THE HIGH COURT

[2010 No. 878 S.P.]

BETWEEN

GE CAPITAL WOODCHESTER HOMELOANS LIMITED

PLAINTIFF

AND

MAUREEN FAULKNER MADDEN

DEFENDANT

THE HIGH COURT

[2009 No. 493 S.P.]

BETWEEN

GE CAPITAL WOODCHESTER HOMELOANS LIMITED

PLAINTIFF

AND

DAVID DIGAN AND MARGARET DIGAN

DEFENDANTS

THE HIGH COURT

BETWEEN

GE CAPITAL WOODCHESTER HOMELOANS LIMITED

AND

O'ROURKE AND KEARNEY

AND

THE HIGH COURT

[2010 No. 809 S.P.]

BETWEEN

GE CAPITAL WOODCHESTER HOMELOANS LIMITED

PLAINTIFF

AND

TADHG BUCKLEY AND GERALDINE BUCKLEY

DEFENDANTS

THE HIGH COURT

[2009 No. 418 S.P.

BETWEEN

GE CAPITAL WOODCHESTER HOMELOANS LIMITED

PLAINTIFF

AND

CIARAN HEALY

DEFENDANT

JUDGMENT of Ms. Justice Dunne delivered the 16th day of May 2013

A number of cases were listed for hearing before me in which the same issue has arisen for determination. The plaintiff in each case is the same and each set of proceedings relates to an application for possession pursuant to s. 62(7) of the Registration of Title Act 1964. (S. 62(7)). The issue at the heart of these proceedings concerns what constitutes a demand for payment on foot of the relevant deed of charge. In the absence of a demand, where required by the deed of charge, the right to bring proceedings under s. 62.7 does not arise. (See *Start Mortgages and Others v. Gunn and Others* [2011] IEHC 275). In the course of the hearing before me, arguments were made on behalf Ms. Faulkner Madden represented by Mr. Maguire S.C. who also represented the parties in the Buckley case. There was no appearance on behalf of the defendants in the O'Rourke case. Mr. Robinson B.L. appeared on behalf of Mr. Healy and Mr. and Mrs. Digan appeared in court in person. I indicated that, I would, if necessary, adjourn their case as they were not legally represented.

The issue as to the adequacy of the letter of demand in these cases relates to a standard form letter used by the plaintiff over a considerable period of time. The issue is complicated by the fact that the adequacy of that form of letter of demand was considered by the High Court in a number of ex tempore judgments (McGovern J. and Dunne J.) and further has been considered in a written judgment delivered in the High Court (Laffoy J.) in the case of *GE Capital Woodchester Homeloans Limited v. Reade and Another* (Unreported, High Court, 12th November, 2012) in which Laffoy J. came to the conclusion that the letter of demand relied on by the plaintiff in those proceedings was not a sufficient demand to enable the plaintiff to bring proceedings under section 62(7). The considered decision in the *Reade* case reached a different conclusion to that given in the course of the ex tempore judgments referred to previously.

Accordingly, I propose to look at the arguments in respect of the letter relied on by the plaintiff in these proceedings and whether that letter constitutes a demand such that the plaintiff was entitled to bring proceedings pursuant to section 62(7). I also propose to consider the issue as to whether it is appropriate for this Court to reach any conclusion on this issue having regard to the decision of the High Court in the *Reade* case.

I will set out the relevant sections of two letters which featured in this case and which are relied on by the plaintiff. For ease of reference I will refer to those used in the case of Ms. Faulkner Madden, dated the 7th February, 2009, and the 24th August, 2009, respectively. The letters in every case are identical save for the obvious differences relating to the identity of the addressee and the amounts involved. In the first letter of the 7th February, 2009, it was stated as follows:-

> "We refer to your mortgage account and note from our records that as at 7th February, 2009, your account is €6,140.06 plus charges of €57.91 in arrears. We must advise that unless you remit this sum in full within seven days from the date hereof we will have no alternative but to pass this account over to our solicitors to commence repossession proceedings as arising from your default under your mortgage agreement the entire balance outstanding has now fallen due which as at the 7th February, 2009, amounted to €386,130.11."

The remainder of the letter went on to set details in relation to legal expenses. The letter of the 24th August, 2009 was written on behalf of the plaintiff by its solicitors in the following terms:-

"Dear Sir, Madam,

> We act on behalf of GE Capital Woodchester Homeloans Limited who instruct that you are in arrears on your mortgage accounts in the sum of €27,350.51 as at the 17th day of August, 2009.
>
> The purpose of this letter is to advise you that as a result of your above default in your mortgages, the entire balance outstanding on your mortgage accounts in the amount of €467,299.24 as at the 17th day of August, 2009 has now fallen due and owing. We are instructed to demand within ten days from the date hereof vacant possession of our security the premise known as ... for the purpose of sale as our client's power of sale has now arisen under the terms of your mortgages. However, if the arrears outstanding to our client are discharged within ten days from the date hereof, proceedings for repossession of our client's security will not be issued.
>
> You should note that if you do not furnish vacant possession or discharge the arrears outstanding within ten days, we have strict and firm instructions to issue proceedings for recovery of possession of our client's security immediately. You should further note that all costs incurred by our client in the recovery of the arrears or in recovery of possession of the premises together will all legal costs and outlays, will be charged to your mortgage accounts and be payable by you to our client together with the balance outstanding your mortgage accounts.
>
> You should also take note that on recovery of possession of the security by our client (pursuant to a court order or by voluntary surrender by you) our client will proceed to sell the security. However, if the net proceeds of sale are not sufficient to discharge the balance outstanding to our clients, our clients are entitled to demand payment from you of the deficit remaining unpaid. This includes any accrued interest, charges, legal fees, costs incurred in selling the property and other related costs."

The remainder of the letter deals with the issue of costs.

Depending on the wording of a mortgage it may be necessary prior to the institution of proceedings to have a valid demand for payment of the full amount due on foot of the mortgage. Such a demand was necessary in the *Gunn* case referred to above, but not in the case of the mortgage in the case of *EBS Limited v. Gillespie* [2012] IEHC 243. It is not in dispute that in these cases, it is necessary for there to have been a valid demand for payment in order to bring proceedings under section 62(7). By way of explanation, I should refer to the provisions of s. 62(7) which provides as follows:-

> "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 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 or the said part thereof, shall be deemed to be a mortgagee in possession."

Thus, as can be seen proceedings under s. 62(7) could only be commenced "when repayment of the principal money secured by the instrument of charge has become due ...".In other words, if the principal money secured by the instrument of charge only became due following a demand in accordance with the terms of the relevant charge, the proceedings pursuant to s. 62(7) could not be commenced in the absence of such demand. As I have said, there is no dispute between the parties that this is a case in which it is necessary to have a valid demand before the commencement of proceedings.

At this stage I propose to look at the submissions in relation to what amounts to a demand. A series of cases from other jurisdictions were relied on by counsel on behalf of the plaintiff. The first was in *Re. A Company* [1985] B.C.L.C. 37 in which an issue arose as to whether a telex was a statutory demand pursuant to s. 223(a) of the Companies At 1948, such that the non payment of the sum referred to would result in the company being deemed to be insolvent. Nourse J. in the course of his judgment at p. 41 stated as follows:-

> "The first, and in my view conclusive, objection to the telex as a demand under that subsection is that it is not an unequivocal demand for payment. Counsel for the company referred me to a definition of a demand given by Walker J. in the Australian case of *Re. Colonial Finance, Mortgage, Investment and Guarantee Corporation Limited* [1905] 6 S.R. NSW 6 at 9. Counsel for the petitioner was prepared to accept that as a fair, working definition. It reads as follows:-
>
> > '... there must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness.'
>
> It must be of a peremptory character and unconditional, for the nature of the language is immaterial provided it has its effect."

I would be happy to accept that definition of a demand as being a practical definition of the word "demand" for the purposes of these proceedings.

Nourse J. went on to refer to the demand in that case as follows:-

> "What effect did the telex of 15th August have? In addition to the final words, to which I have already referred, counsel for the petition relied on two other passages. The first was in these terms:
>
> > 'There is, therefore, due to us a total of £58,964.19. No payments have been made in respect of this album since you settled the January statement. There is, as you are well aware, no provision for cross collateralisation between different streams of product. There has, therefore, been a failure to pay for a considerable period.'

The second passage is in these terms:

> 'The amount ... has been outstanding for a considerable period and amounts to a failure to pay under clause 5(J) (1) and (2).'
>
> Counsel for the petitioner (Mr. Crawford) submits, in effect, that those two passages combined with the last words, constituted a demand as defined by Walker J.
>
> I am quite unable to accept that submission.... But it seems to me that the telex is quite unspecific as to which of these remedies is to be enforced. It certainly is not a clear intimation that payment is required, far less is it of a peremptory character and unconditional. In those circumstances, while I certainly would not consider the telex to be fatal for not having used the word 'demand', it does seem to me that it is not a demand within s. 223(a) of the 1948 Act. It is also flawed on the ground earlier stated, namely that it does not relate to a debt of a specified sum which cannot be seriously questioned as to existence or quantum."

In *Bank of Baroda v. Panessar* [1987] 1 Ch. 335, it was held that where a creditor was entitled by the terms of his security to demand repayment of all monies thereby secured there was no need to specify the precise sum of the debt in making a demand for the monies due thereunder; that, accordingly, a valid demand for the monies owing to the bank from the company in that case had been made.

Counsel on behalf of the plaintiff in relying in that decision pointed out that the amount due herein had been specified in the plaintiff's letter to the defendant.

The effect of giving an alternative option to the debtor as occurred in this case, namely that "if the arrears outstanding are discharged within ten days from the date hereof, proceedings for repossession of our client's security will not be issued", was said not to affect the validity of the demand. Reference was made in that context to the case of *N.R.G. Vision Limited v. Churchfield Leasing Limited and Others* [1988] B.C.L.C. 624, a decision of the Chancery Division of England and Wales, which upheld the validity of the appointment of a receiver. Knox J. in that case stated at p. 637 as follows:-

> "In my judgment, given that a demand for all that is due is enough (for which Walton J.'s decision is clear authority), it is sufficient in the context of a clause such as clause 6 of this debenture deed if a demand is addressed to the guarantor which makes it clear to him that the creditor requires to be paid a sum which is, in fact, due. That, in my view, is plainly the case in relation to the arrears of £112,687.55 and the fact that there is an offer to accept instalments and not to appoint a receiver if those instalments are paid does not, in my view, detract from the efficacy of the demand."

The circumstances of that case were that on the 30th June, 1987, the Churchfield Company wrote to the company making a formal demand for repayment of some £428,000 in respect of an agreement where lessees had defaulted. Negotiations took place and on the 6th July, 1987, the Churchfield Company sent a further letter to the company asking for payment of some £112,000 in respect of leasing agreements which they identified as being in default but offering to accept payment in weekly instalments. It was held that on the facts since the letter of the 6th July, mentioned the figure of £112,000 of arrears which was in fact due it was an effective

demand.

I think it is clear from that decision that the offer to accept instalments or any other alternative does not necessarily render a demand equivocal.

I now want to consider the decision in the *Reade* case and the judgment in the case of the *Wise Company Limited v. John Lanigan* (Unreported, Supreme Court, 21st January, 2004) (Wise) which was relied on by Laffoy J. in the judgment in *Reade*. In the course of her judgment in the *Reade* case, Laffoy J. referred to the decision of the

Supreme Court delivered by Fennelly J. in the *Wise* case. She quoted extensively from that judgment, stating:-

> "The deed of charge in the *Wise* case contained a covenant by the borrower/chargor to "pay [the appellant] and discharge on demand ... the general indebtedness and liability". Fennelly J. records in the judgment that by early 2000 the appellant contended that the sum of £60,898.47 was due and that this sum would have to be paid to redeem the charge. Fennelly J. then went on to say:
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> > 'By a letter of 18th February 2000 from its solicitors, the appellant formally wrote to the respondent demanding possession of the lands within seven days. The letter continued: 'In the alternative, you may pay the said sum of Stg£60,898.47 to our client within the said period of seven days'.
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> On the question as to whether that was an adequate demand to give the Court jurisdiction under s. 62(7), Fennelly J. stated:
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> > 'There remains, however, the point made by the respondent about the absence of a demand. The appellant accepts that the covenant to pay 'general indebtedness' and, hence, the inclusion of such sums within the scope of the charge depends on a demand being made.
> >
> > The appellant says that a sufficient demand was made in the letter demanding vacant possession of the charged lands. That demand was followed by the sentence quoted earlier indicating that the respondent might as an alternative 'pay the said sum of Stg£60,898.47 to our client within the said period of seven days'.
>
> That letter, in its own terms purported to rely on a right conferred by the deed of charge to enter into possession of the property 'in the event of default by you in respect of the repayments due by you...'. Insofar as the advance came within the scope of 'general indebtedness', the covenant to pay came into effect only on demand being made. The present case concerns a claim for possession, not pursuant to any express terms conferring a right to possession, but upon the exercise by the Court of its power to grant an order for possession 'where repayment of the money secured by the instrument of charge has become due'. That, in turn, depends on the appellant being able to show that the general indebtedness has become due. I am satisfied that the appellant could not apply to the court for an order pursuant to s. 62(7) of the Act on the basis of general indebtedness without proof of prior demand for payment, since the covenant applied only upon demand for payment. A suggestion that the respondent might avoid the demand for possession by making a specified payment does not constitute a demand for payment. On this ground, therefore, I believe that the applicant's claim must fail. I would dismiss the appeal."

Laffoy J. on that basis came to the conclusion that her previous judgment in the Reade case of the 22nd August, 2012, was consistent with the decision of the Supreme Court for reasons which she then set out. It is necessary to refer at length to those reasons. She stated at (para. 7 onwards) as follows:-

> "7. First, as is clear from the outline of the provisions of the Charge given by the defendants to the plaintiff and their effect under pre-1st December, 2009 law contained in paras. 13 and 14 of the judgment [of the 22nd August, 2012] under the terms of the Charge the entire of the secured monies, including principal, remaining unpaid would only become due by the defendants to the plaintiff on demand following an event of default. A demand would be necessary to render the monies remaining unpaid on the happening of an event of default due and payable to the plaintiff. Accordingly, as was the position in the *Wise* case, a demand was necessary, in this case, following an event of default.
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> 8. Secondly, as in the *Wise* case, the core question then was whether there was a demand which rendered repayment of the principal monies secured by the Charge due, as required to give the Court jurisdiction under section 62(7).
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> 9. Thirdly, as regards the letter which the plaintiff contended was dispatched on 10th April, 2007 in the form of the precedent letter, on which the plaintiff relied so as to avoid the implications of the decision in *Start Mortgages Ltd & Ors. v. Gunn & Ors.* [2011] IEHC 275, in the interests of clarity, I will quote hereunder the first two paragraphs of that letter, which are the only paragraphs relevant to the issue, because the remainder of the letter deals with the question of legal expenses. The first two paragraphs were in the following terms:
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> > 'We refer to your mortgage account and note from our records that as of XX/XX/XX, your account is €xxxx.xx plus charges of €xx.xx in arrears.
> >
> > We must advise you that unless you remit this sum in full within 7 days from the date hereof we will have no alternative but to pass this account over to our Solicitors to commence repossession proceedings as arising from your default under your mortgage agreement the entire balance outstanding has now fallen due which as of the xx/xx/xx, amounted to €xxxxxxxx.xx.'
>
> The problem with that precedent is that it 'put the cart before the horse'. Under the terms of the charge all monies remaining unpaid by the defendants to the plaintiff secured by the charge would have become immediately due and payable 'on demand' to the plaintiff on the happening of any of the events of default specified, for example, default 'in payment of any monthly or other periodic payment or in payment of any of the secured monies hereunder'. So for repayment of the principal monies to be due, as required by s. 62(7), the essential sequence was -

(a) the happening of an event of default such as non-payment of an instalment, followed by

(b) a demand for repayment of all of the monies remaining unpaid.

The entire monies secured by the charge did not automatically become repayable on the happening of an event of default, as assumed in the precedent letter. The precedent letter demanded the arrears due at the date thereof and threatened the commencement of possession proceedings in the event of the defendants failing to pay up. It did not demand the entire balance outstanding on the charge. On the authority of the *Wise* case, the court has no jurisdiction under s. 62(7), because the principal monies secured by the charge had not become repayable, no demand having been made in accordance with clause 3 of the charge.

10. Fourthly, the letter of 2nd February, 2012 from the plaintiff's solicitors suffers from the same frailty. In the interests of clarity I will quote the first two paragraphs of that letter and part of the third paragraph. The remainder of the letter deals with the issue of legal costs and expenses. The letter stated:

'We act on behalf of [the plaintiff] who instruct us that you are in arrears on your mortgage account in the sum of €53,317.78 as at the 2nd February, 2010.

The purpose of this letter is to advise you that as a result of your above default in your mortgage the entire balance outstanding on your mortgage account in the amount of €270,915.45 as at the 2nd February, 2010 has now fallen due and owing. We are instructed to demand within ten days from the date hereof vacant possession of our security the premises known as ... for the purpose of sale as our client's power of sale has now arisen under the terms of your mortgage. However, if the arrears outstanding to our clients are discharged within ten days from the date hereof proceedings for repossession of our client's security will not be issued.

You should note that if you do not furnish vacant possession or discharge the arrears outstanding within ten day's, we have strict and firm instructions to issue proceedings for recovery or possession of our client's security immediately.'

In that letter, it was assumed that the entire balance outstanding on the charge had fallen due and owing as a result of the defendants' default. In accordance with the terms of the contract between the plaintiff and the defendants embodied in the charge that was not the case. A demand was necessary to call in the entire principal and interest outstanding. The letter of 2nd February, 2010, like the letter relied on in the *Wise* case, was not a demand which rendered the principal money repayable, so as to confer jurisdiction under s. 62(7) on the Court.

11. This Court is bound by the decision of the Supreme Court in the *Wise* case. Therefore, counsel for the second defendant was correct in submitting that that decision determines the issue."

Laffoy J. then made an order dismissing the plaintiffs claim for possession.

I have already noted that in the course of submissions, reference was made to the fact that a number of ex tempore decisions have been given by the High Court in relation to the same form of letter of demand where the court was satisfied with that letter of demand. In the written submissions reference was made to a decision in the case of *GE Capital Woodchseter Homeloans Limited v. Touhidule Islam and Sadia Shahnaz*, in which I considered the decision in *N.R.G.* referred to above. In that case I accepted that the letter of demand was a sufficient demand. However, the argument in that case was predicated on the fact that the letter gave the mortgagor/chargor the alternative of discharging the arrears. The focus of the court was therefore on the question as to whether or not the giving of an alternative in such a letter could vitiate the demand on the basis that it was not an unequivocal demand. Relying on the authority of *N.R.G. Vision v. Churchfield*, I was satisfied in that case that the giving of an alternative did not render the letter unequivocal. *The Wise* decision was not cited to the court in the course of the submissions in that case.

It would not be appropriate to make any comment on the judgment in *Reade* and on the earlier judgment in *Wise* before referring briefly to a number of authorities dealing with the principle of judicial comity or, to put it another way, the circumstances in which one judge of the High Court will or will not follow an earlier judgment of the High Court. During the submissions, I was referred to a series of judgements in the cases of *Re. Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, Clark J. pp 7 to 8, *Brady v. Director of Public Prosecutions* [1020] IEHC 231, pp. 9 to 12, Kearns P. and *Irish Trust Bank Limited v. Central Bank of Ireland* [1976-7] I.L.R.M. 50, 53 on this point.

It goes without saying that certainty in the law is not just a desirable concept but a necessary one. Parties to litigation are entitled to reasonable certainty as to the applicable legal principles in any given area of law. Inevitably, over time, a divergence of view or a series of conflicting or apparently conflicting judgments on specific topics may arise such that the overall position in relation to a particular legal principle becomes uncertain. Clarke J. discussed this matter in his judgment in the case of *In Re. Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, where he made the following observation at internal pp. 7 and 8 of his judgment:-

"I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in *Industrial Services*. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority v. Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Keams J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered."

The comments of Clarke J. in that judgment as to the value of certainty or to use his phrase, "the virtue of certainty cannot be over emphasised" are central to our system of jurisprudence. Undoubtedly, decisions of antiquity may require to be revisited in the light of changed circumstances, more recent developments of the law and other relevant considerations. Clarke J. in the course of the passage referred to above, set out a number of grounds upon which it might be appropriate for a court to come to a different view, namely: (i) where it is clear that the initial decision was not based upon a review of significant relevant authority, (ii) where there is a clear error in the judgment, or (iii) where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. That seems to me to be a useful and appropriate test to apply in considering whether a judge of the same jurisdiction should reconsider a point already decided by a court of the same jurisdiction.

The judgment of Clarke J. in the *Worldport* case was considered by Kearns P. with approval in the decision in the case of *Brady v. Director of Public Prosecutions* [2010] IEHC 231 at internal pp. 9 et seq.

> A passage from the decision of Kearns P. in that case is also of assistance: "As Parke J. stated in *Irish Trust Bank v. The Central Bank of Ireland* [1976- 7] I.L.R.M. 50 at p.53:-
>
> > 'I fully accept that there are occasions in which the principle of *stare decisis* may be departed from but I consider that these are extremely rare. A court may depart from a decision of a court of equal jurisdiction if it appears that such a decision was given in a case in which either insufficient authority was cited or incorrect submissions advanced or in which the nature and wording of the judgment itself reveals that the judge disregarded or misunderstood an important element in the case or the arguments submitted to him or the authorities cited or in some other way departed from the proper standard to be adopted in judicial determination.'"

I have considered carefully the arguments, submissions and authorities opened to the court in relation to the central point at issue as to whether or not the particular letter of demand in this case was sufficient to satisfy the requirements of section 62(7). I have also considered the very careful submissions made to me in relation to the question of judicial comity or *stare decisis* and I have come to the conclusion having regard to the test set out by Clarke J. in the *Worldport* case that the features that would enable this Court to depart from the earlier judgment of the High Court in the *Reade* case are not present in this case so as to permit this Court to revisit the issue as to the validity of the letter of demand. It is also important to bear in mind that the decision of Laffoy J. in the *Reade* case was based on the binding decision of the Supreme Court in the Wise case. In all the circumstances, it would not be appropriate for me to comment further on the adequacy of the letters relied on by the plaintiff in these proceedings as the matter has been determined within the last few months by Laffoy J. in the *Reade* case. Accordingly, I feel that the only appropriate course to take is to dismiss these proceedings.