THE COURT OF APPEAL

CIVIL

[Approved]
[No redaction needed]

Court of Appeal Record Number: 2023/287

High Court Record Number: 2019/9810P
Neutral Citation Number [2024] IECA 84

Costello J.
Pilkington J.
Butler J.

BETWEEN/

GERARD BYRNE

PLAINTIFF/APPELLANT

-AND-

MARS CAPITAL IRELAND DAC

DEFENDANT/RESPONDENT

-AND-

Court of Appeal Record Number: 2023/296
High Court Record Number: 2019/9811P

BETWEEN/

GERARD BYRNE

PLAINTIFF/APPELLANT

-AND-

MARS CAPITAL IRELAND DAC

DEFENDANT/RESPONDENT

-AND-

Court of Appeal Record Number: 2023/291
High Court Record Number: 2020/220P

BETWEEN/

GERARD BYRNE

PLAINTIFF/APPELLANT

-AND-

MARS CAPITAL IRELAND DAC, MARS CAPITAL FINANCE IRELAND DAC, ROBERT WATSON, COLIN MAHER, HAMISH MARR, ANTHONY NOONAN, EOIN DONNELLAN, KIERAN CORCORAN, RICHARD SLOANE, ALAN MONAHAN, STUART HAMILTON AND KEVIN BLAKE

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 22nd day of April 2024

Introduction

1. By judgment delivered on 16 June 2023 the High Court directed that the three related proceedings in the title of this judgment should be dismissed on the basis that they were frivolous and vexatious and/or disclosed no cause of action and/or were bound to fail pursuant to O.19, r.28 of the Rules of the Superior Courts and pursuant to the inherent jurisdiction of the court with the exception of a limited claim of maladministration in relation to alleged overcharging of interest. The appellant has appealed the decision.

2. The High Court delivered a very careful, forensic judgment running to 51 pages and 193 paragraphs. Stack J. carefully considered the many arguments advanced by the plaintiff and carefully analysed the three voluminous statements of claim in her judgment. It is not necessary to reproduce this exercise so thoroughly performed by the High Court and I propose merely to address those issues which remained in contention on the appeal.

Factual background

3. I shall adopt the terminology employed by the High Court and refer to the first proceedings, second proceedings and third proceedings, and Property A and Property B to facilitate a cross-reference from this judgment to the judgment of the High Court.

4. In 2003 the appellant and his then wife took out a loan from Irish Nationwide Building Society ("INBS") in the sum of €275,000 to purchase their family home, Property A. The loan was to be secured by a first legal charge over Property A which was executed by the appellant and his wife on 13 June 2006 and subsequently registered as a burden on the relevant folio.

5. By 2006 the appellant and his wife had planned to divorce and the appellant proposed purchasing another property to be his home. He applied to INBS for a further loan. They also applied to extend the loan on Property A but nothing turns on this. By letter dated 26 May 2006 INBS offered him a loan in the sum of €395,000 to purchase Property B. The letter states that the type of mortgage to be granted was a *"First Legal Mortgage over Residential Investment Property"*. The period of the loan agreement was approximately 20 years and the loan agreement was to be *"interest only"*. The purpose of the loan was stated to be *"To Purchase A Residential Investment Property"*. Special Condition 8.1 of the letter of offer stated:

> *"This property is a residential investment property and is not intended to be used as a principal private residence"*.

The appellant, who was advised by a solicitor, accepted the offer on 7 June 2006 and in due course the monies were advanced, Property B was purchased and a first legal charge in favour of INBS registered on the relevant folios.

6. The appellant alleges that he clearly stated to the branch manager of INBS that Property B was in fact to be his principal private residence and not an investment property. He alleges that the loan application form was signed by him and later completed by the branch manager with whom he had previous dealings and whom he trusted. The appellant said that the local branch manager of INBS told him that later he could alter the terms of the loan, which was initially interest only and at a higher rate than would be applicable to a mortgage of a principal private residence. The appellant says that the branch manager told him *"I will get your mortgage first, then you can change it any way you like later."* Specifically, the appellant alleges that the branch manager represented to him that after three years he could move from an interest only mortgage to the more usual and less expensive repayment mortgage that would normally be granted in respect of a borrower's home.

7. The appellant and his then wife divorced on 18 June 2009. In July 2009 the appellant approached INBS to change the terms of his mortgage over Property B. He says he was told during a telephone call that the mortgage was for a rental property and would attract much higher interest charges. The appellant says that he then disputed with INBS that this was so and alleged that the branch manager had engaged in false and misleading conduct and had misrepresented the situation to him. In September 2009 the appellant instructed a solicitor to write to INBS complaining that the appellant had been told that he could not in fact change the mortgage as he wished contrary to the representations made to him in 2006.

8. In due course Irish Bank Resolution Corporation ("IBRC") took over the appellant's loans and securities from INBS and in 2012 IBRC commenced repossession proceedings against the appellant and his then ex-wife in respect of Property A. In July 2013 the appellant made what has turned out to be his last ever repayment on foot of the mortgage secured over Property B. Arrears have accrued to date. On 17 October 2013 the appellant wrote to IBRC purporting to repudiate the 2006 mortgage transaction on the basis of fraudulent misrepresentation, fraud and deceit, reckless lending practice and negligence. In 2014 Mars Capital Ireland DAC ("Mars") purchased the appellant's loans and securities from IBRC and by order made on 3 September 2014 was substituted as a plaintiff in place of IBRC in the 2012 Repossession Proceedings.

9. The appellant then instituted two proceedings in 2014. The first of these 2014 proceedings, record number 2014/8038P, was against Mars and the second, record number 2014/9620P, was instituted against Mars and the solicitors acting for them in the 2012 Proceedings. These two proceedings are referred to cumulatively by the High Court as the 2014 Proceedings. The 2014 Proceedings expressly related to both Property A and Property B and the mortgage accounts on both properties. They contended, *inter alia*, that the "mortgage loans" were null and void due to the acts of the original lender which were alleged to include fraudulent misrepresentation and illegal conduct, including fraud and deceit, specifically relating to the conduct of the branch manager.

10. The 2012 Repossession Proceedings were settled on 3 July 2018 when the case was listed for hearing in the Circuit Court. The settlement was reduced to writing and signed by the appellant on 20 November 2018 and on behalf of Mars on 8 January 2019. The document records that the 2012 Repossession Proceedings were compromised *"by way of full and final settlement of the debt, mortgage and other disputes, insofar as they relate to*

the housing loans advanced under [the loan account in respect of Property A] and secured by Indenture of Mortgage dated 13 June 2006…". There were five terms to the agreement:

(1) The appellant and his ex-wife were to deliver up vacant possession of Property A to Mars by 3 October 2018.

(2) The appellant and his former wife were to discontinue, cancel or otherwise retract any complaint or related issue to any or all regulatory bodies including the Data Protection Commissioner or similar body.

(3) The appellant was to file notices of discontinuance of the 2014 Proceedings forthwith, with each party agreeing to bear their own costs.

(4) Mars was to vacate two orders for costs in its favour granted by the Circuit Court in April and July 2018 in the repossession proceedings *"subject to [the appellant and his former wife] giving vacant possession of the Property to [Mars] by the 3rd October 2018"*.

(5) *"These terms of settlement are in full and final settlement of the debt, mortgage and other disputes as between [Mars and the appellant and his former wife] insofar as they relate to the Loan Account [in respect of Property A] only"*.

11. The effect of the settlement agreement was that Mars wrote off more than €314,000 on the loan account in respect of Property A. The compromise did not resolve the debt in respect of Property B owed by the appellant alone to Mars.

12. On 19 December 2019 the appellant issued the first and the second proceedings and on 14 January 2020 he issued the third proceedings. Following the delivery of statements of claim in all three proceedings, the respondents issued motions to dismiss all three proceedings on 23 August 2021 on the grounds that they were frivolous and vexatious; disclosed no cause of action; or were bound to fail. The relief was sought either pursuant to O.19, r.28 of the Rules of the Superior Courts or the inherent jurisdiction of the court. The

High Court granted the relief save in respect of a discrete issue of alleged overcharging of interest by Mars' predecessor in title. The appellant appealed in respect of the dismissal of all three proceedings and there was no cross-appeal in respect of the one issue which the High Court declined to strike out.

Discussion

13. Many of the issues canvassed in the High Court no longer featured in the appeal. As I agree with the careful and excellent analysis set out by Stack J. in her judgment, I see no point in repeating her analysis. This judgment is confined to new arguments or reworking of arguments or points where the appellant alleges that the High Court erred.

14. The trial judge correctly identified the authorities relevant to the application to dismiss the proceedings on the grounds that they disclosed no reasonable cause of action or were bound to fail and there was no dispute on appeal in relation to these authorities. The arguments on appeal turned on the application of the principles to the appellant's pleaded cases, or possible causes of action.

Are claims based upon the 2006 mortgage transaction statute barred?

15. Stack J. dismissed any claims based upon the 2006 mortgage transaction on the basis that they were clearly statute barred pursuant to ss.11(2) and 71 of the Statute of Limitations 1957. She held that the core of the appellant's claim was based on alleged misrepresentations made to him by the INBS branch manager when the appellant took out the loan in July 2006 (see para. 41). This was accepted on appeal. The appellant accepts that unless he can rely on the provisions of s.11(5) of the Statute of Limitations, his claim insofar as it is based upon the 2006 mortgage transaction is statute barred for the reasons set out in the judgment of the High Court. It is therefore not necessary to address this further.

16. The appellant accepts that he did not rely upon the provisions of s.11(5) of the Statute in the High Court but he says that he should be permitted to do so on appeal as it is an argument sufficiently close to those he advanced in the High Court that he ought to be permitted to make it for the first time on appeal. In this regard he relies upon the decisions of the Supreme Court in *Lough Swilly Shellfish Growers Co-Op Society Limited v. Bradley* [2013] 1 I.R. 227 and *Ennis v. Allied Irish Banks Plc.* [2021] 3 I.R. 733.

17. The appellant is a litigant in person, though an unusually well-placed one, as he is also a practicing barrister, so some small latitude in this regard is appropriate. I am satisfied that this argument is on the right side of the spectrum identified by O'Donnell J. in *Lough Swilly* and that it would be unjust to debar him from advancing the argument that his case is not statute barred by reason of the provisions of s.11(5) of the Statute given that the question was central to the decision of the High Court, albeit by reference to different provisions of the Statute. Crucially, the argument involves no new evidence and could not require a response on affidavit from Mars. It raises purely legal questions of the correct construction of s.11(5) and its application to the facts in this case.

18. Section 11(5) of the Statute of Limitations 1957 provides:

> *"The following actions shall not be brought after the expiration of twelve years from the date on which the cause of action accrued: -*
>
> *(a) An action upon an instrument under seal …"*

The subsection clearly refers to an action *upon* an instrument under seal: not in relation to or concerning an instrument under seal. The appellant says he comes within the section because he is seeking relief in relation to the mortgage over Property B which was executed under seal. According to him, this means that he is suing "upon" an instrument under seal and therefore the limitation period applicable is twelve years from the accrual of the cause of action. He says that accordingly his claims are not statute barred. I do not

agree. He is seeking to set aside the mortgage, the instrument under seal, on the grounds that it is *"vitiated by fraud"* or *"void ab initio"*. This is the exact opposite to actions within the meaning of s.11(5)(a). The appellant argued that it would be unfair for the limitation period to be twelve years where Mars was suing on foot of the mortgage but only six years where he was seeking to set it aside. However, the question of the fairness or otherwise of limitation periods is neither here nor there. Limitation periods have been established by the legislature and the question of which period is applicable is a matter of statutory construction. In my judgment the wording of the Statute is clear and tellingly, despite the fact the provision has existed since 1957, the appellant could point to no case where the subsection was interpreted in the manner he contends and where an application to set aside a mortgage was held to be subject to a twelve year limitation period. I would reject this new ground of appeal. All of his claims based upon the 2006 mortgage transaction are statute barred and thus any proceeding founded upon such claims should be struck out on the basis they are bound to fail.

Constructive fraud: is there a claim against Mars which is not statute barred?

19. Separately the appellant argued that Mars was guilty of constructive fraud and that this claim was not statute barred. It was a separate claim from that based upon the 2006 mortgage transaction. The argument runs the appellant has complained to Mars that INBS perpetrated a fraud upon him and therefore has been aware of this complaint since 2014. Despite this, it has refused to investigate his allegations of fraud and Mars has continued to take the benefit of the fraud in the form of the higher interest rates chargeable in respect of a residential investment property loan as opposed to a principal private residence loan; Mars continues to rely on the charge securing the loan and has threatened repossession proceedings (since instituted). He contends that Mars' representatives have behaved in an aggressive manner at meetings held between Mars and the appellant seeking to resolve

matters and demanded that he make repayments due on the mortgage for a period of six months. He says that this amounts to constructive fraud.

20. In support of his contention that the actions of Mars amount to constructive fraud he refers to the description of constructive fraud in Halsbury's Laws of England:

> *"'Fraud' in its equitable context does not mean, or is not confined to, deceit; it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties. It is victimisation, which can consist either of the active extortion of a benefit or of the passive acceptance of a benefit in unconscionable circumstances.*
>
> *The general principle is that, if a party is in a situation in which he is not a free agent and is not equal to protecting himself, a court of equity will protect him. In all these cases there might also be circumstances of contrivance or undue advantage implying actual fraud."*

21. It is important to note that the appellant has not and is not alleging that Mars was guilty of actual fraud at any stage. The appellant alleges that Mars has passively accepted the benefit of the more favourable terms in the written documentation dating from 2006 *"in unconscionable circumstances"*.

22. The appellant quoted from the second edition of Keane *Equity and the Law of Trusts in the Republic of Ireland* para. 28.01 where the former Chief Justice discusses constructive fraud in the context of undue influence and unconscionable transactions. The learned author said:

> *"...[T]he salient feature of the equitable jurisdiction was that it operated in cases where, however innocent or otherwise the defendant's conduct might have been, the court would consider it unconscionable that he should retain an advantage <u>which he had derived from the transaction in question</u>."* (Emphasis added)

The passage clearly refers to a defendant's own conduct which may render it unconscionable that the defendant should retain the advantage in question. He was not considering the situation of a third party or assignee (as in this case) nor the position where there were mere unsubstantiated allegations of conduct said to render it unconscionable for the third party to retain the benefit of the transaction.

23. The recent High Court decision in *Nahj Company v. Royal College of Surgeons* [2020] IEHC 539 is likewise of limited assistance as the defendant in that case was accused of the wrongful acts and, as was held by Simons J., the pleas imputed dishonesty to the defendant. That is not the case here.

24. In *Gough v Neary* [2003] 3 I.R. 92 at p. 110 Hardiman J. in the Supreme Court considered the meaning of fraud in s.71 of the Statute of Limitations Act 1957. He emphasised that it was by no means limited to common law fraud or deceit (as was accepted by both Simons J. in *Nahj* and Keane in his textbook). Hardiman J. stated:

> *"... it is clear... that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define 200 years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned is an unconscionable thing for the one to do towards the other".*

Again, I do not find this passage to be of assistance in resolving the issues in this case. There is no suggestion that there is any special relationship between the appellant and Mars and certainly there is nothing which shows that it would be unconscionable for Mars to rely upon the terms of the contractual documents by reason of the nature of the relationship between Mars and the appellant.

25. It is important to emphasise that no culpable act by Mars has been identified and there has been no imputation of dishonesty against Mars. The appellant's case is founded upon the alleged fraud of INBS in 2006. However, there is nothing in the documents available to Mars and no document provided by the appellant to Mars which supports the contention that the concluded contract was not as appears on the face of the loan agreement. The height of the appellant's claim is that knowledge of an allegation of an oral agreement with a predecessor in title which contradicts the terms of the written contract concluded thereafter taints the rights of the successor in title. In effect the appellant's case is that if Mars knows of an allegation of fraud it may not enforce the contract of which it is assignee as it must treat the fraud as established unless and until it investigates the allegation. Indeed, the appellant goes further. He says that once he made an allegation of fraud and Mars failed to investigate it, thereafter every step taken by Mars in reliance on the loan documents and/or security constitutes an ongoing fresh act of constructive fraud in respect of which time starts to run afresh, or, as the appellant accepted during argument before the court, in respect of which there is in effect no time limit at all.

26. This only has to be set out to be dismissed as unstateable. If the appellant is correct it follows that if a debtor makes an unsubstantiated allegation of fraud based upon an oral misrepresentation or agreement which is not investigated by the creditor (presumably to the debtor's satisfaction) then the Statute of Limitations ceases to have any bearing at all. Time runs afresh each day on the basis of the creditor's failure to act on foot of the allegation or, to put it another way, where the creditor acts on the basis of the contractual documentation in disregard of the allegation. This to my mind is contrary to the provisions of s.71 of the Statute of 1957. Subsection 1 provides:

"Where, in the case of an action for which a period of limitation is fixed by this Act, either -

(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

(b) the right of action is concealed by the fraud of any such person,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

27. The subsection provides that once the party knows or could with reasonable diligence know of the fraud then time starts to run, in this case for six years. On his own case, the appellant knew the elements of his claim of fraud by October 2013 at the very latest and therefore, as he has accepted, the claim became statute barred by October 2019, i.e. over two months before he issued the first of the three sets of proceedings the subject of this application. His arguments in relation to constructive fraud turns the Statute on its head if the claim against Mars, which is based solely on (1) the allegation that it is passively unconscionably benefitting from INBS' fraud and (2) despite the appellant's complaint to Mars in 2014 it continues to rely on the terms of the contractual documents, is *not* statute-barred, while his complaint against the alleged perpetrator of the fraud (INBS) *is* barred.

28. I see nothing unconscionable in Mars seeking to enforce the loan agreements when the appellant had every opportunity within the statutorily permitted period to sue INBS or IBRC in relation to his allegations of fraud but elected not to do so. He cannot in effect have the benefit of the claim in some ghostly fashion, having permitted it to become statute barred. I would reject this ground of appeal.

29. For these reasons I would agree with the trial judge in para. 74 where she concludes that the complaints against Mars are either entirely dependent on the statute barred claims

against INBS and its successors under the loan and charge, or failed to disclose a cause of action known to law and should therefore be struck out pursuant to the inherent jurisdiction of the court.

Alleged breach of terms of settlement of 2018 and the second proceedings

30. As set out above, Mars agreed to vacate two Circuit Court orders for costs and as of 19 December 2019 when the appellant issued the second set of proceedings, no application to vacate the orders had been made. The trial judge considers this issue very carefully in paras. 80 to 88 of her judgment where she concludes that it was necessary for the appellant to show a loss where he was suing for breach of contract and that no loss could be shown for the reasons she set out in her judgment. I entirely agree with her and I am satisfied that she made no error in her conclusion. In particular, the settlement agreement did not fix a time for vacating the orders, in contradistinction to the obligation on the appellant to discontinue the 2014 Proceedings "*forthwith*". Mars waited for Property A to be vacated (in accordance with the express terms of the agreement) and sold the property before vacating the costs orders. There is nothing to suggest that this prejudiced the appellant in any way and if he had suffered any prejudice, he could have raised it. Conspicuously, he did not. He did not ask Mars to vacate the two orders before commencing the second proceedings on 19 December 2019. Indeed, he only wrote to Mars on this issue on the very day he issued the plenary summons in the second proceedings. This of course meant that it was impossible for Mars to comply with any request to fulfil its obligations under the terms of settlement before proceedings seeking damages and other relief for alleged breach of settlement issued. Mars issued a motion in the Circuit Court seeking to vacate the orders promptly the following month. It was returnable for late March 2020 and thereafter was overtaken by the COVID-19 pandemic. Any claim in relation to this issue is

now clearly moot as the orders have been vacated and in fact were vacated before the statement of claim was delivered.

31. The appellant alleges that Mars was also in breach of the settlement agreement in that it *"eventually wrote-off the debt only following sale of the Property in or about September 2019 (more than 14 months after entering the said agreement)"*. It is conceptually difficult to understand how the balance of a loan can be written off prior to the realisation of the security and the ascertaining of the net proceeds of sale. There is no evidence at all that Mars unduly delayed in realising the security and ascertaining the outstanding balance due on the loans on Property A. Be that as it may, the appellant can have no complaint as to when the write-off was effected as, at all material times the loss incurred by virtue of the write-off was that of Mars and it could never be laid at his door. I am satisfied that there could be no stateable cause of action for a breach of the terms of the settlement agreement on this ground as clearly the appellant can have suffered no loss. I agree with the trial judge that the proceedings insofar as they are based on these two alleged breaches of the settlement agreement are frivolous and vexatious and disclose causes of action that are bound to fail and therefore ought to be dismissed.

32. Based upon these two alleged breaches of the terms of the settlement agreement (the delay in vacating the costs orders and the delay in writing off the balance due on the loan in relation to Property A), the appellant seeks a variety of declarations that Mars somehow has acted in breach of a variety of statutory provisions which protect the interests of consumers. He alleges that Mars failed to provide him *"with relevant information, in respect of the said Settlement Agreement"* and failed to disclose *"its commercial intent in respect of the transaction"* allegedly contrary to s.42 of the Consumer Protection Act 2007 (hereinafter "the 2007 Act"). He alleges that he was induced to enter into the settlement agreement by representations and/or misrepresentations by Mars and alleges breaches of a

variety of other statutory provisions, provisions of the Unfair Commercial Practices Directive (Directive No. 2005/29/EC) (hereinafter "the 2005 Directive") without reference to any representation or information whatsoever. He concludes this part of his pleading at para. 27:

> *"By reason of the aforesaid negligence, and breach of duty (including breach of statutory duty) and/or breach of contract and/or misstatement and/or misrepresentation on the part of the Defendant its servants or agents, the Plaintiff has suffered loss, damage inconvenience, upset and expense."*

33. In the prayer for relief in the second proceedings the appellant seeks a variety of declarations, if necessary, a reference to the Court of Justice of the European Union on the question of whether the settlement agreement falls within the scope of the 2005 Directive and related questions, and a variety of claims for damages.

34. Before considering whether it is appropriate to seek the declarations sought in the second proceedings, it is worth observing that the appellant averred at para. 23 of his replying affidavit in these proceedings sworn on 10 November 2021 that he issued these proceedings as a form of protective writ. This is not what is meant by a protective writ. A protective writ is issued when a claim is in danger of becoming statute barred and the plaintiff requires further time to investigate the claim. A key feature of a protective writ is that it is normally not served upon the defendants unless and until the plaintiff is in a position to proceed with the claim, having further progressed his or her investigations. Alternatively, the proceedings are allowed to lapse or are discontinued. Certainly, it is difficult to understand how a writ which is issued and pursued can be regarded as protective. Insofar as it suggests that it was issued for an alternative purpose, this could amount to an abuse of process.

35. The key question is whether any useful purpose would be served by granting declarations in circumstances where (a) the costs orders have been vacated, (b) the balance of the loan has been written off and (c) the appellant has obtained a substantial benefit under the settlement agreement, to wit, the writing off of the balance due on the loans secured on Property A amounting to more than €314,000. As the trial judge pointed out, it is well-established that a declaration cannot be sought absent a real controversy between the parties (see *Omega Leisure Limited v. Barry* [2012] IEHC 23 and *MC v. The Clinical Director of the Central Mental Hospital* [2021] 2 I.R. 166).

36. The appellant's case is that if a declaration were made that the settlement agreement of 3 July 2018 had been breached it would support his claim for damages against Mars pursuant to s.74 of the Consumer Protection Act 2007. The declarations sought in the second proceedings all relate to the negotiating and concluding of the settlement agreement which, according to the appellant, involved breaches of ss.42 and 52 of the 2007 Act and Articles 5, 6 and 8 of the 2005 Directive. The appellant contends that because the settlement agreement related to the underlying consumer debt that the provisions of Articles 5, 6 and 8 of the 2005 Directive and ss.42 and 52 of the 2007 Act applied to the settlement of the 2012 Repossession Proceedings. The trial judge held that the provisions simply do not apply to a settlement reached in the context of repossession proceedings (see para. 95). She explained that:

> *"97. Manifestly, the settlement of repossession proceedings is not 'directly connected with the promotion, sale or supply of a product to consumers', as the defendant was not seeking to promote, sell or supply any product to the plaintiff, but rather was seeking to resolve contentious litigation. The plaintiff is confusing the litigation with the underlying transactions to which it is related.*

98. As a result [none of the provisions] have any application to the settlement negotiations or to the settlement agreement of 2018".

37. I agree and have nothing further to add to her analysis. I would also agree that the fact that during the negotiations the appellant was represented by solicitor and counsel is highly relevant. They were interposed between him and the other party to the negotiations. They were in a position to advise him if they required further information in order to advise him properly in relation to the proposed settlement. It is noteworthy that at no point does the appellant identify any particular matter upon which he relied when agreeing to the settlement of the 2012 Repossession Proceedings which he was misled by Mars or point to any information which was withheld which might have altered his decision to enter into an agreement which conferred very considerable benefits on him which he studiously ignored in all of his submissions.

38. As there is in fact no real controversy between the parties in relation to alleged breaches of the various statutory provisions set out in relation to the 2018 Settlement Agreement, it means that no proper purpose recognised by law would be served by permitting the appellant to maintain these proceedings for the purpose of obtaining the declarations set out in his prayer for relief.

39. Finally, as will be discussed more fully below, by reason of the completely inadequate pleading in relation to the alleged breaches of the various statutory provisions recited or the alleged failure to comply with the Articles identified in the 2005 Directive, the appellant has failed to identify any cause of action against Mars in relation to the settlement agreement and accordingly there is no basis for the maintenance of these proceedings to allegedly support a claim for damages pursuant to s.74 of the Act of 2007 as alleged.

Amendment: no response to the inadequate or insufficient pleading identified by the High Court

40. The appellant contends that the trial judge erred by failing to afford him the opportunity to save his proceedings by amendment. In the first place she did so in relation to the question of the overcharging of interest. In the second place, no amendment of the proceedings can save a claim which is statute barred (unless it is to add a new claim which is not so barred, and that also has been rejected here). In relation to the balance of the claims, it is incumbent upon a party who says that the proceedings should not be struck out on the basis that they should be afforded the opportunity to amend the proceedings and thereby save them, to identify an appropriate amendment which would have that effect. It is quite extraordinary that, notwithstanding the terms of the judgment of the High Court, in no single instance has the appellant identified an amendment which would save the proceedings.

41. The statements of claim in all three proceedings are replete with references to breaches of the statutory duty, breaches of various sections of the 2007 Act including ss.41, 42, 43 and 52, and breaches of Articles 5, 6 and 8 of the 2005 Directive, and generally breaches of the Consumer Protection Code. Over many pages the High Court considered each and every one of these pleas by reference to the paragraphs of the respective statements of claim. Stack J. repeatedly pointed out that the appellant failed to identify any duty of care owed by Mars or the personal respondents in the third proceedings to him. For instance, at para. 71 of the judgment she refers to the global references in para. 28(g) of the statement of claim in the first proceedings to the 2007 Act and Consumer Information Act 1978 and observes that they are *"manifestly too general in nature to disclose a cause of action"* and they are liable to be struck out pursuant to O.19, r.28. At para. 131 she observes that the breach of duty of care or negligence alleged

against Mars is said to be the failure to resolve his complaints but that the appellant identifies no breach of contract or any breach of duty known to the law arising out of the failure of Mars to concede his claim. In respect of a plea referring to the Central Bank Act 1942 Stack J. observed that no particular duty binding on any of the respondents has been identified (see para. 133). She stated that general references do not disclose a cause of action and that it is impossible to identify with any precision what para. 35 of the statement of claim in the third proceedings refers to. Similarly at para. 136 of her judgment she says that in paras. 36 to 45 of the statement of claim in the third proceedings the appellant makes various allegations that the personal respondents refused to accept his claims of fraud and threatened to repossess his house and were aggressive, but in fact no cause of action against any of them is pleaded. At paras. 165 and 166 she refers to the very lengthy para. 70 of that statement of claim. It refers to s.44 of the Central Bank (Supervision and Enforcement) Act 2013 but no new claim is set out in respect of the provision. Section 44 came into effect on 1 August 2013 and therefore cannot apply to the 2006 mortgage transaction. Insofar as it potentially could apply to Mars, the only financial service legislation the appellant identifies in his statement of claim for the purposes of s.44 is the 2007 Act. However, as she has already held, that does not apply to the 2006 mortgage transaction as the transaction pre-dates the commencement of the 2007 Act. She therefore concludes that there is nothing in the pleadings which identifies how the section could apply to the subsequent dealings of the appellant with any of the respondents (at para. 167).

42. Stack J. points out that references to a *"prescribed contravention"* within the meaning of s.33AN of the Central Bank Act 1942 as amended did not identify a cause of action, given the variety of possible meanings attributable to the phrase, depending upon its context in the Act. It follows that no particular provision said to be contravened has

been identified in the pleadings and therefore the statement of claim fails to disclose a cause of action in respect of this section (para. 174 of the judgment). At para. 177 of the judgment she concludes that despite the copious references to statutory provisions in para. 70 (r.), (s.), (t.) and (u.), no cause of action whatsoever is disclosed.

43. Stack J. went through each and every statutory provision relied upon by the appellant and she concluded that the appellant had not pleaded how the individual sections were engaged. In each case she held that the pleadings did not identify how the provisions could apply to the dealings between the appellant and the respondents. He did not explain how the provisions of the relevant Act is alleged to have been engaged. He did not plead any transactional decision which he either made or was considering making at any time after Mars acquired the loans and security which might attract the provisions of the 2007 Act. The nearest he came to particularising any claim was to point to the refusal/failure to investigate his allegations of fraud.

44. Notwithstanding the fact that the judgment is replete with references to the inadequacy of the pleadings the appellant on appeal did not take the court to a single plea or prayer for relief in any of the proceedings to show where the trial judge had erred in these conclusions or to demonstrate that he had properly pleaded claims against the respondents in respect of some or all of the alleged breaches of statute. His case remains generalised and untethered from any facts as it was before the High Court. Furthermore, whilst protesting that he had not been afforded the opportunity to save his proceedings by an appropriate amendment, he did not identify a single amendment which could remedy the defects in his pleadings laid bare by the judgment of the High Court. As such he has failed to show that the trial judge erred when she dismissed all of his statutory claims on the grounds they disclose no cause of action known to the law or were impermissibly vague so as to disclose no cause of action. He likewise has failed to identify any

appropriate amendment which would allow this court to permit him to save his proceedings by an appropriate amendment.

45. At the hearing of the appeal the court pressed the appellant to identify any acts of Mars which he said amounted to breaches by Mars of the provisions of the 2007 Act. After much prompting, he identified five issues:

- The failure to investigate his complaints of fraud by INBS.
- The aggressive conduct of the representative at three meetings held in 2014.
- Threatening enforcement proceedings in 2014.
- Settlement of the 2012 Repossession Proceedings in 2018.
- Conduct by representatives of Mars post the settlement agreement.

These of course are not pleaded and the appellant has not sought to amend his proceedings to include them as specific examples of breaches of particular statutory provisions. Nonetheless, I shall consider whether they potentially could ground a claim and thus whether he should be permitted to pursue the claim(s) following a suitable amendment of the relevant proceedings.

46. The failure to investigate a claim of fraud against a predecessor in title which is statute barred does not to my mind ground any cause of action known to the law and the appellant has not identified one to either the High Court or this Court. References to duties imposed on financial institutions or traders do not suffice: they must be linked to facts which can then ground a cause of action. It is the latter connection which is conspicuously missing in this case. The question of aggressive commercial practices, which the second point refers to, will be considered below along with the threat of enforcement proceedings. I have already stated that I agree with the trial judge that the 2007 Act has no application to the settlement of contentious litigation. The final complaint was that the conduct of Mars post the 2018 Settlement Agreement vitiated the agreement in some way. It is not clear to

me how the conduct of Mars post the Agreement or the expectation of the appellant as to how Mars would act in relation to the loan due by him in relation to Property B could ground any cause of action. The 2018 Settlement Agreement specifically excluded the 2006 loan from its terms. Therefore it did not preclude Mars from taking action in relation to the 2006 mortgage transaction. There was no evidence that any steps taken by Mars were not lawfully open to Mars. Therefore, I see no merit in this fifth point, and it does not ground a stateable cause of action against Mars. Thus, the proceedings could not be saved by an amendment based upon this allegation either.

Is it necessary for the appellant to have taken a transactional decision as a precursor to reliance on the protections of the 2007 Act?

47. In his written submissions the appellant alleged the trial judge erred in her interpretation of the 2005 Directive which, he said, applies to commercial practices whether or not there has been a transactional decision. He said that the Directive introduced a single general prohibition on those unfair commercial practices affecting or likely to distort a consumer's economic behaviour and it was not predicated upon a transactional decision having been made.

48. The 2005 Directive was transposed into Irish law by the 2007 Act and therefore it is appropriate to commence the analysis by considering the statute. Notwithstanding the fact that the Act was not in force in 2006, the appellant maintains that the Act nonetheless applies to the 2006 mortgage transaction. While I do not accept that the 2007 Act applies retrospectively to the 2006 mortgage transaction, nonetheless I will address the arguments advanced by the appellant.

49. It is not disputed that a loan secured by a mortgage is a product as defined in the 2007 Act.

50. The phrase *"transactional decision"* is defined in s.2 of the 2007 Act as meaning:

"… in relation to a consumer transaction, whether or not that transaction is completed, any decision by the consumer concerning whether, how or on what terms to do, or refrain from doing, any of the following:

…

(b) make payment in whole or in part for the product".

A consumer transaction means *inter alia* the supply of a product to a consumer which would include the offering of a loan secured by a mortgage. The definition of a transactional decision therefore includes a decision to refrain from repaying the sums due under a mortgage.

51. Section 41 prohibits unfair commercial practices. Subsection (2) provides that a commercial practice is unfair if it:

"(a) is contrary to …

(ii) the standard of skill and care that the trader may reasonably be expected to exercise in respect of consumers, and

(b) would be likely to -

(i) cause appreciable impairment of the average consumer's ability to make an informed choice in relation to the product concerned, and

(ii) <u>cause the average consumer to make a transactional decision that the average consumer would not otherwise make."</u>

(emphasis added)

52. For a commercial practice to be unfair it must satisfy both subparagraph (a) and subparagraph (b). Subparagraph (b) requires the court to assess whether the commercial practice impugned would be likely to cause the average consumer to make a transactional

decision that the average consumer would not otherwise make. The focus is upon the likelihood of making a particular transactional decision.

53. Section 42 provides that a trader shall not engage in a misleading commercial practice and s.43(2) states that a commercial practice is misleading:

> *"if it would be likely to cause the average consumer to be deceived or misled in relation to any matter set out in subsection (3) and to make a transactional decision that the average consumer would not otherwise make."*

Again the court is required to consider whether the practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

54. Section 52 prohibits a trader from engaging in an aggressive commercial practice. Section 53(1) provides that a commercial practice is aggressive if by harassment, coercion or undue influence it would be likely to -

> *(a) cause significant impairment of the average consumer's freedom of choice or conduct in relation to the product concerned, and*
>
> *(b) cause the average consumer to make a transactional decision that the average consumer would not otherwise make."*

55. Once more the focus of the court is on the likelihood of the impugned commercial practice causing the average consumer to make a transactional decision that the average consumer would not otherwise make. A similar requirement is to be found in s.45 in relation to misleading commercial practices.

56. I therefore conclude that the trial judge was correct to say that the existence of a transactional decision is essential to the engagement of any of these provisions in the 2007 Act. The sections are not concerned with hypotheticals. The plaintiff in a given case must identify a transactional decision that he or she has taken which they would not otherwise

have taken but for the impugned commercial practice. There is no cause of action if the consumer resists the allegedly unfair practice and did not take a decision which they would not otherwise have taken. It will then be for the court to consider whether the particular practice was likely to cause the average consumer to make the particular transactional decision and that the average consumer would not otherwise have made that particular transactional decision.

57. In this case the only conceivable transactional decision taken by the appellant in response to any commercial practice of Mars is his continued failure to make any repayments in respect of the mortgage secured over Property B. He ceased making those repayments after July 2013. Mars only acquired the interest in the loan and related securities in 2014. Therefore, Mars had no hand, act or part in his original transactional decision to cease repayment of the loan. It is difficult in those circumstances to understand how Mars' attempts to get him to *resume* repayments could have led him to do the opposite: to continue to withhold repayments. It is even more difficult to understand how the actions of Mars would have been likely to cause the average consumer to decide to continue not to make those repayments (his transactional decision), being a decision that the average consumer would not otherwise have made by reason of the actions of Mars. Despite considerable probing by the court on this very issue, no transactional decision is pleaded or alleged and accordingly none of the provisions of the 2007 Act relied upon by the appellant are of any avail.

58. Furthermore, the threat of enforcement proceedings can only amount to aggressive commercial practices if Mars has no legal basis for taking such action or initiating such proceedings (see s.53(3)(e)(i)). As the appellant was clearly in default in his repayments, Mars was entitled to threaten to institute enforcement proceedings under the 2006 loan agreement and mortgage and so the threat of such enforcement proceedings could not

constitute an aggressive commercial practice within the meaning of ss.52 and 53 of the Act of 2007.

59. In all the circumstances, it is not necessary to analyse all of the relevant statutory provisions at all as the trial judge was correct to conclude that the provisions of the 2007 Act require the aggrieved consumer to identify a transactional decision which they took and which they would not otherwise have taken and that the impugned practice was likely to cause the average consumer to make a transactional decision which the average consumer would not otherwise make. This the appellant has failed to do, so that is the end of all of his claims based upon alleged breaches of the 2007 Act.

Breaches of the Consumer Protection Code

60. The appellant also contended that he had pleaded a stateable claim against Mars for breaches of the Consumer Protection Code on the basis that Mars "*purports to adhere*" to that code. He accepted that the code was not actionable *per se* but asserted that because Mars adhered to the code and was obliged by the provisions of s.117 of the Central Bank Act 1989 to comply with the provisions of the code, it followed that breaches of the code were actionable, albeit indirectly, relying on what he stated was the "*interplay between the provisions of the [2005 Directive] and purported adherence to codes of conduct*". He did not expand upon this submission or explain what precisely was intended by it and advanced no argument which would allow this court to conclude that he had a cause of action against Mars for alleged breaches of the Consumer Protection Code, notwithstanding the fact that his alleged claims of breaches of the provisions of the 2007 Act and 2005 Directive were bound to fail. In those circumstances the additional references to alleged breaches of the Consumer Protection Code added nothing to his three proceedings against Mars.

A claim for damages pursuant to s.74 of the 2007 Act

61. Section 74 of the 2007 Act confers a right of action for damages on consumers against traders in the following terms:

> *"(2) A consumer who is aggrieved by a prohibited act or practice shall have a right of action for relief by way of damages, including exemplary damages, against the following:*
>
> *(a) any trader who commits or engages in the prohibited act or practice;*
>
> *(b) if such trader is a body corporate, any director, manager, secretary or other officer of the trader, or a person who purported to act in any such capacity, who authorised or consented to the doing of the act or the engaging in of the practice;*
>
> *...*
>
> *(5) Where in an action under this section it is proved that the act or practice complained of was done or engaged in by a body corporate it shall be presumed, until the contrary is proved, that each (if any) director of the body and person employed by it whose duties include making decisions that, to a significant extent, could have affected the management of the body, and any other person who purported to act in any such capacity at the material time, consented to the doing of that act or the engaging in of that practice."*

62. The basis for a claim for damages under s.74 is that a consumer is aggrieved by a prohibited act or practice. It is therefore incumbent on a plaintiff to plead the particulars of the impugned act or practice. For the reasons set out above, the appellant has clearly failed to do so in any of the three proceedings. That alone suffices to conclude that no stateable cause of action for damages under s.74 has been pleaded and therefore the claim should be dismissed as one that is bound to fail (on the basis that the appellant has failed to suggest any amendment which could otherwise save proceedings which are bound to fail).

The personal respondents and s.74

63. In addition to this essential plea, if the claim is against a director, manager, secretary or other officer of the trader, the plaintiff must plead that the director, manager, secretary or other officer either authorised the specific prohibited act or practice which caused the consumer to enter into a transactional decision that he would not otherwise have made or that the director, manager, secretary or other officer consented to the doing of the act or the engaging in of the practice complained of. The pleading must relate facts which the plaintiff says substantiates either that the individual defendant authorised or that they consented to the impugned act or practice.

64. Subsection (5) introduces a rebuttable presumption. The impugned act or practice must be shown to have been done or engaged in by the body corporate. If the body corporate is the sole defendant that is the end of the pleading. If, however, individuals are also sued, then the presumption in subs. (5) comes into play. Once it is proved that the body corporate has committed the act or engaged in the practice complained of, the rebuttable presumption applies. It is a three-fold presumption. First, that each director of the body consented to the doing of the impugned act or engaging in of that practice. Second, that each person employed by the body whose duties included making decisions that, to a significant extent, could have affected the management of the body, consented to the doing of that act or the engaging in of that practice. Thus, in relation to a person who is not a director, the presumption will only apply if the plaintiff can also show that their duties had the scope identified and that the decisions they were authorised to make could have affected the management of the body to a significant extent. It follows that if a case is brought against a person employed by the body corporate (but not a director) these matters must be pleaded with particularity by the plaintiff.

65. The third circumstances where the rebuttable presumption applies is to any other person who purported to act in *"any such capacity at the material time"* in which case they should be presumed to have consented to the doing of the impugned act or the engaging in of the impugned practice. The "capacity" could refer to that of a director of the body corporate or to a person employed who had the requisite duties. Again, it will be necessary for a plaintiff to plead this case with particularity in order to engage the provisions of subsection (5). It is also worth observing that a *"person employed"* within the meaning of subs. (5) would not necessarily be a manager, secretary or other officer of the trader within the meaning of subs. (2)(b) and it is only those persons who come within s. 74(2)(b) against whom a consumer has a right of action for damages.

66. As regards the ten personal respondents sued in the third proceedings, they are sued either as the servant and/or agent or as the servant and/or agent and/or officer of Mars or of Mars Capital Finance Ireland DAC ("Mars Capital Finance"). None is sued as a director of either Mars or Mars Capital Finance. Section 74(2)(b) does not give the appellant a cause of action against employees or servants or agents of the first or second named respondent. While para. 25 of the statement of claim in the third proceedings pleads that the appellant holds each of the *"said directors, officers, employees, servants and/or agents personally liable pursuant to s. 74(2)"* of the Act of 2007, he has not sued any of them as a director, manager, secretary or other officer of either Mars or Mars Capital Finance. This was pointed out by the trial judge in her judgment but the appellant has not sought to mend his hand and in particular has not identified the basis upon which he sues *any* of the ten named personal respondents. In fact it is remarkable that the statement of claim only refers to three of the named personal respondents, Mr. Watson, Mr. Maher and Mr. Sloane. No case at all was advanced against the others. I cannot improve upon the trial judge's succinct

rejection of the appellant's claim against the personal respondents as disclosing no reasonable cause of action. At paras. 111 and 112 of her judgment she states:

> *"111. I would add that, even though it is not specifically pleaded in this part of the statement of claim, s. 74(2) of the 2007 Act does not provide for any cause of action against employees. Instead, it provides for individual liability on the part of directors, managers, secretaries, or officers of bodies corporate (but not their employees) for any "prohibited act or practice", as defined in s. 67 (but excluding those set out in s. 74(1)). The plaintiff does not, anywhere in the statement of claim, identify any material facts which would ground a claim against the Personal Defendants. They are sued in their capacity as employees, against whom no cause of action arises, and the plaintiff suggests, but without positively asserting, that they may be officers of Mars Capital. In my view, this is insufficient to plead a cause of action against an individual.*
>
> *112. Even if I am in wrong in that, no specific breach which would allow any of the Personal Defendants to know the essentials of what is claimed against them is set out in the statement of claim. There are copious, very generalised pleas of breaches of many provisions of the 2007 Act which may, depending on the applicable facts, be actionable as a matter of law. However, no case against these individuals is identified."*

67. The appellant's claim for damages pursuant to s.74 of the 2007 Act is bound to fail because he has failed to identify a stateable claim that the relevant body corporate (Mars or Mars Capital Finance) has engaged in any of the acts or practices prohibited under the Act. Every such commercial practice or act must be related to a transactional decision taken by the appellant as I have discussed above, and the appellant has conspicuously failed to identify any in this regard. Further, the case against the personal respondents is completely

unpleaded and truly amounts to an abuse of process in all of the circumstances. As such, in my judgment, the trial judge was correct to hold that the third proceedings also failed to disclose a cause of action and should be struck out pursuant to O.19, r.28 (other than the claim in relation to what was described as maladministration of the appellant's loan account, relating to the overcharging of interest).

Paragraphs pleading maladministration of the appellant's loan accounts

68. The appellant separately alleged that the trial judge erred in identifying the paragraphs in his statement of claim in the third proceedings relating to alleged maladministration (overcharging of interest by Mars' predecessor in title) of his loan accounts. He says that in addition to the specific paragraphs which were permitted to continue, Stack J. ought to have permitted him to rely upon part of para. 70 of the statement of claim as the particular subparagraphs he wishes to retain in the proceedings referred to maladministration of the accounts. Having reviewed the judgment and the permitted pleadings and para. 70, I am satisfied that Stack J. was correct to omit this paragraph from the list of permitted paragraphs. While there is a reference to maladministration of the loan accounts in para. 70, it is not in fact part of the claim for damages for such alleged maladministration, which is set out much earlier in the statement of claim. The actual claim which has been permitted is a narrow one and the appellant has not shown that any aspect of this permitted claim has been excluded from the proceedings as authorised by the High Court. I see no reason to interfere with the decision of the trial judge on this matter.

Conclusion

69. Other than the claim which the High Court did not dismiss, the claims advanced by the appellant in these three related sets of proceedings are either hopelessly statute barred or do not disclose a cause of action known to the law or are bound to fail for the reasons set

out in the judgment of Stack J. in the High Court and this judgment. The appellant has had the opportunity to bring his core claim against INBS, IBRC or Mars and has failed to do so within the time fixed by statute for him to do so. He has offered no explanation for this failure and he cannot now be heard to complain that his right of action to the courts has been improperly denied him. His attempts to avoid the implications of his inaction by recasting his claims against Mars do not save his proceedings as he has not pleaded any stateable cause of action against Mars. He clearly has advanced no cause of action against the ten personal respondents in the third proceedings. Despite having multiple opportunities to suggest possible amendments to his proceedings which could save them from being dismissed, he has failed to suggest a single possible amendment which could have such an effect. In those circumstances I would dismiss the appeal and affirm the decision of the High Court.

70. My provisional view is that the appellant has lost all three appeals and the respondents have been wholly successful. It follows that presumptively they are entitled to the costs of the appeals against the appellant, to be adjudicated in default of agreement. If the appellant wishes to argue for a different order for costs, he should contact the office of the Court of Appeal within ten days of the delivery of this judgment to arrange for a short hearing on the question of costs. In that event, the appellant should serve written submissions limited to 1,500 words within seven days of applying for a costs hearing and the respondents may reply within seven days of receiving the appellant's submissions, also limited to 1,500 words. If, following a hearing, the court proceeds to make an order for costs as indicated, the party who sought the costs hearing risks incurring the additional costs of such a hearing.

71. Pilkington and Butler JJ. have read this judgment in draft and authorised me to indicate their agreement with same.