UNAPPROVED
THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 194
Appeal Number: 2019/244

Faherty J.
Haughton J.
Binchy J.

BETWEEN/

MICHAEL LEAHY AND KATHLEEN LEAHY

PLAINTIFFS

- AND -

BANK OF SCOTLAND PLC AND PENTIRE PROPERTY FINANCE LIMITED T/A PENTIRE AND PEPPER FINANCE CORPORATION (IRELAND) LIMITED T/A PEPPER ASSET SERVICING AND TOM KAVANAGH

DEFENDANTS

JUDGMENT of Ms. Justice Faherty dated the 12th day of July 2021

1. This is the plaintiffs' appeal against two Orders of the High Court (Simons J.) both dated 5 April 2019 the first of which dismissed their claim as against the first defendant ("the Bank") pursuant to O.19, r.28 of the Rules of the Superior Courts ("RSC"). In the second Order, the High Court dismissed the reliefs sought by the plaintiffs against the Bank by way of final orders, including declarations in relation to implied contractual rights and to have the Bank's defence to their proceedings struck out.

Background

2. In 2004, Bank of Scotland (Ireland) Limited ("BOSI") provided loan facilities to the plaintiffs. By way of Facility Letter dated 29 July 2004, BOSI advanced the sum of €600,000 to the second plaintiff which was drawn down on 20 August 2004. The second loan agreement dated 5 October 2004 was executed by the first and second plaintiffs on 24 November 2004 and the amount advanced was €140,000. Both loans related to premises consisting of nine commercial units, two shell units and two apartments in County Kilkenny. In respect of both loans, the respective Facility Letters contained an endorsement to the effect that the plaintiff/borrower confirmed "that for the purposes of the Consumer Credit Act, 1995, in availing of the facility and drawing down the loan" they were "acting within our business, trade and profession".

3. The loan agreements were subject to BOSI's "General Conditions Applicable to Loan Facilities…" ("the General Conditions"). Condition 14.1 of the General Conditions provided that the borrower "shall not be entitled to assign or transfer all or any of its rights, benefits or obligations…". Condition 14.2 provided that BOSI "may at any time, without the prior consent of the Borrower, assign, novate or transfer any of its rights and benefits and transfer any of its obligations under any of the Finance Documents to any person, firm or company or subparticipate or subcontract any of its rights or obligations under the Finance Documents".

4. Pursuant to Condition 27.1, the Loan Agreements were to be "governed by, and shall be construed in accordance with, the laws of Ireland and the Borrower hereby submits, for the benefit of the Bank, to the jurisdiction of the Courts of Ireland for all purposes in the (sic) connection with the Loan Agreement".

5. By Deed of Mortgage and Charge dated 20 August 2004 the second plaintiff granted a mortgage over the properties the subject of the loan agreements which was duly registered in the Registry of Deeds.

6. At one minute to midnight on 31 December 2010, BOSI merged with the Bank in accordance with Directive 2005/56/EC on cross-border mergers of limited liability companies and Regulation 13 of the EC (Cross-Border Mergers) Regulations 2008. The effect of the merger was that all of the assets and liabilities of BOSI transferred to the Bank. BOSI was then dissolved without going into liquidation.

7. It is common case that in 2015, ownership of the plaintiffs' loans was transferred to the second named defendant ("Pentire") as part of the sale of a large number of loans by the Bank. This transfer was completed on 20 April 2015.

8. Some three months or so subsequent to the transfer by the Bank to Pentire, the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 ("the 2015 Act") was enacted on 8 July 2015 and commenced on that date.

9. The within proceedings were commenced on 25 July 2016. It appears, however, that prior to the institution of the proceedings, the plaintiffs sought, unsuccessfully, to obtain leave to seek judicial review. The first set of judicial review proceedings are entitled *Michael Leahy, Applicant, and Bank of Scotland plc, Respondent.* They bear record number 2016 No. 347/J.R. The Bank was put on notice of the leave application. Leave to apply for judicial review was refused by the High Court (Humphreys J.) on 20 June 2016. The second set of proceedings are entitled *Michael Leahy, Applicant, and The Minister for Finance, Respondent and Bank of Scotland plc, Notice Party.* They bear record number 2016 No. 500/J.R. Leave was refused on foot of the first plaintiff's *ex parte* application on 11 July 2016. The first plaintiff has appealed this refusal.

The plaintiffs' claim against the Bank

10. In their plenary summons the plaintiffs claim as against the Bank, damages for breach of contract and breach of duty (including statutory duty), and damages for negligence.

11. The first version of the statement of claim was delivered on 24 October 2016. It comprised some one hundred and eleven narrative paragraphs. A notice for particulars was delivered by the Bank on 2 December 2016. On 6 December 2016, the first plaintiff advised the Bank that the plaintiffs were declining to "accept service" of the notice for particulars and requested the Bank's defence within seven days. The Bank issued a notice of motion on 11 January 2017 compelling replies to particulars, or alternatively seeking to dismiss the plaintiffs' claim for failing to reply to particulars. On 9 January 2017, the other defendants issued a motion seeking to strike out part of the statement of claim for prolixity and/or dismissing or striking out the claim for being improperly pleaded, scandalous, frivolous, vexatious and/or bound to fail.

12. On 11 July 2017, prior to the hearing of both those motions, the plaintiffs delivered an amended version of the statement of claim. On 13 November 2017, the High Court made an order providing for the delivery of a revised version of the amended statement of claim of 11 July 2017 and gave directions for the service of notices for particulars and delivery of defences. The second amended statement of claim was duly delivered on 27 December 2017.

13. The following factual matrix is alleged in the plaintiffs' pleadings (and augmented by the written and oral submissions of the first plaintiff). It is not in dispute that the plaintiffs fell into arrears in respect of the Loan Agreements. It is pleaded that the monthly repayments of €3,500 on the second plaintiff's €600,000 loan were discharged by the second plaintiff between 2004 and 2009, with the first plaintiff taking on responsibility for

the loan repayments between 2009 and December 2014. This was due to the depletion of the rental income available to the second plaintiff from 2009 onwards. It is said that the Bank was aware of this from its six-monthly reviews.

14. It is pleaded that on a date prior to November 2011, the plaintiffs informed BOSI and/or the Bank that they had taken up residence in the secured property. It is said that the Bank acquiesced in this arrangement, and that latterly, the second and third defendants did likewise.

15. In June 2014 the first plaintiff met with an employee of Certus (a service provider to the Bank). According to the second amended statement of claim, at this meeting the first plaintiff apprised the Bank *via* Certus that he required relief from paying the second plaintiff's loan. Furthermore, discussions ensued between the first plaintiff and Certus with a view to the plaintiffs redeeming or "buying back" their loans, subject to agreement being reached on the buyback price. It is also asserted that at that stage the Bank offered to sell the first plaintiff *his* loan and that for that purpose his loan was required to be valued. It is also pleaded that at this meeting the first plaintiff requested forbearance in respect of the loans but was advised that if the plaintiffs pursued that line of action, the Bank would be unable to sell the first plaintiff his loan.

16. In December 2014, the first plaintiff wrote to the Bank, again advising that he could no longer justify funding the continued repayments of €3,500 per month in respect of the second plaintiff's loan. It is pleaded that as of December 2014 the first plaintiff had discharged some €252,000 in loan repayments. It is pleaded that at this time, the first plaintiff was advised to put in an offer to buy back his loan. Moreover, the plaintiffs were advised that the Bank intended to transfer the loans to Pentire. The first plaintiff made an offer to buy back his loan in December 2014, which, it is asserted, was agreed in principle.

However, there was no further communication from the Bank on the matter. In any event, no binding agreement was reached in this regard. The plaintiffs do not assert otherwise.

17. It is also asserted that by December 2014 the plaintiffs also had an agreement in principle that there would be a moratorium on their loan repayment obligations albeit, again, there was nothing put in writing in this regard and no concluded agreement.

18. The plaintiffs assert that at a meeting on 30 April 2015 with a representative of the third named defendant ("Pepper") (Pepper being a service provider to Pentire), they offered an alternative payment structure of some €600.00 per month towards the discharge of the loans. It is also the plaintiffs' case that while Pepper undertook to obtain a valuation for the purpose of progressing the plaintiffs' offer to buy back their loans, all subsequent attempts by the plaintiffs in 2015 to meet with Pepper were refused such that they were left "in limbo" albeit they continued to persist in their efforts to secure funds to buy back their loans.

19. On or about 19 February 2016, the fourth named defendant ("the Receiver") was appointed by Pentire as receiver over the properties which had been charged by the second plaintiff to the Bank, the benefits of which the Bank had transferred to Pentire on 20 April 2015.

20. It is pleaded that in March 2016, the first plaintiff met with a representative of Pepper. In his oral submissions to the Court, the first plaintiff maintained that he was informed by Pepper that the Receiver had been appointed because the plaintiffs had been deemed to be non-cooperative borrowers. It is asserted that Pepper refused to allow the first plaintiff to buy back his loan or to separate his loan from that of the second plaintiff notwithstanding that the first plaintiff was not seeking the release of the secured properties on which his loan had been secured along with that of the second plaintiff. It is not,

however, the case that the first plaintiff proffered any funds in discharge of his loan in 2016, rather he had made the offer to discharge the loan.

21. The first plaintiff met with Pepper on 30 April 2016. It is pleaded that he was told by Pepper either to buy out the loans or surrender the secured properties. The first plaintiff also met with the Receiver following the latter's appointment.

22. The plaintiffs assert that the meetings the first plaintiff had with Pepper and the Receiver in 2016 were entirely unsatisfactory. They maintain that Pepper commenced their meeting by stating at the outset that they retained the discretion to terminate the meeting if what they heard from the first plaintiff was not to their liking. Similarly, the meeting with the Receiver was unsatisfactory in circumstances where it became apparent that the Receiver was not listening to anything that was being said by the first plaintiff.

23. The essence of the plaintiffs' case against the Bank is set out at paras. 25-27 of the second amended statement of claim. In summary, the pleas advanced are:

- Condition 14.2 of the General Conditions never intended to confer on BOSI or the Bank as its successor in title an express or implied absolute or conditional right to transfer the plaintiffs' loans to any person, firm or entity "where such a transfer would affect such a fundamental change to the loan contract between the parties bound thereby, and the contractual relationship between them, and to fundamentally change the terms and conditions attaching to that contract and contractual relationship, and to also substantially change the protections afforded to the "Borrower" (being the Plaintiffs) by (a) the loan terms and conditions, (b) the Laws of Ireland applicable or capable of being applied thereto, and (c) the Central Bank of Ireland through its various Codes of Conduct [issued by the Central Bank pursuant to the provisions of s.117 of the Central Bank Act 1989 ("the 1989 Act")]."

- The Bank had no proper or legal authority in common law, in equity or by statute to deprive the plaintiffs of their statutory rights under s.117(1) of the 1989 Act to the protections of the "Code of Conduct for Business Lending to Small and Medium Enterprises" and/or the "Code of Conduct on Mortgage Arrears" by transferring the plaintiffs' loans to an unregulated entity (Pentire).
- Condition 27.1 of the General Conditions, under the heading "Law and Jurisdiction" prohibits the transfer effected between the Bank and Pentire: the terms of the General Conditions were intended to run the term of the loans.

The above complaints are repeated towards the end of the second amended statement of claim under the heading "Particulars of Negligence and Breach of Duty (Including Statutory Duty) and Breach of Contract Against the First Defendant". As distilled by the trial judge, the gravamen of the plaintiffs' case is that the Bank was negligent and in breach of duty and in breach of contract when it sold their loans to Pentire, an unregulated entity. As appears from the second amended statement of claim, the pleas advanced against the Bank are to some considerable extent predicated on the series of events as outlined above, the most significant of which are said to have occurred between April 2015 and February 2016. As observed by the trial judge, many of the complaints set out in the second amended statement of claim relate to alleged actions or omissions on the part of the second to fourth defendants which actions are said to have been taken subsequent to the transfer of the loans by the Bank to Pentire in April 2015.

24. Following a request for particulars by the Bank on 1 February 2018 which was replied to on 27 February 2018, the Bank delivered a full defence on 12 April 2018.

25. The Bank's motion to have the plaintiff's claim against it struck out issued on 23 May 2018. The plaintiffs' motion seeking declaratory reliefs against the Bank issued on 4 February 2019.

26. In their notice of motion dated 23 May 2018, the Bank seek the following reliefs:

"(a) An Order striking out the proceedings as against the First Defendant pursuant to the provisions of Order 19; rule 28 of the Rules of the Superior Courts 1986, on the grounds that same are frivolous and vexatious and/or disclose no reasonable cause of action.

(b) Further or [in] the alternative, an Order pursuant to the inherent jurisdiction of this Honourable Court dismissing the proceedings as against the First Defendant on the grounds that same are unsustainable, frivolous and vexatious and/or that same constitute an abuse of process."

27. The Bank's application is grounded on an affidavit sworn on 22 May 2018 by Mr. Hugh Catling, an officer with the Bank. The Bank's solicitor, Mr. Frank Flanagan of Mason Hayes and Curran also swore an affidavit on 18 May 2018. The first plaintiff swore a replying affidavit on 1 August 2018. The plaintiffs' motion against the Bank is grounded on an affidavit sworn by the first plaintiff on 4 February 2019 to which Mr. Catling swore a replying affidavit on 22 February 2019.

28. Both motions came on for hearing before the High Court (Simons J.) on 1 March 2019. At the hearing, the first plaintiff represented himself and the second plaintiff as a litigant in person. They remain litigants in person for the appeal.

The judgment of the High Court

29. Essentially, the trial judge found that the requisite threshold for an Order pursuant to O.19, r.28 RSC dismissing the proceedings was met in this case. He concluded that the plaintiffs' case against the Bank was misconceived in law on three bases. Firstly, he found that the two loan agreements expressly authorised the transfer and assignment of the loans to third parties. He noted that Condition 14 of the General Conditions expressly addressed the right of the lender to transfer and assign the loans. He noted that the Bank had

succeeded to BOSI's interest under the two loan agreements and that, accordingly, the Bank was entitled to exercise the rights provided for under General Condition 14. He found support for his conclusion in *McCarthy v. Moroney; Moroney v. Property Registration Authority* [2018] IEHC 379 where an almost identical contractual provision to General Condition 14 was considered.

30. Simons J. also considered that the plaintiffs had no sustainable basis to argue that the Code of Conduct for Business Lending to Small and Medium Enterprises and/or the Code of Conduct on Mortgage Arrears formed part of the contractual arrangements that had been entered into between the plaintiffs and BOSI/ the Bank. He so concluded in light of the decision of the Supreme Court in *Irish Life and Permanent Plc v. Dunne* [2015] IESC 46. There, Clarke J. rejected the argument (albeit it had not been pressed) that *"the contractual arrangements between a lender and a borrower must be taken to have implied into them the provisions of the Code in circumstances where the Code can change from time to time (and thus could not have been particularly in the contemplation of the parties when they entered into their contracts)"* and where, unlike other legislation such as the Sale of Goods and Supply of Services Act 1980, the Employment Equality Act 1998, and the Package Holiday and Travel Trade Act 1995, the 1989 Act did not expressly provide that certain terms were to be implied into relevant contracts.

31. Relying on the *dicta* of McGovern J. in *Cheldon Property Finance DAC v. Hale* [2017] IEHC 432, Simons J. concluded that the loan agreements between the Bank and the plaintiffs could not be read as having a term implied therein to the effect that the lender would not transfer the loan to an unregulated entity.

32. The second basis upon which the trial judge found the plaintiffs' case to be misconceived in law was that there was no statutory restriction on the transfer of loans to unregulated entities. He found that both prior to and subsequent to the enactment of the

2015 Act, the transfer by a regulated entity (here, the Bank) of ownership of loans to an unregulated entity (here, Pentire) was not precluded under Irish law He noted that the approach of the Oireachtas, in enacting the 2015 Act, *"was to ensure that an entity which holds the legal title to credit granted under a credit agreement (as defined) must either: (i) arrange to have credit servicing undertaken by an authorised credit servicing firm, or (ii) obtain authorisation itself. Put otherwise, the legislation implicitly recognises that a loan may be lawfully transferred to an unregulated entity."* (at para. 48)

33. He considered that the position had been clarified by the judgment of the Supreme Court in *Launceston Property Finance Ltd. v. Burke* [2017] IESC 62, [2017] 2 I.R. 798 and a number of other judgments delivered after the decision of the Supreme Court in *Launceston.* I will return to *Launceston* and the other authorities relied on by the trial judge later in the judgment in the context of the plaintiffs' submissions that the trial judge erred in relying on this jurisprudence.

34. Ultimately, the trial judge concluded that there was no statutory restriction which precluded the Bank from transferring the plaintiffs' loan agreements to Pentire on 20 April 2015, that the legal position in that regard had not been changed by the enactment of the 2015 Act and that *"[s]till less did the 2015 Act have the effect of retrospectively invalidating transfers to unregulated entities which had already taken place prior to 8 July 2015."* (at para. 58)

35. The third basis upon which the trial judge found the plaintiffs' claims against the Bank to be misconceived was that they had not suffered any loss or prejudice as a result of the transfer of their loans to Pentire.

36. Simons J. noted that *"[t]aken at its height",* the plaintiffs' case against the Bank *"amounts to an allegation that, for a period of three months between 20 April 2015 and 8 July 2015, the Plaintiffs were deprived of the benefit of the Codes of Conduct issued by the*

Central Bank. This is said to be the consequence of the transfer of the two loan agreements from Bank of Scotland to an unregulated entity, namely Pentire. The claim against Bank of Scotland is confined to a claim in damages only." (at para. 59) He found that by virtue of the reasons already outlined in his judgment, the plaintiffs' allegation did not disclose any actionable wrong on the part of the Bank. He stated that the plaintiffs *"are unable to point to any loss or prejudice said to have been suffered during the three-month interregnum between the transfer of the loan agreements and the enactment and commencement of [the 2015 Act]".* (at para. 61) As the provisions of the Codes of Conduct did not form part of the contract between a borrower and a lender, they could not be directly relied upon by a borrower save in the circumstances which had been outlined by Clarke J. in *Dunne.* There, Clarke J. opined that *"a court could not properly act to consider a possession application"* without considering the provisions of a Code of Conduct which regulate possession proceedings given that *"it might well be said that a court making an order for possession might be facilitating the carrying out of 'the very act' which the Code is designed to prevent".* Simons J. went on to quote from the judgment in *Dunne* where, at para. 5.20, Clarke J. stated:

> *"However, in respect of the other provisions of the Code, different considerations apply. There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution, in formulating its detailed policies in respect of mortgage arrears and applying those policies to the facts of individual cases, can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the Oireachtas had intended to give the courts such a role then it would*

surely have required detailed and express legislation which would have established the criteria by reference to which the Court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law."

37. Returning to the circumstances of the plaintiffs, Simons J. noted that no measures had been taken to enforce the security under the loan agreements during the three-month period between 20 April 2015 and 8 July 2015 and the appointment of a receiver did not occur until 19 February 2016 which was "*well after the commencement of [the 2015 Act]"*. By the time the Receiver was appointed, *"the 2015 Act was in force, and if and insofar as the Plaintiffs wish to challenge the appointment of the receiver by reference to the Codes of Conduct, then this is something they can pursue against the relevant defendants"*. (at para. 63) The trial judge went on to state:

"64. What is clear, however, is that the Plaintiffs have no cause of action as against Bank of Scotland. The only relief sought against Bank of Scotland is a claim in damages. In circumstances where the Plaintiffs have been unable to identify any actionable wrong on the part of Bank of Scotland, and are unable to point to any prejudice or loss said to have been suffered during the three-month interregnum between the transfer of the loan agreements and the enactment and commencement of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015, there is simply no basis on which the Plaintiffs could succeed in obtaining damages against Bank of Scotland.

65. For the reasons set out in detail above, I am satisfied that the Plaintiffs have no reasonable cause of action against Bank of Scotland. In reaching this conclusion, I have carefully considered the case as pleaded against the bank, and

have assumed *that the facts are as asserted by the Plaintiffs in the pleadings. Even taking the Plaintiffs' case at its height, the case against Bank of Scotland is bound to fail and is vexatious. The test in* Lopes v. Minister for Justice Equality and Law *Reform [2014] IESC 21; [2014] 2 I.R. 301 is met*."

Discussion

38. The issue that arises in this case is whether on their pleadings, taken at their height, the plaintiffs have a stateable cause of action in damages against the Bank. This requires consideration of a number of findings made by the trial judge in respect of which the plaintiffs contend the trial judge was in error.

39. However, before turning to the specifics of how it is said the trial judge erred, it is apposite to have regard to the principles governing an application to strike out proceedings on the basis of O.19, r.28 RSC or pursuant to the inherent jurisdiction of the court.

40. Order 19, r.28 RSC provides that "[t]he Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action […] and in any such case or in case of the action[…] being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed […] as may be just."

41. There is also the power of the court to strike out proceedings pursuant to its inherent jurisdiction. This was confirmed by Costello J. in *Barry v. Buckley* [1981] I.R. 306:

"But, apart from Order 19, the Court has an inherent jurisdiction to stay proceedings and on applications made to exercise it the Court is not limited to the parties pleadings but is free to hear evidence on affidavit relating to the issues in the case…The principles on which it exercises this jurisdiction are well established- basically its jurisdiction exists to ensure that an abuse of process of the courts does not take place. So, if the proceedings are frivolous or vexatious they

will be stayed. They will also be stayed if it is clear the Plaintiff's claim must fail …"

42. The law pertaining to O.19, r.28 is well established. As said by Costello J, in *Barry v. Buckley*, *"the Court can only make an order under this Rule when a pleading on its face discloses no reasonable cause of action".*

43. As explained by Clarke J. In *Salthill Properties v. Royal Bank of Scotland plc* [2009] IEHC 207, in order to determine whether proceedings should be dismissed under O.19 as disclosing no cause of action *"the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim."*

44. In *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21(cited by the trial judge), the Supreme Court set out the position in the following terms:

> *"The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p.308 of his judgment in Barry v. Buckley, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that thus the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked.* (per Clarke J. at para. 2.3)

45. The requirement that an application under the RSC must be *"based on a contention that the case as pleaded does not disclose a cause of action"* was re-stated by Clarke J. in *Moylist Construction Limited v. Doheny & Ors* [2016] IESC 9.

46. In the present case, the Bank sought relief both pursuant to O.19, r.28 and the inherent jurisdiction of the court. The jurisdiction ultimately invoked by the trial judge was that pursuant to O.19, r.28. Accordingly, the complaints that the trial judge erred will be assessed, in the first instance, having regard to this rule. I turn now to the specific grounds raised by the plaintiffs in the within appeal.

Did the trial judge err in relying on Launceston and similar jurisprudence to reject the plaintiffs' contention that the Bank was precluded in law from transferring their loans to Pentire?

47. The first issue is whether the trial judge was correct in finding that the decision of the Supreme Court in *Launceston* and other jurisprudence are authority for the proposition that the Bank was not precluded in law from transferring the plaintiffs' loans to Pentire. In *Launceston,* which concerned possession proceedings, the High Court had directed that the defendants deliver up possession of property in Galway to a bank (Anglo) from which the defendants had borrowed money, which borrowings had been secured on the defendants' property. On appeal to the Supreme Court it was argued, for the first time in the case, that Launceston Property was not authorised to conduct business in the State and thus could not move to enforce the security.

48. That argument was rejected by the Supreme Court. At paras. 20 and 21 of his judgment, McKechnie J. concluded that the Oireachtas in enacting the 2015 Act had amended, *inter alia,* Part V of the Central Bank Act 1997 and did so *"in order to ensure that borrowers who had a 'regulated loan' which was acquired by an 'unregulated body' would continue to have the protection of various consumer codes and statutory*

provisions." McKechnie J. was satisfied, from the provisions of the 2015, that Launceston Property was not itself obliged to be "authorised" by the Central Bank in order to legally operate within the State. The Supreme Court was satisfied that Launceston Property had in fact appointed the necessary licensed intermediary, which, incidentally, was Pepper Finance Corporation (Ireland) Ltd ("Pepper"), an entity that was registered in the State. (Pepper is the third named defendant in the within proceedings).

49. In the present case, in the court below, the first plaintiff sought to distinguish *Launceston* on the basis that on the facts of that case, the transfer of loans in question had been completed at a time *subsequent* to the commencement of the 2015 Act, unlike the position in this case, where the transfer of the loans occurred some months prior to the commencement of the 2015 Act. The trial judge addressed this submission in the following terms:

> *"Whereas this description of the chronology of events in Launceston is correct as a matter of fact, it does not in any way affect the legal principles identified by the Supreme Court. It is implicit in the judgment in Launceston that there is no preclusion on the transfer of loans to an unregulated entity. The only statutory regulation is in relation to the servicing of such loans, which must now, since July 2015, be carried out by a regulated entity. (Alternatively, the holder of the credit must obtain authorisation itself)."*

50. I find no basis to disagree with the reasoning of the learned trial judge. My conclusion in this regard is fortified by a consideration of a number of cases decided subsequent to *Launceston.*

51. In *Hogan v. Deloitte* [2017] IEHC 673 (a case also considered by the trial judge) a similar complaint to that being made here was advanced. In *Hogan*, a loan had been transferred to an unregulated entity which subsequently engaged a credit servicer under the

2015 Act. What was at issue in *Hogan* was, *inter alia,* Mr. Hogan's (the borrower) motion for interlocutory relief preventing the defendants from trespassing or taking unlawful possession of the property in question. One of the arguments put forward was that the borrower had not consented to the transfer of his account to an entity that was unregulated in this jurisdiction. Rejecting the contention that the transfer to an unregulated entity gave rise to even a *"fair issue to be tired",* Stewart J. stated that:

> *"The plaintiff has repeatedly referred to the issue of transfer from a regulated to an unregulated entity. The Launceston decision has unquestionably set this dispute at naught. PAS is a regulated credit institution that meets the requirements of the 2015 Act. The plaintiff has complained that Shoreline and PAS failed to appraise (sic) of him of the ameliorating effect of PAS's involvement. It is the plaintiff's responsibility to appraise (sic) himself of his legal position. Indeed, based on the contents of the affidavits put before the Court, it would appear that the plaintiff is quite capable of taking the necessary steps to ascertain the status of various entities involved in these proceedings. Therefore, there is no fair bona fide question under this heading either."* (at para. 39)

52. In the course of his judgment in the present case, the trial judge stated, with regard to *Hogan*:

> *"52. On the facts of that case, as in the present case, the transfer of the loan in issue had taken place prior to the commencement date of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. See, in particular, paragraph [28] of the judgment in Hogan where the plaintiff in that case is recorded as having submitted that the behaviour complained of, i.e. the transfer of the mortgage loan to an unregulated entity, occurred before the 2015 Act came into effect. This*

argument is then rejected in terms by Stewart J. at paragraph [39] of the judgment."

53. The principles in *Launceston* have also been applied in *Moroney,* another decision considered by the trial judge. One of the principal complaints made in *Moroney* was that the loans had been *"sold out of regulation*". The High Court (McDonald J.) rejected the argument that this had caused prejudice to the borrower. At para. 46 of the judgment he stated:

> *"I fully appreciate that Mr. Moroney seeks to make a case that he has been prejudiced as a consequence of what has occurred because he is now dealing with what he describes as 'unregulated entities'. He makes the case that Bank of Scotland is unregulated in this State and he also makes the case that Ennis Property is unregulated. I deal with this issue in more detail below. It is sufficient to note at this point that, for the reasons discussed below, I have come to the conclusion that there is no substance to Mr. Moroney's concerns about the regulatory status of either Bank of Scotland or Ennis Property. It is sufficient to record at this point that both Ennis Property and Bank of Scotland are subject to precisely the same obligations and have precisely the same rights as BOSI had prior to the transfer and, in those circumstances, I cannot see how Mr. Moroney is in a position to advance the case made by the plaintiffs in Dellway. The plaintiffs in that case could show that an acquisition by NAMA would give NAMA more extensive rights than were held by the original lenders."*

54. At para. 64, McDonald J. noted that while the transferee in that case (Ennis Property) was not itself a regulated entity, pursuant to the 2015 Act, it was required to act through a credit servicing firm. For that purpose, it had engaged Pepper, a regulated credit servicing firm. He noted that s.5 of the 2015 Act inserted a new provision to the 1997 Act stat. s.34G

which was *"designed to ensure that the obligations which are imposed on regulated financial service providers will also apply in circumstances where, as here, a credit servicing firm such as Pepper is acting on behalf of Ennis Property, the owner of the legal title of the loans and related securities"*.

55. McDonald J.'s analysis of the effect of the 2015 Act is set out at paragraphs 67 to 68 of the judgment, as follows:

> *"In light of the provisions of [the Central Bank Act 1997] (as inserted by the 2015 Act), it seems to me that the legislature has very carefully created a situation where transfers taken by an entity such as Ennis Property are, in fact, subject to regulation. This has been confirmed by recent judgments both of the Supreme Court and of the High Court.*
>
> *In Launceston Property Finance Ltd v. Burke [2017] 2 IR 798 at p. 806 McKechnie J. in the Supreme Court confirmed that the purpose of the enactment of the 2015 Act was: -*
>
> > *'...in order to ensure that borrowers who had a 'regulated loan' which was acquired by an 'unregulated body' would continue to have the protection of various consumer codes and statutory provisions.'"*

56. McDonald J. went on to state:

> *"In my view, having regard to the provisions of s. 34 G of the 1997 Act (as inserted by s.5 of the 2015 Act) and having regard to the observations of McKechnie J. in Launceston and Stewart J. in Hogan v. Deloitte , the law is now clear and accordingly, that Mr. Moroney has no legal basis to make a case that he has been in some way wronged by the transfer of the loan and related security by Bank of Scotland to Ennis Property. While Ennis Property is itself an unregulated entity, the effect of the 2015 Act is that Mr. Moroney*

> *has the same protections in practice as he would if he was dealing with a regulated financial service provider."* (at para. 70)

57. McDonald J. was thus satisfied to reject a cause of action based upon a complaint about the transfer of loan facilities and associated security to an "unregulated entity" prior to the commencement of the 2015 Act (where, incidentally, the Bank as in this case was the transferor) finding that it *"failed to disclose a reasonable cause of action and/or are bound to fail".* (at para. 172) In the present case, the trial judge found the judgment of McDonald J. in *Moroney* of particular assistance given that it concerned the transfer of loans which had originally been provided by the Bank.

58. A similar approach to that taken in *Moroney* was adopted by the High Court in *Geary v. Property Registration Authority & Ors.* [2018] IEHC 727. There, Ní Raifeartaigh J. considered that the issue of the transfer of loans to unregulated entities had been discussed extensively in *Launceston, Hogan* and *Moroney.* She noted that it had been concluded that the law was now clear and there was no legal basis upon which to make a case that a borrower was somehow wronged by the transfer of a loan by a regulated entity to an unregulated entity *"because the effect of the 2015 Act is that the borrower has the same protections in practice as he would if he was dealing with a regulated financial service provider."* (at para. 34)

59. Ní Raifeartaigh J. was *"not satisfied that any significantly new dimension to this argument has been raised in any of Mr. Geary's affidavits and I consider that this issue is …bound to fail."* (at para. 34) She went on to state:

> *"Accordingly, I am satisfied that although the threshold is high for exercising the 'strike out' jurisdiction, as referred to earlier, this threshold has been reached in the present case and that the Gearys are essentially seeking to re-litigate matters that have already been decided in previous decisions of the High Court and Supreme*

> *Court. I therefore propose to exercise my discretion pursuant to the inherent jurisdiction of the Court to strike out the proceedings as against Bank of Scotland."* (at para. 35)

60. She was thus satisfied to exercise her discretion pursuant to the inherent jurisdiction of the court to strike out the proceedings against Bank of Scotland.

61. The decision of Ní Raifeartaigh J. has been upheld by this Court, in a decision rendered subsequent to the judgment of the trial judge in this case (*Geary v. Property Registration Authority & Ors* [2020] IECA 132). In giving the judgment for the Court, Murray J. opined as follows:

> *"59. ... Insofar as it is sought to contend that the fact that Ennis is not itself a regulated entity gives rise to any ground of legal complaint, this is also misconceived.*
>
> *60. Section 5 of the Consumer Protection (Regulation of Credit Servicing Firms) Act, 2015 ('the 2015 Act') inserts a new provision into the Central Bank Act 1997 ('the 1997 Act'). This is s.34G. That provision is intended to ensure that obligations imposed on regulated financial service providers will also apply in circumstances where a credit servicing firm is acting on behalf of the owner of the legal title of the loans and related securities. The provision imposes a prohibition on such a credit servicing firm, either on its own behalf or on behalf of the owner from taking or failing to take an action 'if the taking of or the failure to take the action would otherwise be a prescribed contravention if a retail credit firm took or failed to take that action'. Furthermore, under s.34G (2) a person who holds the legal title to credit granted under a credit agreement is prohibited from instructing a credit servicing firm to take or fail to take an action 'if the taking of or the failure to take*

the action would otherwise be a prescribed contravention if a retail credit firm took or failed to take that action.'

61. In Launceston Property Finance Ltd v. Burke [2017] IESC 62, [2017] 2 IR 798 at para. 20, McKechnie J. confirmed that the purpose of the enactment of the 2015 Act was to ensure that borrowers who had a 'regulated loan' which was acquired by an 'unregulated body' would continue to have the protection of various consumer codes and statutory provisions. That decision makes it absolutely clear that provided the owner of legal title to the loans has engaged a regulated credit servicing firm to act on its behalf in respect of those loans, the fact that the owner itself is not regulated provides no basis for impugning the transfer of loans or securities to it. Here it is not disputed that Ennis has retained and acts through a regulated credit service firm within the meaning of s.5 of the 2015 Act. Accordingly, this argument inevitably fails."

62. Here, the plaintiffs take issue with the reliance placed by the trial judge on *Launceston* and seek to distinguish it on the basis that their loans were transferred by the Bank to Pentire *prior* to the enactment of the 2015 Act. They assert that it was unlawful for the Bank to transfer the loans to Pentire (an unregulated entity) and that their argument cannot be negated by reliance on *Launceston.* They maintain that the enactment of the 2015 Act on 8 July 2015 did not cure the difficulties which presented for them upon the sale by the Bank to Pentire in April 2015.

63. The plaintiffs also contend that the *ratio* of the Supreme Court in *Launceston* was confined to the proposition that Launceston had the requisite *locus standi* to defend the appeal and that in effect all the Supreme Court determined was that Launceston, having appointed a regulated service agent, had *locus standi* for the purposes of the appeal to the Supreme Court. They assert that the judgment of the High Court in *Hogan* has wrongly

promulgated the *Launceston* judgment and given it a status that it does not otherwise merit. They assert that what was in issue in *Hogan* was, as in *Launceston,* a challenge to *locus standi* and that insofar as Stewart J. concluded that *Launceston* was authority for the proposition that a cause of action did not arise because a loan had been transferred from a regulated entity to an unregulated entity she erred in so concluding. The plaintiffs say that nowhere in the *Launceston* judgment is it asserted that the involvement of a service agent, regulated by the Central Bank, remedies concerns regarding loan transfers from a regulated to an unregulated entity. It is further asserted that in *Launceston,* McKechnie J. was wrong to consider that the provisions of the 2015 Act gave Pepper authority to operate within the State.

64. While the plaintiffs point to the fact that the *ratio* of the decision in *Launceston* did not directly relate to whether the transfer of loans from a regulated entity to an unregulated entity gave rise to a cause of action in damages in favour of the borrowers, their contention in this regard overlooks the fact that the subsequent decisions in *Hogan, Moroney* and *Geary* concern the very application of the issue of principle discussed by the Supreme Court in *Launceston,* to the question of whether the kind of action that is sought to be maintained here is known to law. That question was effectively answered in the negative in *Hogan*, *Moroney* and *Geary.* There is thus a consistent body of authority that makes it clear that the transfer of loans from a regulated lender to an unregulated entity does not give rise to a cause of action in favour of an aggrieved borrower.

65. Accordingly, the plaintiffs have no sustainable basis in law for a claim in damages against the Bank by virtue of the fact that it transferred the loans to Pentire. I agree with counsel for the Bank that the plaintiffs' submissions do not provide any arguable basis for upsetting the established case law.

66. I am also satisfied that the plaintiffs claim that the 2015 Act did not avail them because the loan transfer in question predated the commencement of that Act is misconceived. In *Hogan, Geary* and *Moroney,* the loans in issue in those cases were also transferred prior to the commencement of the 2015 Act. Moreover, the loans that transferred in *Moroney* and *Geary* were those of the Bank and the date of transfer was 20 April 2015, as was the case here.

67. The protections afforded by the 2015 Act and the associated amendments made to the 1997 Act by, *inter alia,* the amendments made to definitions of certain activities contained in s.28 of the 1997 Act and, thereafter, the creation of a new s.34G to the 1997 Act, enure to the benefit of the plaintiffs *qua* borrowers. Indeed, the net effect of those legislative changes is the subject of discussion by McDonald J. in *Moroney* and Murray J. in *Geary.* The passing of the 2015 Act and the changes wrought to the 1997 Act ensure protection for borrowers notwithstanding that loans may have been transferred from a regulated entity to an unregulated entity.

Alleged non-entitlement of the Bank to rely on Condition 14.2 of the General Conditions

68. The plaintiffs dispute that the Bank was permitted by Condition 14.2 of the General Conditions to sell the loans to Pentire. It is contended that in circumstances such as the present case, where a primary residence is involved – the plaintiffs residing in the apartments which comprise part of the secured property – the provisions of Condition 14.2 must be read as being subject to the plaintiffs' statutory right to be afforded the protections contained in the Code of Conduct on Mortgage Arrears. Accordingly, they contend that the General Conditions in the loan agreements made between the Bank and the plaintiffs do not bestow absolute unconditional authority on the Bank to transfer the loans to entities other than regulated entities.

69. It is alleged that the plaintiffs' rights have been set aside by the Bank in selling the loans to Pentire. They say that the 2015 Act unlawfully created two separate groups of borrowers: (i) those whose loans were sold to regulated entities where borrowers retained their rights; and, (ii) those whose loans were sold to unregulated entities thereby resulting in the loss to the borrowers (including the plaintiffs) of their statutory rights. It is asserted that the provisions of the 2015 Act cannot be retrospectively applied to their loans and cannot cure the serious harm which was done to them on 30 April 2014 when the Bank refused them a moratorium and forbearance-facilities which were available to the plaintiffs pursuant to the relevant Codes of Conduct. It is asserted that consequent on the transfer by the Bank to Pentire on 20 April 2015, the plaintiffs were stripped of the protections afforded by the Codes of Conduct.

70. It is thus submitted that where breaches of the Codes of Conduct later arise, this must be held to have repercussions for the Bank. On this basis, the plaintiffs assert that notwithstanding the express contractual provisions permitting the assignment of their loans, it was legally impermissible for the Bank to engage in the loan transfer given the regulatory status of Pentire, and that having done so, a claim in damages on the part of the plaintiffs against the Bank arises.

71. In my view, the claim that the Bank is not entitled to rely on Condition 14.2 is simply not stateable. A similar claim was roundly rejected by McDonald J. in *Moroney.* McDonald J. articulated that position as follows:

> *"79. At this point, it is sufficient to recall that, for the reasons already advanced in relation to Clause 27 of the Deed, the references to the 'Bank' in Clause 14.2 must, as a consequence of the cross-border merger, now be read as a reference to Bank of Scotland. When read in that way, it seems to me to be abundantly clear that Bank of Scotland has a contractual right, without the prior consent of the borrower to*

assign any of its rights and benefits under any of the Finance Documents. For completeness, it should be noted that the term ' Finance Documents' is broadly defined in Clause 1.1 of the General Conditions as including the ' Loan Agreement, the Security Documents and any agreements, documents, arrangements, letters or undertakings that may be entered into or executed pursuant thereto or in connection therewith...' In turn, the term ' Security Documents' is defined in the same clause as meaning the ' Security' identified in the relevant facility letters. At an earlier point in this judgment, I have already drawn attention to the way in which each of the facility letters specifically calls for security in the form of mortgages or charges over the lands the subject matter of these proceedings.

80. For similar reasons, as I have already set out in relation to Clause 27 of the Deed, I have come to the conclusion that Clause 14.2 of the General Conditions confers a very clear right to assign the lender's benefit of every aspect of the contractual arrangements originally put in place between Mr. and Mrs. Moroney and BOSI. Again, it does not seem to me to be necessary for Ennis Property to rely on the general law relating to assignments. However, if Ennis Property had to rely on the general law, I express the same view in relation to this issue as set out in paragraph 76 above. It seems to me that the relevant conditions of s. 28(6) of the 1877 Act have been met."

72. Nothing in the plaintiffs' submissions persuades me that I should not adopt the approach of the learned McDonald J. in *Moroney*, particularly when the very same Condition 14.2 was in issue in that case. Here, the transfer ultimately effected between the Bank and Pentire was provided for by Condition 14.2 of the General Conditions. The plaintiffs' argument runs contrary to the plain reading of an express contractual term to which they agreed. Accordingly, I accept the position, as set out at para. 22 of Mr.

Catling's affidavit, that the loan facilities in question, and the associated security, were freely assignable by the Bank. The regulatory status of Pentire created no legal impediment to the transfer, nor could same amount to any sustainable basis for a claim in damages as against the Bank in circumstances where the plaintiffs' loans, post the transfer, had the benefit of the 2015 Act as and from 8 July 2015, and in circumstances where Pentire as and from April 2015 had retained Pepper, who as and from 8 July 2015 was a regulated credit firm within the meaning of s.5 of the 2015 Act.

73. There is also no merit in the argument that the Court should imply a term into the loan facility restricting the lender from transferring the loan to an unregulated entity. The plaintiffs cannot simply imply into Condition14.2 the restriction which they seek. In *Cheldon Property Finance DAC v. Hale ,* McGovern J. rejected an argument that there was an implied restriction in relation to the transfer of certain loan facilities by Permanent TSB to Cheldon Property Finance DAC stating:

> *"11. The defendants invite the court to imply a term into the loan facility to the effect that the bank would not transfer the loan to 'an unregulated or unauthorised entity'. The loan is serviced by Pepper Assets Servicing which is a credit servicing firm within the meaning of the Consumer Protection (Regulation of Credit Servicing) Act 2015 and is regulated by the Central Bank of Ireland. The regulatory authority has made no issue of the fact that the loan is serviced in this way.*
>
> *14. The terms which the defendants seek to have implied in the loan facility do not meet the above tests and would have the effect of contradicting an express term of the contract. As a matter of law, such a claim is bound to fail. Accordingly, this is an issue capable of being determined in an application for summary judgment.*

There is no warrant for implying such a term and I decline to do so." (emphasis added)

74. In the absence of any contractual provision prohibiting the transfer in issue here, and where there is in fact contractual provision for such a transfer, the plaintiffs must establish that there is a cause of action in law that they are entitled to pursue. The plaintiffs have not done so. As already set out above, the Bank was not precluded in law from effecting the transfers. Furthermore, I am satisfied that a change in the identity of a lender consequent upon a transfer having occurred does not mean that any change has occurred in the rights and obligations provided for under the loan agreements transferred. The pronouncements of McKechnie J. in *Launceston* are strong authority for this proposition. I am also satisfied that the *dictum* of Murray J. in *Geary* is supportive of this proposition.

75. Moreover, the plaintiffs' submissions in relation to the alleged breach of contract are predicated on a misunderstanding of the relevant Codes of Conduct. The status of these Codes was the subject of consideration in *Irish Life and Permanent v. Dunne.* As is clear from the *dictum* of Clarke J. in *Dunne*, the protections afforded by the Codes are justiciable if same refer to an essential protection. (In this regard see paras. 5.1. 5.17, 5.20, 5.23 and 5.24 of *Dunne*). Taking the plaintiffs case at its height, there is nothing in the factual matrix as pleaded that, in my view, would warrant a finding that they have a stateable case against the *Bank* in respect of any essential protection of the kind contemplated by Clarke J. in *Dunne,* such as would militate against the Bank being granted the relief it seeks pursuant to its motion. This is particularly so in circumstances where no enforcement action was taken against the plaintiffs until some ten months post the transfer of their loans to Pentire. That is not to say, however, that the plaintiffs are not at liberty to pursue the second to fourth defendants in respect of the matters pleaded in the second amended statement of claim. The outcome of that pursuit will be determined at the trial of the action.

Condition 27 of the General Conditions as a basis to prohibit the transfer of the loans to Pentire?

76. The plaintiffs further allege that the "law and jurisdiction" clause (Condition 27) in the General Conditions prohibited the loan transfer by the Bank to Pentire. The plaintiffs' reliance on Condition 27 of the General Conditions as a basis for their pleaded claims against the Bank is plainly misconceived. Condition 27 is clearly a choice of laws/exclusive jurisdiction clause, and nothing more.

Alleged breach of constitutional rights

77. In their written and oral submissions, the plaintiffs cite Article 40 of the Constitution in aid of their argument that the enactment of the 2015 Act had the effect of creating inequality between two groups of borrowers, to wit, those borrowers whose loans transferred from a regulated entity to another regulated entity and those (including the plaintiffs) whose loans transferred from a regulated entity to an unregulated entity. They also rely on the *dictum* of Denham J. in *Sinnott v. Minister for Education* [2001] IESC 63 as authority for their proposition that where a primary residence is involved the rights provided for in the Codes of Conduct are those of the borrower and inure until the loan has reached its full term (or is settled). It is asserted that it is in those circumstances that the Bank could not set at nought their rights by transferring their loans to an unregulated entity.

78. In my judgement, there is no stateable basis for the claim that the plaintiffs' constitutional rights have been infringed by the Bank. Firstly, it is not clear how this claim is said to arise in circumstances where the enforcement action against them post-dated the transfer by some ten months. Insofar as they maintain that the 2015 Act breached the guarantee of equality before the law as provided for by Article 40 of the Constitution, that claim is not stateable in circumstances where the passing of the 2015 Act is intended to

ensure that the obligations imposed on regulated service providers will also apply where a credit servicing firm is retained to act on behalf of the (unregulated) owner of the legal title to the loans and related securities. Accordingly, the distinction which the plaintiffs seek to draw between borrowers whose loans transferred to regulated entities and those whose loans transferred to unregulated entities does not assist them. In any event, and notwithstanding that the plaintiffs may be aggrieved at the legal architecture employed by the State to regulate matters where loans are transferred by regulated entities to unregulated entities, this is not a justiciable grievance as against the Bank. Nor can any alleged legislative delay in enacting the 2015 Act be laid at the door of the Bank. Insofar as the plaintiffs assert that their rights under the relevant Codes of Conduct inure for the duration of the term of their loan, that is an argument for the trial of the action against the second to fourth defendants. It is not an argument that can assist the plaintiffs in opposing the Bank's motion in circumstances where I have already determined that the Bank was not precluded in law, or contractually, from transferring the plaintiffs' loans to Pentire and where the obligations (whatever they may be) of the Bank *vis a vis* the Codes of Conduct in question passed to Pentire on 20 April 2015 and where it was Pentire who appointed the Receiver on 19 February 2016.

Alleged error of the trial judge in finding no loss accrued to the plaintiffs as a result of the transfer of their loans to Pentire

79. The trial judge found that no loss had accrued to the plaintiffs as a result of the transfer to Pentire. This was in circumstances where the enforcement action against the plaintiffs commenced only in February 2016 which was after the transfer by the Bank to Pentire. The enforcement action also post-dated the coming into force of the 2015 Act, which, as I have said, is legislation that effectively ensures that the plaintiffs have the same

protections in practice as they would otherwise have were they dealing with a regulated financial service provider.

80. In his submissions, and in contending that the trial judge erred in finding that the plaintiffs incurred no losses pursuable against the bank, the first plaintiff listed the losses which he alleges have been incurred and in respect of which the plaintiffs say they are entitled to pursue the Bank. By way of example, the first plaintiff cited, as the first manifestation of visible harm, the statement of affairs which Pepper delivered to the plaintiffs which, it is alleged, was not in the standard form. The plaintiffs contend that in this regard they were denied the benefit of the Code of Conduct on Mortgage Arrears. It is also asserted that harm occurred on 30 April 2015 when Pepper refused to accept the alternative payment structure then being offered by the plaintiffs and when no appeal was afforded to them against this refusal. It is asserted that this, again, constituted a breach of the Code of Conduct on Mortgage Arrears.

81. It is contended that before any action was taken against them in 2016 they should have been provided with the benefit of the Code of Conduct on Mortgage Arrears. The first plaintiff thus asserts that in those circumstances the plaintiffs are entitled to ask the Bank at trial whether as and from 2015 it provided the benefits of the Code of Conduct on Mortgage Arrears to the plaintiffs.

82. The first plaintiff also advised the Court that a search carried out by him on 4 October 2020 failed to show that Pepper was registered with the Central Bank, yet some months prior, namely on 25 June 2020, they had written to the first plaintiff on behalf of Pentire. Asked how this information was relevant to the Bank's application to have the proceedings against it struck out, the first plaintiff contended that if it is the case that Pepper is not registered and/or has failed to satisfy the plaintiffs of its registered status,

then the Bank caused harm to the plaintiffs when it sold their loans to Pentire, itself an unregulated entity.

83. Taking, as I must for present purposes, the plaintiffs' claims at their height, the first thing to be observed is that the complaints are directed towards the second to fourth defendants. Any or all of the grievances which the plaintiffs have are matters to be pursued with Pentire as the Bank's successor in title and/or the third and fourth defendants. In essence, the plaintiffs' alleged dissatisfaction at their treatment at the hands of Pentire, Pepper and the Receiver, is a matter for them to pursue with those defendants in circumstances where Pentire stands in the shoes of the Bank post the sale of the loans by the Bank, where Pentire appointed Pepper, and where the Receiver has been appointed by Pentire. Alleged breaches by those defendants which occasion loss to the plaintiffs do not give the plaintiffs a justiciable cause of action against the Bank.

84. The plaintiffs also argue that harm was occasioned to them by the Bank setting aside their statutory entitlements to rely on the relevant Codes of Conduct when it sold their loans to Pentire. It is alleged that this is in circumstances where Pentire (and Pepper) have no duty of care to the plaintiffs. The plaintiffs thus maintain that it cannot be said that the transfer by the Bank of their loans to the unregulated Pentire occasioned no loss to them.

85. I have earlier rejected the plaintiffs' submission that the trial judge erred in finding that the Bank was not precluded in law or pursuant to the relevant loan agreements from transferring the loans in issue here to Pentire. Thus, as the plaintiffs have been unable, as put by the trial judge, *"to identify any actionable wrong"* on the part of the Bank in engaging in the transfer, their claim that the transfer *per se* by the Bank to Pentire caused them loss is not stateable. Equally, as found by the trial judge, the plaintiffs *" are unable to point to any prejudice or loss said to have been suffered during the three-month*

interregnum between the transfer of the loan agreements and the enactment and commencement of [the 2015 Act], there is simply no basis on which the Plaintiffs could succeed in obtaining damages against [the Bank]". (at para. 64)

86. None of the arguments put forward by the plaintiffs in the course of this appeal persuades me that the trial judge erred in finding as he did. As indicated above, the plaintiffs have myriad grievances about the treatment afforded to them post the transfer of the loans. These remain to be litigated as between the plaintiffs and the second to fourth defendants. While the first plaintiff contends that had the Bank not sold the loans to Pentire in February 2015 he would have had the benefit of the moratorium which he had agreed with the Bank "in principle" in December 2014, the fact of the matter is that as the first plaintiff fairly concedes there was no concluded agreement in this regard. In any event, insofar as the plaintiffs maintain that a change or variation to any of the terms of the loan agreements was made or agreed as between them and the Bank prior to the transfer (or indeed as between the plaintiffs and the second to fourth defendants post the transfer), as regards the first of these scenarios, the Bank's successor in title will be bound by any variation alleged to have been agreed by the Bank, subject to the plaintiffs being in a position to prove their case in that regard. As I have said, that will be a matter for the trial of the action between the plaintiffs and the second to fourth defendants.

87. Again, while much was made by the first plaintiff in his oral submissions of an agreement "in principle" reached between him and the Bank in December 2014 providing for a buy back by the plaintiffs of their loans, the first plaintiff conceded at the appeal hearing that there was no binding contract in this regard. Accordingly, for present purposes, it does not fall to be considered whether the plaintiffs might have a stateable case against the Bank that they lost the benefits of any such concluded agreement as a result of the transfer by the Bank of their loans to Pentire in April 2015. All in all, there is no

stateable basis for the proposition that the transfer by the Bank of the plaintiffs' loans to Pentire must be vitiated because it took place before a concluded agreement could have been reached between the plaintiffs and the Bank regarding their indebtedness.

The alleged failure of the trial judge to determine the plaintiffs' complaint that the Bank failed to apprise Pentire that the plaintiffs were residing in the secured property.

88. In their written and oral submissions, the plaintiffs assert that the Bank has not been open and transparent. They point to the denial, in the Bank's defence to the proceedings, that the Bank had been informed by the plaintiffs that they were residing in apartments that comprised part of the secured property. Yet the Bank's own internal documentation (dated November 2011) records that the plaintiffs were living in the "Apartments we hold as security".

89. The plaintiffs also contend that the trial judge erred in failing to determine as stateable, their claim that there was a breach of duty on the part of the Bank by reason of its failure to apprise Pentire that their primary residence comprised part of the secured assets. They maintain that this is particularly egregious in circumstances where Pentire went on to appoint a receiver over their assets.

90. As I understand it, the thrust of the plaintiffs' complaint is that had the Bank apprised Pentire in 2015 of the plaintiffs' living arrangements, the decision to appoint a receiver might not have been taken.

91. Taking the plaintiffs' case at its height, as I must, their complaint in the above regard is not stateable, particularly in circumstances where, on their own pleadings, it is clear that there was a protracted period of interaction between them and the second and third defendants from April 2015 to February 2016 when the Receiver was appointed. It is not stateable that a claim in damages could be said to arise where the plaintiffs had ample opportunity in this ten-month period to apprise Pentire and/or Pepper of their living

arrangements. Moreover, as can be seen at para. 18 of the second amended statement of claim, the plaintiffs plead that Pentire and Pepper acquiesced in their living arrangements. On any reading, therefore, the alleged failure of the Bank to apprise Pentire/Pepper of such arrangements is not maintainable.

92. Even if I am wrong in this regard, the fact of the matter is that it was Pentire and not the Bank who commenced the enforcement action against the plaintiffs. Accordingly, if it is the case that the actions of Pentire in February 2016 were in breach of any of the Codes of Conduct and protections to which the plaintiffs claim they were entitled (which would not have been affected by the loan transfer on 20 April 2015 and indeed which have been copper fastened by the passing of the 2015 Act), then the plaintiffs remain free to litigate their claims in this regard against Pentire as the entity who assumed the erstwhile obligations of the Bank (whatever they may turn out to be) following the transfer of 20 April 2015. On this basis the plaintiffs are at liberty to call in aid whatever legal principles and case law they believe may assist them, including their reliance on the decision in *Allied Irish Banks plc v. Buckley* [2019] IEHC 97.

93. All of the plaintiffs' claims in this regard await determination at the trial of the action against the second to fourth defendants.

Overview

94. In all the circumstances, the plaintiffs have not persuaded this Court that the trial judge erred in striking out their claim against the Bank pursuant to O.19, r.28 RSC. Even if the matters pleaded by the plaintiffs would prevail at the trial, the plaintiffs' case against the Bank is bound to fail. In that circumstance, to paraphrase Clarke J. in *Lopes*, then their claim against the Bank *"must be vexatious"* and, accordingly, must be dismissed under the RSC. Accordingly, for the reasons set out herein, I would affirm the Order of the trial judge.

95. By virtue of the conclusions I have reached, it follows that I would also affirm the trial judge's Order striking out the plaintiffs' motion dated 4 February 2019.

96. The plaintiffs have not succeeded in their appeal. Accordingly, it follows that the Bank should be entitled to its costs. If, however, either party wishes to seek a different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, if necessary. If no indication is received within the twenty-one-day period, the Orders of the Court, including the proposed costs order, will be drawn and perfected.

97. As this judgment is being delivered electronically, Haughton J. and Binchy J. have indicated their agreement therewith and the order I have proposed.