THE HIGH COURT

CHANCERY

[2017 No. 1421 P]

BETWEEN

MICHAEL WHELAN

PLAINTIFF

- AND -

PROMONTORIA (FINN) LIMITED

KEN FENNELL

DEFENDANTS

JUDGMENT of the Hon. Ms. Justice Stewart delivered on 12th day of December, 2017.

1. The plaintiff in these proceedings is a debtor of the first-named defendant and seeks a number of declaratory reliefs related to the first-named defendant's attempt to call in the plaintiff's loans. However, in the application currently before the Court, he seeks interlocutory relief restraining the defendants from taking action on foot of the deed of appointment of a receiver dated 20th January, 2017. In particular, he seeks to restrain the defendants from selling the property that served as security for the loans in question and from dealing with the tenants currently residing therein. The originating notice of motion is dated 15th February, 2017, and grounded on the plaintiff's affidavit of that same date. Replying affidavits from Ken Fennell and Stephen McKeever were sworn on 22nd and 23rd February, 2017. A second affidavit was sworn by the plaintiff on 27th February, 2017. A second affidavit was sworn by Mr. Fennell and Mr. McKeever on 3rd and 6th March, 2017. An affidavit was sworn by Alex Brett on 13th March, 2017. In those affidavits, the following background information is set out.

2. The deed of appointment appointing the second-named defendant as receiver operates on foot of a Deed of Mortgage and Charge dated 19th February, 1997. The terms of this loan were agreed between the plaintiff and Ulster Bank Limited. It was a term loan based on two rolled up facilities, issued in 2003 and 2004 as variable rate term loans, to be repaid in full in 2019. The manner in which the loan was repaid was reformulated in 2004, when the second loan was rolled up into the first loan. While the terms of the loan require repayments on a capital-and-interest basis, all repayments to date have been on an interest-only basis. The plaintiff avers that Ulster Bank never took issue with this deviation from the loan's terms and never alleged that an event of default had occurred. It is alleged that this state of affairs was regularised in 2009 by Alex Brett, acting on the plaintiff's behalf, and the loans were repaid on an interest-only basis. Two properties located in Ballsbridge served as security for the loan. Promontoria Holding 152BV purchased the loan by mortgage sale deed on 23rd July, 2015, and transferred its interests in the loan to the first-named defendant (hereon referred to as PFL) on 14th September, 2015.

3. The plaintiff states that he was initially contacted by PFL, acting through Capita Asset Management Services (hereinafter referred to as CAS), in December, 2015/January, 2016, wherein they confirmed that the loans were performing, requested that the loans be repaid on a capital-and-interest basis and enquired as to his intentions about the future of the loans. He avers that he was contacted again in January, 2016, wherein PFL asserted that the loan had been in default since December, 2013 and requested full repayment. In later affidavits, it was clarified that the reference to 2013 is a typographical error and that PFL was referring to December, 2003, when the first loan was issued. In any event, the plaintiff states that any event of default alleged by the defendants is contrived. Extensive correspondence continued between the parties over the course of 2016, including a meeting on 16th August, 2016. Following on from the appointment of the second-named defendant as receiver, CAS referred to the possibility of legal action for repossession and the property was advertised for sale on 13th February, 2017. The defendants also made contact with the tenants of the secured property, indicating that their future rent payments should be made to the receiver. Once he became aware of the advertisement for sale, the plaintiff made this application to secure interlocutory relief.

4. There are a number of points arising out of these facts that are in dispute between the parties. The plaintiff avers that the above loan was performing in compliance with the terms agreed between himself and Ulster Bank. He also avers the appointment of the second-named defendant is a tactic to force him to refinance the loan for PFL's commercial gain or, failing that, to make more immediate profits by realising their security, in anticipation of Promontoria's exit from the Irish market in 2018. The plaintiff states that those allegations have gone unrebutted. He states that the loan is performing well and that he is willing and able to pay it on a capital-and-interest basis. Indeed, he states he would have paid it on that basis had Ulster Bank requested him to do so, but they did not and the two sides came to an agreement to repay the loan on an interest-only basis. He highlights the un-controverted evidence before the Court that the loans are fully secured against the current value of the secured property and that PFL will not accrue a loss on the loan. In oral submissions, it was said that the plaintiff would be able to pay off the loans immediately without having to sell the secured property. He simply cannot do so at this precise moment in time. Finally, he avers that he sought undertakings from the defendants that they would not sell the property, which were not forthcoming, and so he makes this application.

5. Stephen McKeever, an associate director with CAS, swore a replying affidavit on 23rd February, 2017. In response to the above allegations, he avers that mortgagees such as PFL are entitled to look to their own interest in exercising their rights. He also highlights the "on demand" nature of the loans. As for the alleged agreement between the plaintiff and Ulster Bank to pay the loans on an interest-only basis, Mr. McKeever avers that this directly contradicts the terms of the loans, as well as correspondence from the plaintiff's relationship manager in Ulster Bank, dated 21st May, 2013, which appears to suggest that the bank were actively seeking repayment. In any event, Mr. McKeever highlights that no documentation has been provided to evidence any alternative arrangement between the plaintiff and the bank. It is suggested that the plaintiff has all but admitted that he is in default in repaying his loans, notwithstanding that the presence of a default is irrelevant, as the loans are repayable on demand. While it is conceded that CAS originally characterised the loans as performing, Mr. McKeever avers that this statement was made in error and was not repeated.

6. In his affidavit of 22nd February, 2017, the second-named defendant disputes any challenge to his appointment as receiver. He also avers that his actions in this matter have not been aggressive, as the plaintiff alleges, and that steps have been taken to regularise his position and prepare the property for sale in the usual manner.

7. In his second affidavit of 27th February, 2017, the plaintiff questions the need for a written agreement approving payment on an interest-only basis, given that the loans have always been repaid on that basis and the bank never took any steps to enforce the terms of the loan facilities. As for the 2013 correspondence from the bank, which sought repayment of the loan, the plaintiff avers that those demands were part of a broader discussion regarding several other much-larger loans in which the plaintiff was involved. This dispute was allegedly resolved to the bank's satisfaction, who were happy to continue repayment of the 2003/4 loans on an interest-only basis.

8. A further dispute subsists regarding the delivery of the letters of demand. A copy of the letters was sent to the plaintiff's business premises and to his domestic residence. The plaintiff avers that the letters were not delivered to his business premises, a statement substantiated by the fact that they were returned to CAS undelivered after the date at which Mr. Fennell was appointed. However, Clause 28 of the 1997 charge states that service is effective one day after posting, notwithstanding any failure in delivery, and the defendants rely on that term. The plaintiff expresses consternation as to how the letter could not have been delivered, given that delivery of all other post has occurred without difficulty. He highlights that the letter of demand were not sent by e-mail. He also avers that the defendants have engaged in various activities aimed at intimidating him, including cancelling bin collection for the secured properties and threatening to evict tenants. The averments made by the defendants regarding the need for remedial works to address safety concerns in the properties is rebutted, as the properties were allegedly in compliance with Dublin City Council's standards when they were last inspected in 2013/4.

9. The second-named defendant swore a replying affidavit on 3rd March, 2017, in which he notes that no paperwork has been produced to substantiate the claim that Dublin City Council are satisfied with the condition of the properties. An expert report procured from Diskin Fire is exhibited and it comes to different conclusions. The second-named defendant avers that the plaintiff, acting through agents unknown, sought to have the report's concerns rectified on 2nd March, 2017, to partial success. The threatening tactics referred to by the plaintiff are denied and it is alleged that the plaintiff himself was responsible for the lack of timely bin collections.

10. Mr. McKeever swore a replying affidavit on 6th March, 2017, in which he avers that the letters of demand were returned to the defendants because they were not called for, An Post having retained them at their depot for five weeks after the plaintiff failed to answer at the address of delivery (the plaintiff's business premises). As for the failure to e-mail the letters, Mr. McKeever avers that one of his colleagues, Ronan Hopkins, telephoned the plaintiff's agent, Alex Brett, and communicated the contents of the letters. Mr. Brett swore an affidavit on 13th March, 2017, in which he states that Mr. Hopkins told him that correspondence was forthcoming but did not refer to its contents. Rather, he states that he was left to assume that the correspondence related to the subject matter of their conversation, which was the possibility of a mutually acceptable commercial resolution. Mr. McKeever swore a third affidavit on 14th March, 2017, which rebuts Mr. Brett's assertion that he was not informed of the contents of the correspondence and exhibits a contemporaneous note taken by Mr. Hopkins of the conversation that took place with Mr. Brett.

11. Mr. Brett states that the residential address to which the letters were sent is one the plaintiff has not resided in for some time. The defendants submit that the letters were sent to the residential address listed in the facility letters. As for the upgrading of safety standards, Mr. Brett avers that the alterations made on the plaintiff's instruction were carried out following advice from a fire inspector. Mr. Brett believes that the properties now comply with the relevant regulations and he requests that the receiver refrain from carrying out any further work on the properties, as the validity of his appointment is not accepted.

Submissions
- Appointment of the second-named defendant

12. A chronology of events is attached to the plaintiff's submissions. In applying for interlocutory relief, the plaintiff submits that there are three serious issues to be tried. The first of these relates to whether or not the second-named defendant was validly appointed. The plaintiff submits that the appointment is invalid because it is in breach of s. 20 of the Conveyancing Act 1881, which has allegedly not been excluded from the 1997 mortgage. S. 20 states:-

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

> (i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
>
> (ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or…

The plaintiff refers back to his chronology as evidence that the notice period set out in s. 20 was not complied with. He directs the Court's attention to s. 24 of the 1881 Act, which states that the notice period outlined in s. 20 also applies to the appointment of a receiver. The plaintiff alleges that PFL failed to satisfy the terms of Clause 22 of the mortgage by not drawing up a deed of assurance to specifically exclude the application of s. 20. He relies on *Moran v. AIB Mortgage Bank and Anor* [2012] IEHC 322 as a statement as to how s. 20 should be interpreted and applied. If the Court holds with the plaintiff on this first issue to be tried, he nevertheless asks for the remaining two issues to be determined, so as to negative the need for fresh proceedings if and when a receiver is validly appointed.

13. Clause 9 deals with the power to appoint a receiver. The defendants submit that the structure of the clause distinguishes this charge from the charge in Moran because it sets out contractual terms and powers, seeks to exclude the limitations set out in the 1881 Act and does not rely on any statutory powers, whereas the Moran charge specifically incorporated and relied on the 1881 Act, subject to a term excluding the restrictions in s. 20. It is also submitted that the terms of Clause 9 are sufficiently broad to cover the appointment of a receiver in the circumstances outlined above. As for the need for a deed of assurance, the defendants allege that the plaintiff has mistaken the context in which Clause 22 operates, as it relates purely to the bank's power of sale and not the receiver's contractual powers.

- ¬Estoppel by Convention

14. The second serious issue submitted by the plaintiff is that PFL took over the loan and security from Ulster Bank subject to the same equities that operated against the bank, regardless of any awareness PFL had of those equities. In making this argument, he relies on Haughton J.'s decision in *Sheehan v. Breccia* [2016] IEHC 67. Specifically, the plaintiff submits that the two loans are subject to an estoppel by convention within the meaning of Denning L.J.'s reasoning in *Amalgamated Investment & Property Company Limited (In Liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 Q.B. 84. This estoppel allegedly operates with regard to the manner in which the loans were to be paid: on an interest-only basis until the loan comes to term in 2019, at which point it would be paid in full. The plaintiff has no difficulty with this state of affairs being brought to an end and is happy to commence capital-and-

interest payments within the terms of the loan facility. However, he submits that PFL is estopped from alleging that the plaintiff has been in default since 2003.

15. The defendants rely on McGovern J.'s decision in *Komady v. Ulster Bank Ireland Ltd* [2015] IEHC 314 in submitting that a bank's decision not to exercise its legal entitlements against a defaulting borrower does not, of itself, give rise to an estoppel. The defendants highlight the similar facts shared between this case and Komady; namely that there was no record of a decision or representation by the bank to waive its rights (to the contrary, the Court's attention is drawn to Clause 25.2 of the 1997 Charge, which specifically states that's the bank's rights are not waived in cases of delay), that the loan was repayable on demand and that an estoppel by "course of dealing" was alleged. The defendants also highlight that correspondence indicating the reservation of rights, such as the letters sent by PFL to the plaintiff, significantly influenced McGovern J.'s findings. In outlining the strict manner in which "on demand" loans and estoppel arguments are treated by the courts, the defendants rely on Keane J.'s decision in *Tennant v. McGinley* [2016] IEHC 325 and Kennedy L.J.'s decision in *Lloyd's Bank Plc v. Lampert* [1999] 1 All ER (Comm) 161 (as approved by Dunne J. in *AIB v. Keane & Ors* [2012] IEHC 516). The plaintiff distinguishes these authorities on grounds that the lenders in those cases had lost faith in the borrowers' ability to repay the loan, whereas no doubt has been expressed in this case that PFL will be fully repaid one way or another.

16. With regard to the plaintiff's averments that Ulster Bank were content with the loan being paid on an interest-only basis, the defendants submit that this is incongruous with the averments in the plaintiff's supplemental affidavit, in which he concedes that Ulster Bank did send correspondence expressing dissatisfaction with the current level of repayment (but he goes on to say that they were happy to continue as is once debts stemming from other loans were addressed). The defendants note that the plaintiff has failed to produce any correspondence, record or individual that can substantiate this new claim, or indeed any of his previous claims about the bank's position vis-a-vis these loans. It is submitted that the absence of such evidence has a debilitating effect on the plaintiff's estoppel argument, per McGovern J.'s findings in *Komady*. The plaintiff submits that his claims are substantiated by the actual events that transpired over the entire tenure of his relationship with Ulster Bank.

17. The one piece of correspondence exhibited before the Court which indicates the bank's dis-satisfaction with the plaintiff's debt repayment is relatively non-specific. When the Court enquired as to the existence of other correspondence, the defendants submitted that the exhibit refers to prior correspondence, which was not included with the documents provided under the loan book sale to Promontoria.

- "Repayable on Demand"

18. The plaintiff's third and final serious issue to be tried relates to the "on demand" nature of the loans. Clause 8.1(a) of the mortgage states:-

> (a) If the borrower shall fail to pay on demand any of the secured liabilities which are payable on demand;

The plaintiff submits that the mortgage is of limited value in explaining what this term means and that said ambiguity should be resolved using the principles of construction outlined by Geoghegan J. in *Analog Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 274. In characterising this ambiguity, the plaintiff submits that it is unclear whether PFL can call in the loan for any reason, notwithstanding the lack of a default and the lack of danger that they will lose money on the investment. The plaintiff relies on the obiter dicta of Clarke (as he then was) and Charleton JJ. in *ACC Bank v. Kelly* [2011] IEHC 7 and *National Asset Loan Management Limited v. Barden* [2013] 2 I.R. 28 to contend that PFL cannot act in this manner. He also relies on the Supreme Court's judgment in *Holohan v. Friends Provident & Century Life Office* [1966] I.R. 1 as a statement that, if a mortgagee exercises their power of sale in a sufficiently unreasonable manner, an injunction will be warranted. Any doubt as to the operation of the facility letters should allegedly be construed *contra proferentem.*

19. The defendants submit that the facility letter clearly states that the loan is repayable on demand and that there can be no other interpretation of the words used than that, particularly in light of the discretion afforded to the bank under Clause 26 of the 1997 charge. In such circumstances, it is submitted that there is no ambiguity on the face of the facility that requires assessment under the principles outlined in *Analog Devices*. The defendants draw the Court's attention to various clauses within the 1997 mortgage itself, including Clauses 2.1, 8 and 9. Regarding the *obiter* comments of Clarke and Charleton JJ. in *Kelly* and *Barden*, the defendants refer to Irvine J.'s decision in *O'Flynn v. Carbon Finance* [2014] IEHC 458 and suggest that these obiter comments should only be acted upon where the mortgagee is accused of, or has admitted to, acting in an arbitrary, capricious or unreasonable manner.

- Ulterior Motives

20. Regarding PFL's alleged ulterior motives for calling in the loans, be that commercial gain or Promontoria's alleged plans to exit the Irish market in 2018, the defendants again rely on McGovern J.'s judgment in *Komady*, particularly the sections of Paget's *Law of Banking* and Baker J.'s decision in *Ryan v. Danske Bank* [2014] IEHC 236 referred to therein. It is submitted that a mortgagee is entitled to look to its own interests when exercising its rights and only risks liability if it acts in bad faith. They also submit that the plaintiff is not seeking injunctive relief for *bona fide* purposes.

- The Adequacy of Damages

21. In assessing whether damages would be an adequate remedy in this matter, the plaintiff submits that the loan is fully secured and he has given an undertaking in damages, so damages are an adequate remedy from the defendants' perspective. From his perspective, he submits that damages would not be an adequate remedy because the defendants are interfering with his property rights and he will lose the property if it is allowed to be sold. In buttressing this submission, he relies in Clarke J.'s conclusions in *Metro International S.A. v. Independent News & Media Plc* [2005] IEHC 309 that the Court will intervene where property rights are at issue. It is also submitted that, given the alleged invalidity of his appointment, the second-named defendant is trespassing, a wrong that cannot be compensated for by damages.

22. When examining the remedial adequacy of damages, the defendants rely on *Curust Financial Services Ltd. v. Loewe-Lack-Werk* [1994] 1 I.R. 450 in submitting that this assessment should occur on the balance of probabilities. The defendants submit that the secured property is an investment property divided into multiple units and, on the balance of probabilities, damages are a adequate remedy for any loss suffered by the plaintiff should he succeed at the hearing. They also highlight that, by setting out on affidavit his calculations of the cost of refinancing the loan, the plaintiff has effectively quantified his own loss, a loss which damages can undoubtedly compensate for. The plaintiff disputes the reliance on *Curust*, as that case involved a purely commercial loss, whereas property rights are at issue in these proceedings.

23. Regarding the plaintiff's reliance on *Metro International (supra),* the defendants submit that the facts of that case are very different, in that they involved wrongful occupation of a property, as opposed to a commercial event involving the exercise of contractual powers over secured property. The plaintiff argues that *Metro International* cannot be distinguished in this manner, given its broad application in practice, including in Irvine J.'s decision in *Carbon Finance*.

- The Balance of Convenience/Least Risk of Injustice

24. The plaintiff submits that this element of the test should be determined in his favour, as he has given an undertaking in damages, the loan is fully secured and PFL will suffer no appreciable loss. The defendants highlight that the second-named defendant has already been appointed and is in the process of carrying out his functions, including addressing the safety infractions that subsisted during the plaintiff's tenure. In those circumstances, it is submitted that the status quo should be maintained.

Decision
25. In order to succeed in the application for interlocutory injunctive relief, the plaintiff must satisfy the Court that there is a fair issue to be tried in respect of the issues arising in this case. With regard to the validity of the appointment of the receiver, the mortgage deeds dated 19th February, 1997, are exhibited to the affidavit of Stephen McKeever, sworn on 23rd February, 2017, and contained at Tab O of the booklet including same. The Conveyancing Acts 1881 - 1911 apply to the 1997 deed of mortgage. Clause 22 of the deed of mortgage states as follows:-

> "Further Assurance
>
> The Borrower shall at any time if and when required by the bank execute such further legal or other mortgages or assignments in favour of the Bank as the Bank shall from time to time require over all or any of the Secured Assets and all rights and remedies relating thereto both present and future (including any Vendor's lien) to secure the Secured Liabilities such further mortgages, charges or assignments to be prepared by or on behalf of the Bank at the cost of the Borrower and to contain an immediate power of sale without notice, a clause excluding Section 17 and the restrictions contained in s. 20 of the Conveyancing Act, 1881 and such other clauses for the benefit of the Bank as the Bank may reasonably require".

26. Thus the deed of mortgage would appear to incorporate s. 20 of the Conveyancing Act 1881 into the deed, as Clause 22 requires a further deed of assurance in order to exclude it. In *Moran v. AIB Mortgage Bank and Jim Luby (Receiver)* [2012] IEHC 322, McGovern J. considered the provisions of the 1881 Conveyancing Act in respect of the appointment of a receiver. He stated as follows:

> *"4. By Clause 8.01, the AIB mortgage provides, inter alia, as follows:-*
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> *"The Bank shall have the statutory powers conferred on mortgagees by the Conveyancing Acts with and subject to the following variation and extensions, that is to say: "*
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> *(a) The secured monies (whether demanded or not) shall be deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of these presents.*
>
> *(b) The power of sale shall be exercisable without the restrictions on its exercise imposed by section 20 of the Act of 1881…"*

5. The mortgages relevant to this case predate the commencement of the 2009 Act. In each case, the Mortgage Deed expressly provides that the mortgage debt is deemed to have accrued due on the date of execution of the Mortgage Deed. Thus, the right to appoint a receiver accrued prior to 1st December, 2009. Clause 8.02 of the Mortgage Deed and Clause 7.2 of the AIB Mortgage Conditions expressly excluded the restrictions on the exercise of the power of sale imposed by s. 20 of the 1881 Act. Section 20 of the 1881 Act provides:-

> *"A mortgagee shall not exercise the power of sale conferred by this Act unless and until- "*
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> *(i) Notice requiring payment of the mortgage money has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money, or part thereof, for three months after service; or*
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> *(ii) some interest under the mortgage is in arrears and unpaid for two months after becoming due; or*
>
> *(iii) there has been a breach of some provision contained in the Mortgage Deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon."*
>
> *6. Pursuant to s. 24(1) of the 1881 Act, the restrictions imposed by s. 20 effectively apply also to a power to appoint a receiver. Section 24(1) states:-*
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> *"A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver unless he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be a receiver."*
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> *However, the restrictions imposed by s. 20 were varied by the terms of the Mortgage Deeds and the Mortgage Conditions so that the power of sale was exercisable without the restrictions imposed by s. 20 of the 1881 Act. Furthermore, the secured monies were deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of the mortgage. Therefore, as soon as the Deed was executed and the contract entered into, the power of sale was exercisable and, as a result, the right to appoint a receiver had accrued."*

27. At para. 3.5 of *Kavanagh v. Lynch* [2011] IEHC 348, Laffoy J. stated that:-

> *"…One must read into the 2007 Mortgage and the Mortgage Conditions, where appropriate, the relevant provisions of the Act of 1881 where they had been incorporated therein, subject to any variations which are expressly provided for…".*

28. I am satisfied that there is a distinct and fundamental difference between the mortgages being considered by McGovern J. in the

Moran case and the mortgage in the present case. At Clause 8.01 of the AIB mortgage, it is specifically stated that the money became due "on the execution of these presents". It went on to specifically exclude the restrictions "imposed by s. 20 of the Act of 1881". Neither of those variations or exclusions are contained in the mortgage before this Court. Therefore, I accept that the plaintiff has established that there is fair issue to tried as to whether notice requiring payment of the mortgage money pursuant to s. 20 of the 1881 Act had to be served before a receiver could be validly appointed. It seems to me that, on foot of the terms of the mortgage documents put before the Court in this case, the plaintiff has established a fair issue to be tried on this point.

29. However, if that were the only point in this case, it is of course likely that the defendants would attempt to mend their hand and restart the process. In those circumstances, the plaintiff identified two further points on which he says that there is a fair question to be tried. The second point on which the plaintiff relies is the question of whether or not the facilities are payable on demand. In respect of this point, the defendants contend that the loan is payable on demand and an issue does not arise in relation to default, as the mortgagee is entitled to be repaid when a demand for repayment of all monies due is made. This argument is based on the precise wording of Clause 8.1(8) of the mortgage, which states "if the borrower shall fail to pay on demand any of the secured liabilities, which are payable on demand…"

30. Again, as this is an application for interlocutory relief, all that the plaintiff must convince the Court of at this juncture is that he has an arguable case or that there is a fair question to be tried that the loan is not payable on demand in the current circumstances. The plaintiff contends that the reason for the first-named defendant calling in the loan is that they wish to exit the Irish market in 2018. The plaintiff contends that the loan has not been called in because it is in default or because the first-named defendant is at risk of losing money. It seems to me that it is at least arguable on the plaintiff's part and that there is an issue to be tried as to whether this case comes within the category of cases identified by Clarke J. in *ACC Bank v. Kelly* [2011] IEHC 7, where he states as follows at para. 7.7:-

> *"There is, in my view, a possible legal issue as to whether a financial institution, having the benefit of a demand facility, is entitled for no reason at all to call in the loan in question. Certainly that seems to be what the normal meaning of the words used imports. However, it may be possible to argue that a financial institution needs at least some reason in order to call in the loan (at least in cases where the relevant facility contemplates a term arrangement) even though it may not be a reason which amounts to a breach of a term of the relevant facility. Indeed, one of ACC's witnesses indicated that he felt that a bank might have some difficulty in justifying exercising the demand nature of a facility unless there was some good reason."*

31. The same issue was identified by Charleton J. in *National Assets Loan Management Limited v. Cyril Barden* [2013] 2 I.R. 28, where he stated at para. 12:-

> *"[12] Then there is the issue as to whether this facility letter correctly describes a contract of loan repayable on demand. In Bank of Ireland v. AMCD Ltd [2001] 2 All E.R. (Comm) 894 , an issue of the construction of a loan facility expressed to be on demand came before the High Court of England and Wales. On a review of the authorities, Collins J. decided that a demand facility that is subject to an expectation that sums will be repaid on the occurrence of certain business transactions for which the money is lent is not thereby transformed into a contract to await payment subject to the occurrence of specified events…*
>
> *[13] The situation here is parallel. The loan is repayable on demand. Were it to be the case that the bank jumped ahead of the business situation contemplated to be a success and demanded repayment notwithstanding that sales were progressing in a reasonable fashion it is possible that another argument might succeed. It might also be that a borrower would be entitled to reasonable notice of the change in the attitude of the bank and reasonable time to arrange another facility. While not deciding that issue, as it is not now before me, it is beyond argument that, where the expectation of repayment through a business venture has not been met because that venture has failed, or has stalled in circumstances where there is no reasonable expectation that it may turn in the context of whatever time may be reasonably contemplated under the contract, there is nothing to stop the bank treating a repayment on demand facility as just that."*

32. O'Dalaigh C.J., delivering the Supreme Court's unanimous judgment in *Holohan v. Friends Provident and Century Life Office* [1966] I.R. 1 stated as follows at p. 25:

> *"A mortgagee with a power of sale has not power to dispose of the mortgagor's property with the same freedom as if it were his own. The defendants' Head Office appear to have taken an authoritarian line of action in this matter which left their Dublin office with no option but to obey. They declined even to examine into the possibilities of a better price, and this, in my judgment, was such unreasonable conduct on their part and such a disregard of the plaintiff's interests that an injunction should issue to restrain the defendants completing the sale to Mr. Sweeney."*

33. In *O'Flynn & Ors. v. Carbon Finance* [2014] IEHC 458, which it should be pointed out was also a judgment on foot of an interlocutory application, Irvine J. stated as follows at para. 154:-

> *"154. Having regard to Mr. McCullough's submission that his client merely operated the agreements which linked the corporate liabilities of the O'Flynn Group with the personal loans of the plaintiffs, these being agreements which they entered into with open eyes and the benefit of legal advice, I think he may have the better side of the argument. However, this is an interlocutory application and the threshold which the plaintiffs have to achieve is relatively modest. In these circumstances I am satisfied that they have established a serious issue to be tried as to whether Carbon in issuing the demand letters for the admitted sole purpose of seeking to procure an event of default that would allow them appoint receivers and call in the corporate loans, acted in a capricious, arbitrary or unreasonable manner such as to call into question the validity of such demands."*

34. In this case, the initial loans were secured and drawn down in or around 2003 and the period thereafter. They were repaid at all stages to Ulster Bank on an interest-only basis up and until such time as discussions ensued between the plaintiff and Ulster Bank. The full extent of those discussions has not been put before the Court, and, since they occurred, an interest and capital payment has been made by the plaintiff in respect of the borrowings. The only gap in the payments occurred during a time following the acquisition of the loans by Promontoria, when there appeared to be confusion in relation to the correct bank account into which the payments should be made. Other than that, the plaintiff has maintained the payments, there has been no suggestion that any loss will be occasioned upon the first-named defendant and, while the Court is not in a position to form a definitive view in the matter, I am satisfied that the plaintiff has established an arguable case that there is a fair issue to be tried in relation to the on demand nature of the facilities and the manner in which the powers flowing therefrom have been exercised.

35. The third issue which the plaintiff has identified, which is interlinked to some extent with the issues identified above, is the question of whether there is a genuine default in respect of the loans on the part of the plaintiff. The defendants initially specified a date in 2013 as the default date but subsequently corrected that date and submitted that the default originated from the date of the first facility letter in 2003. Ulster Bank retained control of the loans until July, 2015 and, for a period of in excess of ten years, the parties conducted their business on the basis that the loans would be repaid on an interest-only basis, with full repayment scheduled to occur in 2019. The plaintiff argues that an estoppel by convention has arisen whereby Ulster Bank could not rely on defaults arising from 2003 and 2004. It follows that the first-named defendant is bound by that estoppel, regardless of whether they were on notice of same. It would appear from the affidavit evidence put before the Court that the first-named defendant may not have procured a complete set of documentation from Ulster Bank when they acquired the loan portfolio which contained, *inter alia*, the plaintiff's loan. In any event, it was unable to put before this Court at the interlocutory hearing documentary evidence in relation to any ongoing prior issue regarding default and/or ongoing payments in respect of the loan between the plaintiff and Ulster Bank. Therefore, I am also satisfied that the plaintiff has established that there is a fair issue to be tried on this estoppel point.

36. The Court accepts the statement of law set out in *Komady* by McGovern J. However, I am of the view that this case is distinguishable from *Komady* by virtue of the factual matrix involved and, in the particular, the fact that 1) the litigating parties were both the original contracting parties and the Court had a broad set of correspondence before it, whereas in this case the documentation is incomplete and PFL is attempting to speak for the Bank and its approach to the loans, and 2) the plaintiffs in *Komady* had come to the Court without clean hands and it would therefore be inappropriate to grant equitable relief grounded in a serious question over the operation of a creature of equity such as estoppel.

37. With regard to the question of whether damages would be an adequate remedy, this matter was considered at length in the decision of Clarke J. in Metro *International S.A. & Ors. v. Independent News & Media Plc.* [2005] IEHC 309. At para. 4.1, he stated as follows:-

> *"The approach of the court to these issues was fully but succinctly set out by McCracken J. in B & S Limited v. Irish Autotrader Limited [1995] 2 I.R. 142 which has the merit of being a case involving analogous issues concerning an allegation of passing off and which also relates to the titles of potentially competing publications.*
>
> *4.2 At p. 145 McCracken J. set out a summary of the test to be applied in circumstances where it has been shown, as here, that there is a serious issue to be tried in the following terms:-*
>
> *"1. An interlocutory injunction should be refused if damages would adequately compensate the plaintiff for any loss suffered between the hearing of the interlocutory injunction and the trial of the action provided the defendant would be in a position to pay such damages.*
>
> *2. Should this test be answered in the negative an interlocutory injunction should be granted if the plaintiffs undertaking as to damages would adequately compensate the defendant should he be successful at the trial in respect of any loss suffered by him due to the injunction being in force between the date of the application for the interlocutory injunction and the trial, again assuming that the plaintiff would be in a position to pay such damages.*
>
> *3. If damages would not fully compensate either party then the court may consider all relevant matters in determining where the balance of convenience lies but these will vary depending on the facts of each case.*
>
> *4. It is normally a council of prudence, although not a fixed rule, that if all other matters are equally balanced the court should preserve the status quo.*
>
> *5. Again where the arguments are finally balanced, the court may consider the relative strength of each parties case as revealed by the affidavit evidence adduced at the interlocutory stage where the strength of ones parties case is disproportionate to that of the other.""*

38. At para. 4.4 Clarke J. continued:-

> *"…There are, of course, cases where even at trial damages would be an adequate remedy and where, in accordance with the established jurisprudence of the courts, an injunction will not normally be granted even though the plaintiff succeeds in establishing wrongdoing. There are, however, on the other hand, cases where the courts have traditionally not been prepared to award damages even though there is a sense in which any relevant loss could be calculated in monetary terms. Thus in many cases where a plaintiff alleges an infringement of his property rights the court will intervene by injunction where those property rights have been established rather than compensate the plaintiff for the loss of those property rights. To take an extreme but illustrative example a person who owns a house and whose house is occupied by others (assuming them to be a mark for the value of the house) would undoubtedly be entitled to an injunction to restrain such wrongful occupation even though there is a sense in which the aggrieved party could be fully compensated by being awarded as compensation as against a defendant of means the value of the house together with any additional sums that might be necessary to compensate for the disruption caused. Thus the mere fact that a property right (or indeed a diminution in such a right) can be valued in monetary terms does not of itself mean that damages for an infringement of that property right can necessarily be said to be an adequate remedy.*
>
> *4.5 While it may well be that a temporary short term interference with a disputed property right (resulting from a failure to grant an interlocutory junction) may not give rise to quite such a clear-cut situation, it is, nonetheless, in my view important for the court to take into account in addressing the question of whether damages may be an adequate remedy (for the period identified by McCracken J. in Irish Autotrader) whether the nature of the matter which is alleged to be interfered with is the kind of matter which the courts have traditionally held should be protected by injunction rather than simply compensated for in damages. Clearly property rights are one such category which is the probable explanation for what was described by Costello J. in Mitchelstown Co-Operative Agricultural Society Limited v. Golden Vale Products Limited (Unreported, High Court, Costello J. 12th December, 1985), as the "axiom" that in most passing off actions damages are not an adequate remedy for a successful plaintiff."*

39. In this case, the first-named defendant has appointed a receiver, the validity of which will be determined of the ultimate hearing. The defendants contend that, as the property is an investment property, damages are an adequate remedy and the injunctive relief should therefore not be granted. It seems to me that what distinguishes this case from many other cases before the courts, where applications are made for injunctive relief as against financial institutions and/or receivers appointed by said institutions, is that, in this particular instance, the plaintiff has established that he has been repaying the loans on an ongoing basis on foot of an apparent

arrangement with Ulster Bank which was other than in accordance with the terms of the original facility letters. There does not appear to have been any action taken by Ulster Bank to disturb that alternative arrangement. The plaintiff indicates that full repayment will take place in 2019. The first-named defendant does not appear to dispute that but simply wishes to dispose of the asset before that date. In those circumstances, the receiver was appointed to dispose of the property by organising and facilitating the sale of same. It seems to me that this would be an unwarranted interference in the plaintiff's property rights and that, in the unusual circumstances of this case, damages would not be an adequate remedy.

40. In assessing the law in relation to the adequacy of damages, the Court is cognisant of two opposing legal rules of thumb: damages aren't an adequate remedy for a trespass and damages are an adequate remedy for commercial investments. Identical considerations arose in this Court's decision in *McGarry v. O'Brien* (Rec No: 2017/4686P), which is being delivered contemporaneously to this decision. With respect to the adequacy of damages, the Court's reasoning is broadly similar in both cases. In attempting to reconcile the above rules, the emerging analytic theme is to use a fact-based approach. The property rights at stake in this case relate to real property. Each parcel of land is unique and, where a defendant has improperly disposed of that land, it is impossible to fully compensate for the loss suffered because no other piece of land is identical to the one that was lost. However, where the land is involved in some commercial or monetary venture and the predominant feature of the plaintiff's investment in the land is for some financial purpose, it is quite correct for a court to conclude that such loss can be compensated with an award in damages, as the predominant feature of the plaintiff's investment in the land does not touch upon any of the aspects of that land which make it unique.

41. If, on the facts, I were to counter-balance the commercial features of a mortgagor plaintiff's investment in real property, I would look for some fact which 1) displaces financial gain as the predominant feature of the investment (e.g. the property is also that plaintiff's family home), or 2) establishes a potential violation of the plaintiff's property rights in land of such significance as to amount to a violation of the special status those rights hold in the field of property law by virtue of the considerations outlined above. In this case and in *McGarry*, the predominant feature of the plaintiff's investment in the land was financial. However, in their actions, the defendants in both cases have potentially violated the base level of respect that property rights in land attract. In *McGarry*, almost the entirety of the defendant's case was in disarray, with affidavits loosely drafted, vital pieces of evidence left out and the receiver's powers exercised in a manner that had the potential to raise serious public policy concerns. The cumulative effect of these facts amounted to a situation where, if the questions to be tried were resolved in the plaintiff's favour, the defendant would have acted with such disregard to the plaintiff's property rights in land that it be simply wrong to allow the receivership to continue before the defendant got his house in order.

42. In this case, the defendants have failed to exhibit documentation that should be in their possession and would obviate the Court's concerns with regard to the alleged estoppel by convention. There is also a fair question to be tried with regard to whether the first-named defendant has exercised its powers in circumstances that did not truly warrant such exercise and with an ulterior (and not entirely *bona fide*) motive in mind. If these issues were resolved in the plaintiff's favour, then such a flagrant disregard and disrespect for the plaintiff's property rights in the land would have occurred that damages could not be an adequate remedy.

43. It is important to make clear that, in taking a fact based approach and performing the above assessment, it is not simply a matter of a fair question to be tried being established. I would seek to determine whether the mortgagor plaintiff has established issues which, if resolved in their favour, would mean that the defendant had behaved in such an improper manner that their actions are practically incongruous with the entire notion of real property rights and the special place they hold in Irish law. Such issues include, but are not limited to, high levels of incoherence or lack of care in preparation of the defendant's case or conduct, improper, capricious or arbitrary activity on the defendant's part and/or activity that has the potential to raise serious public policy concerns.

44. My approach to this issue, as outlined above, is of course not a mandatory exercise that must be performed in assessing the adequacy of damages and there are a number of other considerations for the Court to also keep in mind, including the plaintiff's actions and attitude in respect of the monies owed, whether title to the lands is in dispute, whether damages would be an adequate remedy for the defendant, whether the undertaking as to damages is substantial etc. However, in cases where a mortgagor plaintiff's relationship to a property is predominantly financial, I am of the view that the relevant defendant(s) ought to demonstrate that, in their conduct before the Court and vis-à-vis the plaintiff, they have borne the plaintiff's real property rights in mind and acted accordingly.

45. The plaintiff has given an undertaking to pay the defendant's damages and I am satisfied with that undertaking. I am also satisfied that the balance of convenience rests with granting the interlocutory reliefs sought, as the least risk of injustice lies with the prevention of an apparently arbitrary and unwarranted interference with the plaintiff's property rights.

46. For the reasons outlined above, I propose to grant the reliefs sought and to make orders in terms of the notice of motion dated 15th February, 2017, pending the final determination of these proceedings.