able to secure alternative accommodation and many will not, but that factor, of itself, does not provide the basis upon which to refuse relief as a matter of law. The issue of the immediate and serious personal and social consequences of the order whereby borrowers and their family may be rendered homeless is a matter that unfortunately they are left to address with limited resources by seeking alternative accommodation privately or, if that is not possible by seeking accommodation from the public housing authority. If that is not available to them that issue is one which falls to be addressed within a wider social framework by the executive and legislature. I am therefore not satisfied that the remedy of possession whether considered in light of the CJEU or ECHR jurisprudence could be regarded as lacking proportionality generally or in the circumstances of this case or breaches the applicants' rights under the Charter or the Convention.

Conclusion

137. The court is satisfied that for all of the above reasons this application should be refused.