Neutral Citation No: [2018] NICA 11 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC10582** *Delivered:* **09/03/18**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

GERARD THOMAS HERRON

Appellant:

-v-

BANK OF SCOTLAND PLC

Respondent:

_____

Before: Morgan LCJ and McCloskey J

_____

MCCLOSKEY J

Introduction

[1] By an originating summons dated 27 July 2012 under Order 88 of the Rules of the Court of Judicature (NI) 1980 ("the Rules"), Bank of Scotland Plc (hereinafter "*the Bank*") sought an order against Gerard Thomas Herron (hereinafter "*the Appellant*") for possession of 9 Viewfort, Dungannon, County Tyrone (the "*premises*"), a dwelling house occupied by the Appellant. By order of the Deputy Master dated 23 October 2015 the Bank was granted the relief sought. By her judgment delivered on 30 May 2017 Madam Justice McBride dismissed the ensuing appeal. The case comes before this Court in this way.

[2] While it has been assumed that the Appellant's recourse to this Court takes the form of an application for leave to appeal, it is not clear why this is so. The relevant statutory provision is section 35 of the Judicature (NI) Act 1978. This provides, in part:

> *"35. - (1) Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court appeals from any judgment or order of the High Court or a judge thereof.*

(2) No appeal to the Court of Appeal shall lie-

…

(g) without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court, except in the following cases namely:-

[NIL APPLICABLE]

(4) Subject to subsection (3), any doubt which may arise as to what orders or judgments are final and what are interlocutory shall be determined by the Court of Appeal.

…"

No special provision is made for proceedings under Order 88 of the Rules. Moreover there is no apparent reason in principle why a possession order should be categorised interlocutory. In Valentine, Civil Proceedings in the Supreme Court, it is stated at paragraph 11.00:

> "*An order is only final if made on an application which must determine the action however it is decided.*"

[3] There is no obvious reason why this principle, the formulation whereof is uncontroversial, should not apply to Order 88 proceedings. Hitherto there appears to have been a widely held belief, untested by judicial decision, in this jurisdiction that a challenge of the present kind takes the form of an application for leave to appeal rather than a substantive appeal. This might be attributable to the interlocutory classification of the kindred case of proceedings to enforce a money judgment by an order for sale of a security. We consider the aforementioned belief to be incorrect. We shall, therefore, treat this as a substantive appeal.

Judgment of McBride J

[4] The appeal before the Judge was conducted by the mechanism of a re-hearing. The Appellant was self – representing, assisted by a "McKenzie" friend. The Bank was represented by solicitor and counsel. The Judge considered a mixture of affidavit and sworn *viva voce* evidence. She condensed the Appellant's somewhat prolix grounds of appeal to the following:

(a) Procedural irregularities in the proceedings before the Deputy Master.

(b) Insufficient evidence to support the claim.

(c) Lack of standing to bring the claim.

Having done so, the Judge continued:

> "*In addition to the grounds set out in the Notice of Appeal, Mr Herron has now raised an additional ground in his most recent affidavit filed on 20 March 2017 namely that the agreement was a secured credit agreement and in accordance with the EU Directive 85/577/EC he is entitled to and has cancelled the agreement.*"

[5] Arising out of this extract from the judgment it is appropriate to highlight certain dates and data at this stage. The hearing before the Judge was conducted on a total of three dates: 21 and 22 November 2016 and 21 March 2017. The Appellant had sworn a total of 13 substantive affidavits and certain further affidavits of a procedural nature, linked mainly to a series of interlocutory applications. The Bank had closed its case at the stage when the Appellant sought to introduce the aforementioned new ground of appeal via yet another affidavit. The Judge addresses this in the following passage:

> "*After the Bank closed its case, Mr Herron sought to file additional affidavit evidence ….. which raised new points not made at the lower court or in his appeal notice. In the exercise of my discretion I granted* [him] *leave to file this additional evidence. After the hearing Mr Herron then supplemented his evidence by further correspondence to the Bank and court setting out details of a clerical error made in a Notice of Cancellation he had sent to the Bank.*"

In another passage one learns that the "Notice of Cancellation" upon which the Appellant was relying was dated 16 March 2017. Of this the Judge says the following:

> "*In the Notice of Cancellation Mr Herron states that he does not have funds to 'resolve the inequity' and further states the most he can reasonably afford to pay based on his current income is £200 per calendar month.*"

This was followed by a notification by the Appellant to the Bank on 27 March 2017 of "*a clerical error*" in the Notice dated 16 March 2017.

[6] On careful analysis the following findings and conclusions can be distilled from the judgment of McBride J:

(i) The procedural irregularities ground was of no moment as the appeal was proceeding *de novo*.

(ii) The Appellant "*did enter into and did sign the mortgage deed on 28 March 2008*".

(iii) The mortgage "*…. is a valid agreement and he is therefore the person responsible for the mortgage debt and is subject to the terms of the mortgage*".

(iv) There were certain identifiable errors in the evidence on behalf of the Bank: in particular, contrary to certain averments, a charge had been registered against the premises, there was a miscalculation in the arrears in the Bank's grounding affidavit and the loan had been securitised. The Judge expressed herself satisfied that the errors in the Bank's affidavits (a) were made innocently and (b) were not material to the issues to be determined.

(v) The Appellant was "*… in default of the terms of the mortgage agreement by reason of his default in payment of principal and instalments when due*". The Judge considered this finding fortified by what is recorded in [5] above.

(vi) It was not for the Court to resolve any dispute about the actual amount due and owing: the Court was concerned only with the issue of whether the Bank was entitled to an order for possession.

(vii) The charge registered against the premises on 10 May 2010 did not prejudice the Bank's entitlement to possession, as its charge being dated 27 April 2009 ranked first in priority.

(viii) While the Bank was not a party to the mortgage deed, as a matter of law all rights and liabilities there under transferred to it, on 17 September 2007, by virtue of the HBOS Group Reorganisation Act 2006.

(ix) The Bank remained the legal owner of the charge at all times: the arrangement which it made in order to securitise the charge was an equitable assignment only.

(x) It followed that the Bank was entitled to register the charge in the Land Registry. Registration was conclusive evidence that the Bank was the registered owner thereof.

[7] Finally, the Judge dismissed the Appellant's ground of appeal of late advent based on EU Directive 87/577/ECC (the "*1987 Directive*") in the following terms:

> "*I find this submission to be completely devoid of any merit because, firstly, the deed of mortgage does not fall within the scope of the EU Directive, which applies to*

> *contracts entered into 'away from the trader's premises'. This deed was entered into at business premises and therefore Mr Herron cannot avail of the provisions in the Directive. Secondly, it makes no sense in law or commerce that a person can take out a loan and then unilaterally cancel the agreement without repaying the loan. If such a right existed it would wreak havoc with the established patterns of commercial lending and it would prevent creditors lending money with consequent disastrous effect on business and commerce.*"

McBride J then expressed her omnibus conclusion in the following terms:

> "*The evidence in this case is overwhelming that the Bank advanced substantial monies to Mr Herron, secured by way of a charge on the premises. Under the mortgage agreement Mr Herron agreed to pay instalments when due and owing. Mr Herron did so until the summer of 2011. Since that time he has defaulted. Although he has made a number of sporadic payments, no payments have been made since August 2014. From that date Mr Herron has lived in the premises effectively rent free.*"

Having referred to certain figures the Judge then commented that the premises appeared to be in negative equity.

The mortgage evidentiary materials

[8] The documentary evidence relating to the mortgage arrangement upon which the Bank's application for possession was based are of self-evidently elevated importance. We turn to examine them at this juncture.

[9] Chronologically, the first documentary evidence of significance is the completed loan application form. This has the following noteworthy features:

(a) Mr Herron's name appears repeatedly throughout the document.

(b) The "*estimated completion date*" viz the date upon which the Appellant was hoping to secure the loan was 29 June 2007.

(c) The Appellant was applying to remortgage the premises.

(d) His "*mortgage advisor*" was identified as a named person of the company "Wisemove Mortgages", which had a specified financial services register number.

(e) The application form was clearly completed by the broker.

(f) The broker's fee for the services provided was specified as £300.

(g) The Appellant had been residing at the premises from 01 May 2006.

(h) The Appellant was applying for a loan of £320,000 for the threefold purpose of discharging his extant mortgage balance (£123,000), satisfying a divorce settlement (£67,000) and "debt consolidation" (£130,000).

(i) The loan term for which he was applying was one of 10 years and the "loan repayment type" sought was "*interest only*".

(j) The specified interest rate was 6.19%.

(k) The name and address of the Appellant's solicitor (Mr Annett) were specified, as were details of his bank and credit card.

[10] By letter dated 20 June 2007 the original mortgagee, Birmingham Midshires Plc, informed the Appellant that his application had been approved. This letter attached the offer of advance and the mortgagee's standard conditions. Within these materials it was recorded that the relevant mortgage broker had advised the Appellant of the suitability of this mortgage and recommended that the Appellant, if desired, contact this party for further advice. The Appellant was also informed of the following matters: the total amount to be repaid, namely £559,527.91; the imposition of a fixed rate of interest of 6.19% until 01 July 2009; a variable interest rate thereafter, being 2.19% above Bank of England base rate (the then prevailing rate being 7.69%); and that repayment of the loan would entail £1.74 for every £1 borrowed.

[11] Chronologically, the next significant documentary evidence is the mortgage deed. This is dated 28 March 2008 and identifies the Appellant, the mortgagee and the premises. The signature which the Judge found to be that of the Appellant was witnessed by one Mr Annett, a solicitor in the firm specified in the completed mortgage application form. The Land Registry evidence confirms registration of the Bank's charge on 27 April 2009, followed by the registration of a "matrimonial charge", on 10 May 2010, under the Family Homes and Domestic Violence (NI) Order 1998.

The proceedings before this Court

[12] In his formal notice to this Court, the Appellant seeks to challenge the following aspects of the judgment of McBride J:

(i) The rejection of the Appellant's case under the 1987 Directive and, specifically, the Judge's finding that the mortgage deed was entered into at business premises.

(ii) The Judge's finding that the Bank had sustained a loss as a result of the Appellant's failure to repay the stipulated instalments.

(iii) The Judge's assessment of the Bank's grounding affidavit.

(iv) The Judge's failure to consider the fairness of the terms of the mortgage agreement under EU Directive 93/13/EEC (the "*1993 Directive*").

(v) Incompatibility with the decisions in Swift First Limited v McCourt [2012] NICH 33 and Santander (UK) v Carlin and Hughes [2013] NICH 14.

[13] For the record, the Appellant presented his case through the medium of both oral and written submissions. He received liberal assistance from his "McKenzie" friend throughout. On the hearing date, the Court gave the Appellant the facility of two generous recesses to enable him to deal with certain questions raised. Finally, the Appellant was given the further facility of providing supplementary submissions to the Court following the hearing.

[14] Based on our distillation of the Appellant's central grounds of appeal in [12] above, we shall address each issue in turn.

The first ground of appeal: Directive 85/577/EEC ("the 1985 Directive")

[15] The expressed purpose of the 1985 Directive is "*to protect the consumer in respect of contracts negotiated away from business premises*". The mischiefs identified in the recitals are of note:

> *"Whereas the special feature of contracts concluded away from the business premises of the trader is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not except; whereas the consumer is often unable to compare the quality and price of the offer with other offers; whereas this surprise element generally exists not only in contracts made at the doorstep but also in other forms of contract concluded by the trader away from his business premises;"*

The solution proposed by the Directive was to confer on the consumer a "cooling off" period of at least 7 days "*… in order to enable him to assess the obligations arising under the contract*".

[16] *This Directive shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded:*

> *"during an excursion organized by the trader away from his business premises, or during a visit by a trader.*
>
> *(i) to the consumer's home or to that of another consumer,*
>
> *(ii) to the consumer's place of work;*
>
> *Where the visit does not take place at the express request of the customer."*

By Article 3(2):

> *"This Directive shall not apply to:*
>
> *(a) contracts for the construction sale and rental of immovable property or contracts concerning other rights relating to immovable property."*

[17] The transposing measure of domestic law is the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 ("the 1987 Regulations"). By Regulation 2(1):

> *"' land mortgage' includes any security charged on land and in relation to Scotland includes any heritable security"*

By Regulation 3(1):

> *"These Regulations apply to a contract, other than an excepted contract, for the supply by a trader of goods or services to a consumer which is made –*
>
> *(a) during an unsolicited visit by a trader–*
>
> *(i) to the consumer's home or to the home of another person; or*
>
> *(ii) to the consumer's place of work;*
>
> *(b) during a visit by a trader as mentioned in paragraph (a)(i) or (ii) above at the express request of the consumer where the goods or services to which the contract relates are other than those concerning which the consumer requested the visit of the trader, provided that when the visit was requested the consumer did not know, or could not*

reasonably have known, that the supply of those other goods or services formed part of the trader's business activities;

(c) after an offer was made by the consumer in respect of the supply by a trader of the goods or services in the circumstances mentioned in paragraph (a) or (b) above or (d) below; or

(d) during an excursion organised by the trader away from premises on which he is carrying on any business (whether on a permanent or temporary basis)."

Regulation 3(2)(a)(i) provides:

"*For the purposes of this regulation an excepted contract means*

(a) any contract–

(i) for the sale or other disposition of land, or for a lease or land mortgage;"

[Emphasis added.]

In passing, the current measure of domestic law, namely the Cancellation of Contracts made in a Customer's Home or Place of Work Regulation 2008, has no application in the present case given its operative date of 01 October 2008.

[18] We consider the Appellant's first ground of appeal doomed to fail as the mortgage deed upon which the Bank's application for repossession was founded is, plainly, a contract "*relating to immovable property*", within the meaning of Article 2(a) of the 1985 Directive and a "*land mortgage*" within the meaning and scope of Regulations 2 and 3 of the 1987 Regulations.

[19] While this assessment defeats the Appellant's first ground *in limine*, we shall nonetheless address briefly its factual dimension. The vast swathes of evidence generated in the appeal proceedings before the Judge consisted mainly of an unprecedented volume of affidavits and oral evidence adduced in the course of a three day hearing. The materials before this Court include full transcripts of the proceedings on each of the three days. A laborious forensic exercise yields the outcome that there is no identifiable evidence expressly underpinning the Judge's finding that the mortgage deed was executed "*at business premises*".

[20] However, on the other hand, there was no admissible evidence before McBride J, or this Court, that the mortgage deed was executed at any of the "prohibited locations" viz the Appellant's home, his place of work or the home of another consumer during a visit uninvited by him. In [8] – [11] above we have

analysed in a little detail the documentary evidence bearing on the events preceding and surrounding the execution of the mortgage deed. We have also read with some care those parts of the transcribed evidence touching in any way on this issue.

[21] In so doing we have taken cognisance of the Appellant's post-hearing submission which highlights a particular segment of the evidence in the transcript of the third day of trial. In the relevant exchanges the Judge noted that Mr Annett – see [9](k) above – was acting as an agent of the Bank. This prompted the Appellant to assert that, contrary to what appears on the face of the document, Mr Annett did not witness the Appellant signing the mortgage deed. We accept the further submission of Mr Gibson (of counsel, representing the Bank) that this evidence does not even begin to suggest that the mortgage deed was executed at any of the prohibited locations. We note further that the Appellant's aforementioned assertion ventured considerably beyond what was stated in his affidavit evidence, namely that he could not recall whether Mr Annett had witnessed his signature.

[22] Giving effect to our analysis above, we are satisfied that there was sufficient evidence upon which the Judge could unassailably find by inference that the mortgage deed was executed at none of the prohibited locations. This ground of appeal, therefore, fails on this further basis.

The second ground of appeal: The Judge's improper finding that the Bank had sustained a loss

[23] This ground barely qualifies for mention. We can identify no semblance of misdirection in law or in fact in the Judge's unremarkable and innocuous statement in her judgment that the Appellant's failure to repay the instalments required by the mortgage arrangement gave rise to a loss on the part of the Bank. We elaborate on this in our assessment of the fifth (and final) ground of appeal, *infra*.

The third ground of appeal: the Judge's inadequate assessment of the Bank's affidavit evidence

[24] This is in essence a challenge to those aspects of the judgment of McBride J digested in [6](iv) above. While it may be subsumed also within the fifth ground of appeal we shall, nonetheless, treat it as a free standing challenge. In this context we remind ourselves of what this Court stated in Heaney v McEvoy [2018] NICA 4:

> *"[17] Generally an appeal is by way of rehearing. The rehearing is conducted by way of review of the trial, including any documentary evidence, and the trial testimony is not re-heard. In most appeals the hearing consists entirely of submissions by the parties and questions put to the parties by the judges. New evidence is not generally admissible unless it can be shown that it is relevant and that the evidence could not with reasonable diligence have been brought before the original trial.*

[18] The Court of Appeal is entitled to review findings of fact as well as of law but the burden of proof is on the appellant to show that the trial judge's decision of fact is wrong. On a review of findings made by a judge at first instance, the rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The first instance hearing on the merits should be the main event rather than a try-out on the road to an appeal.

[19] Even where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and contemporaneous documents without oral testimony, the first instance judgment provides a template and the assessment of the factual issues by an appellate court can be a very different exercise. Impressions formed by a judge approaching the matter for the first time may be more reliable than the concentration on the appellate challenge to factual findings. Reticence on the part of the appellate court, although perhaps not as strong where no oral evidence has been given, remains cogent (see DB v Chief Constable [2017] UKSC 7).

[20] Those principles are clearly of material significance in this case. The trial judge had the advantage of hearing the oral evidence of the appellants on the Tomlin Order issue. He considered the appellants to be both unreliable historians eager to mould the facts to their objective as opposed to telling the unvarnished truth. He gave examples in respect of the Order that they said the Court of Appeal had made and the alleged admission by their former solicitor that he was guilty of misrepresentation. There is no indication that the judge did not take all the circumstances surrounding the evidence into account, that he misapprehended the evidence or that he had drawn an inference which there was no evidence to support. In light of the judge's conclusions we see no basis upon which we could interfere with his refusal to set aside the Tomlin Order."

[25] It is clear from her judgment that McBride J evaluated the Bank's affidavit evidence critically. The Judge did not shrink from highlighting certain disparities and errors. It fell to the Judge to consider these in the context of the entirety of the evidence. We are satisfied that the Judge dealt with this issue in a scrupulous and balanced way. Furthermore, although not articulated in these precise terms, the Judge was evidently satisfied that the errors, unacceptable of course, were genuine:

and the contrary case was not made. We consider it clear, on any showing, that the errors, considered in the full evidential context, were of little moment and, most important, they do not either individually or collectively call into question the Judge's principal findings and conclusions.

[26] It follows that the Appellant's reliance on Heininger v Bayerisch Vereinsbangag (Case C-481/99) avails him nothing. There the Sixth Chamber of the CJEU resolved the apparent tension between the exemption provisions of the 1985 Directive and the corresponding exemption provisions of the Consumer Credit Directive (Directive EEC87/102, Article 2). The Court acknowledged that the 1985 Directive expressly and exhaustively listed a number of contracts to which it did not apply, including contracts concerning rights relating to immovable property. The Court reasoned, however, that derogations from Community rules on the protection of consumers had to be interpreted strictly and the kind of secured credit agreement in question was not to be considered a right relating to immovable property since the subject matter of the agreement was the grant of funds which was linked to a corresponding obligation for repayment together with interest. Thus it did not matter that the agreement was secured by a charge on immovable property. The decision of the Court is encapsulated at [39]:

> "*Neither the preamble to nor the provisions of the Consumer Credit Directive contain anything to show that the Community legislature intended, in adopting it, to limit the scope of the Doorstep Selling Directive in order to exclude secured-credit agreements from the specific protection provided by that Directive.*"

[27] Stated succinctly, in the absence of any finding by the trial judge that the mortgage deed was executed at any of the prohibited locations and in light of our assessment that this did not entail any error of law on the part of the Judge, the decision in Heininger does not advance the Appellant's case. It follows also that the Appellant's purported cancellation of what he described in his formal Notice as "*our agreement dated 20 June 2007*", on 16 March 2017, was of no legal effect as he had not acquired any right to cancel under Regulation 4 of the 1987 Regulations.

[28] Giving effect to the principles rehearsed above, we consider this aspect of the judgment of McBride J unassailable, disclosing as it does no arguable material error in fact or in law.

Ground Four: Unfair Contract Terms

[29] The subject matter of Council Directive 93/13/EEC is "*unfair terms in consumer contracts*". The aims and mischiefs rehearsed in the recitals of this measure include safeguarding the citizen "*in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own …*"; achieving more effective protection of the consumer; the imperative that

contracts are formulated in "*plain, intelligible language*"; the "equalisation" of both written and oral contracts; and, generally, the progressive establishment of the internal market.

[30] Bearing in mind the present context the most salient provisions of the 1993 Directive are these:

Article 3

> *"A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*
>
> *2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.*
>
> *The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.*
>
> *Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him."*

Article 4

> *"Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.*
>
> *2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language."*

Article 5

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

[31] The relevant domestic law transposing measure is the Unfair Terms in Consumer Contracts Regulations 1999 (the "1999 Regulations") as amended by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001. The 1999 Regulations came into operation on 01 October 1999 and, therefore, applied to the contractual arrangements underlying these proceedings. The essential scheme of this measure is contained in Regulations 5 – 8 inclusive:

> "***Unfair terms***
>
> *5(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*
>
> *(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.*
>
> *(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.*
>
> *(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.*
>
> *(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.*
>
> ***Assessment of Unfair Terms***
>
> *6(1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract*

was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

(2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate–

(a) to the definition of the main subject matter of the contract, or

(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

Written Contracts

7(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12.

Effect of Unfair Term

8(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term. "

[32] The legal framework has one further ingredient in the specific case of mortgages, namely the Financial Services and Markets Act 2000 and the Mortgage Conduct of Business Rules, a non-statutory best practice guide, These measures are to be considered in conjunction with the 1999 Regulations, including Schedule 2 thereto which contains an indicative and non-exhaustive list of terms which may be regarded as unfair.

[33] We take judicial notice of the reality that the terms of the majority of mortgage deeds will attract the appellation of "*not individually negotiated*", thereby engaging Regulation 5 of the 1999 Regulations and the "*significant imbalance …. to the detriment of the consumer*" test. Pausing at this juncture, it is common case that the Appellant raised no issue concerning either the 1993 Directive of the 1999 Regulations at the trial. The Appellant did not make the case at first instance that any of the terms of the mortgage contravened the fairness provisions of the 1999

Regulations and, before this Court, the issue has arisen in a vacuum. Making the assumption – a generous one – that the trial judge was nonetheless required to proactively give consideration to this issue, we consider that it has no substance. The Appellant has not identified any provision of the mortgage deed which could arguably be deemed unfair under the 1999 Regulations. In making this assessment we have given particular consideration to the interest provisions, noted in [10] above and find nothing untoward in the same.

The Fifth Ground of Appeal

[34] The essence of this ground is that the judgment of McBride J is not "*consistent with the directions of*" the decisions in Swift First Limited v McCourt [2012] NI CH 33 and Santander (UK) Plc v Carlin and Hughes [2013] NI CH 14. In Swift First [2012] NICH 33, a claim for possession of premises on foot of a charge, Horner J stated at [42]:

> *"The Defendant's central complaint has been that the Plaintiff did not have legal ownership (or any ownership) of the Charge and/or of the loan. This is a claim which is being increasingly made primarily by personal litigants where a mortgage or charge, particularly a sub-prime mortgage or charge, is in arrears. Investigation of this issue can result in a disproportionate expenditure of both time and money. Accordingly, when considering the conduct of any further claims where the central issue is whether or not the financial institution has the locus standi to obtain an Order for Possession, it is suggested the following course should be adopted after lists of documents have been exchanged by both sides. Firstly, there should be an inspection of those documents in the list of each party. Secondly, the solicitor acting for the financial institution should warn the proposed deponent on behalf of the financial institution of the serious consequences he or she bears personally, and the consequences for his or her employer, if he or she swears an affidavit that is false in any respect. Thirdly, the solicitor should confirm to the court that the deponent has been so advised before the affidavit is sworn. Fourthly, the deponent on behalf of the financial institution should then swear the affidavit dealing with the plaintiff's title to seek an Order for Possession."*

[35] In Santander (UK) Plc, Deeny J endorsed this approach unreservedly, at [7]. The Judge was highly critical of the failure on the part of the lender to file affidavits according with the Swift Advances rubric. The grounding affidavit had, rather, been sworn by the lender's solicitor. It was common case that this contained an egregious error, in the form of a misrepresentation that the mortgage had not been assigned.

This emerged only at the stage of the appeal. In addition, the lender had failed to comply with the Court's direction to swear an affidavit re-joining to the affidavits of the two Appellants. The combination of these three misdemeanours impelled the Judge to allow the appeal, reversing the Master's Order for possession.

[36] In his formulation of this ground, the Appellant makes express reference to his affidavit sworn on 22 May 2015. This is a rejoinder to the affidavit of Catherine Yeates, a solicitor in the firm representing the Bank, sworn in response to the Master's Order to provide the Appellant with specific discovery on oath of all documents relating to the "appointment" of the firm of solicitors in which Mr Annett was employed. The affidavit of Ms Yeates, brief and formulaic in nature, exhibits two documents, namely the offer of mortgage to the Appellant and a letter dated 20 June 2007 from an agent of the Bank's predecessor to the solicitors in question acknowledging that the firm represented the Appellant in the matter and requesting that the firm act for the mortgagee also.

[37] In paragraph 11(c) of his rejoinder affidavit, the Appellant adverts to another affidavit sworn on behalf of the Bank, that of Cahal Maurice Carvill of 27 March 2015. Mr Carvill was the deponent of the original grounding affidavit (of 29 October 2012). He swore this affidavit "*further to*" his grounding affidavit. The affidavit explains, in brief and simple terms, the small difference (circa £100) between the arrears figure prevailing on the date of issue of the originating summons and that prevailing on the date of service thereof, 14 days later. The Appellant, rejoining to Mr Carvill's second affidavit, avers, *inter alia*:

> "*Further, Cahal Maurice Carvill does not indicate that he has been informed of the serious consequences that he bears personally, and the consequences to his employer, if he swears an affidavit that is false in any respect ….*
>
> *His testimony therefore appears to be inconsistent with Court guidance on the swearing of affidavits in actions for possession, as laid out in [Swift Advances Plc and Santander (UK) Plc]…..*"

[38] Having examined the dense documentation in the voluminous trial bundles assembled for this application for permission to appeal, we trace the "Swift First" issue in the following way:

(i) In his order dated 23 July 2014 the Chancery Master ordered that the Bank -

> "*… do within 28 days from this day file and serve an affidavit by a senior officer in accordance with the procedure set forth in paragraph 42 of ……. Swift Advances Plc v McCourt exhibiting with full particulars the securitisation relation to*

> *the Plaintiff's charge, exhibiting copies of all relevant documentation and ……"*

(ii) By an affidavit sworn on 02 October 2014 Ian Stewart, the "Head of Secured Mortgages" of the Lloyds Banking Group, purported to comply with the Master's Order. He averred in [4]:

> "*I have reviewed the decision of Swift v McCourt which I have marked A in the bundle ……*
>
> *Whilst not accepting that the Plaintiff does not have title, or that the Defendant has done anything which satisfies the burden of proof in this regard, I beg leave to refer to … [*various specified documents*]*"

Notably, the judgment in Swift First is exhibited to Mr Stewart's affidavit. We shall say much about this affidavit *infra*.

(iii) The Appellant's response was speedy: in one of his many affidavits, this one sworn on 31 October 2014, he highlighted that Mr Stewart's affidavit was not in compliance with the Master's Order.

(iv) Next one Catherine Yeates, a solicitor in the firm representing the Bank, swore an affidavit (on 09 March 2015) in purported compliance with the Master's further Order requiring discovery on oath of all documents bearing on the Bank's appointment of Hagan solicitors in the transaction under scrutiny.

(v) This was followed by the second affidavit of Mr Carvill, a solicitor employed in the firm previously representing the Bank and the deponent of the affidavit grounding the possession proceedings, correcting some of the figures specified in his first affidavit.

(vi) In a further affidavit sworn on 22 May 2015 the Appellant, *inter alia*, protested that the affidavit of Ms Yeates was not in conformity with the Swift First requirements.

(vii) In yet another affidavit, sworn on 26 June 2015, the Appellant observed that Mr Stewart's aforementioned affidavit was similarly non-compliant with Swift First.

(viii) Next, having initiated his appeal against the Deputy Master's Order for possession, the Appellant highlighted this issue once again in an affidavit sworn on 04 December 2015.

(ix) The Appellant did likewise in yet another affidavit sworn on 16 September 2016.

(x) The riposte to the latter took the form of a skeleton argument composed by counsel for the Bank, dated 22 September 2016, containing the passage "*…. as has been pointed out to the Appellant on numerous occasions his remedy was to enforce the order if he did not believe it had not been complied with – he did not.*" The reference here is to the Order of the Chancery Master dated 23 July 2014 noted at (i) above.

[39] This ground of appeal is formulated clearly and expressly in [7] of the Appellant's Notice dated 20 June 2017. It was not addressed adequately in either of counsel's skeleton arguments, nor was it canvassed in the oral submissions of either party. This prompted the Court, when preparing its judgment, to issue a direction inviting both parties to rectify these *lacunae*.

[40] The response on behalf of the Bank notes that Mr Stewart, the person who swore the affidavit noted in [38](ii) above, gave evidence during the hearing before the Master, thereby affording an opportunity for cross-examination of which the Appellant did not avail. Second, it is observed that the decision in Swift does not have the status of either a rule of Court or a practice direction. This is followed by the submission that the requirements of Swift First were observed. It is further submitted that the issue of securitisation, to which the Master's discovery order was directed, was canvassed during the hearing before the Judge. Counsel's further submission also contains the assertion that all documents bearing on the sale and transfer of the loan were disclosed. The following omnibus submission is made:

> "*It is therefore denied that Swift v McCourt was not followed. But even if it wasn't the mischief behind the* [Swift direction] *has been satisfied. The Respondent proved its legal right to enforce the loan.*"

[41] The Appellant, in his written rejoinder, draws attention to the following matters:

(i) Part of Mr Stewart's oral evidence to the Master was that questions concerning the "origination" of mortgage loan accounts were "*outside of* [his] *own personal remit with the bank.*"

(ii) The Appellant's case has been that in the absence of records relating to the actual price at which the loan account was supposedly sold and repurchased via the securitisation process, the Bank has not demonstrated that it sustained a loss. McBride J's finding to the contrary was "*founded on a misapprehension of banking practice*".

(iii) In support of his case on this discrete issue, the Appellant was relying on an article written by Professor Richard Werner which contains the following passage:

> "*Thus it can now be said with confidence for the first time – possibly in the 5,000 years history of banking – that it has been empirically demonstrated that each individual bank creates credit and money out of nothing when it extends what is called a 'bank loan'. The bank does not loan any existing money, but instead creates new money.*"

The author's theory is based upon the suggestion that the loan is affected by crediting the borrower's account with a phantom deposit (the "credit creation theory") and not by transferring money from other accounts, internal or external. This article, it appears, is the sole foundation of the Appellant's "no loss" argument rejected by the Judge. The Appellant acknowledges that this argument did not feature either orally or in writing before the Judge and, indeed, the Professor's article was evidently not in the trial bundle.

(iv) The aforementioned established banking practice is further confirmed by a Bank of England 2014 publication which states:

> "*When a bank makes a loan to one of its customers it simply credits the customer's account with a higher deposit balance. At that instant, new money is created.*"

(v) The documents discovered by the Bank did not include "*copies or originals of executed documents in respect of the securitisation or sale of the account in question*". This, the Appellant suggests, exposes a failure to comply with the discovery order of 23 July 2014. Quite the contrary: the documents in question, he submits, "*…. were neither signed nor dated and showed evidence of having been altered*".

(vi) In particular, the documents discovered contained nothing evidencing the "*alleged repurchase or transfer back to the* [Bank] *of the specific account in question*".

[42] Having conducted the forensic analysis in [36] – [38] above, we consider that the essential ingredients of this ground of appeal are unassailably correct: none of the affidavits under scrutiny is in compliance with the decision in Swift First. Even more fundamentally, the affidavit of Mr Stewart was in breach of the Chancery Master's Order. This aberration becomes all the more striking when one considers that Mr Stewart, makes explicit reference to the Swift First decision in his affidavit in the context of responding on oath to the Appellant's request for discovery of documents and exhibits the judgment. The further submission provided on behalf of

the Bank contains no tangible reference to what is detailed in [36] – [38] above and, in truth, does not really engage with the heart of the issue, namely an incontestable failure to comply with the Master's discovery Order.

[43] While the submission of Mr Gibson on behalf of the Bank that the decision in Swift Finance does not rank as either a rule of court or a Practice Direction is technically correct, though far from attractive, it fails to grapple with the inescapable reality that the Bank failed to comply with the specific and unequivocal terms of the Master's discovery Order. The Bank has at no time addressed or attempted to explain this failure. The Court cannot view this failure as anything other than serious. The importance of discovery affidavits in this *genre* of litigation complying scrupulously with the Swift First requirements is apparent from the terms in which Horner J expressed himself, the full endorsement provided by the (then) senior Chancery Judge Deeny J in Santander and the mischief to which the Swift First mechanism is directed. No attempt was made on behalf of the Bank either at first instance or on appeal to confront these aberrations and, before this Court, until the issue was proactively raised by the panel, it was similarly neglected. This, in its totality, is manifestly unacceptable.

[44] We consider that this discrete ground of appeal should properly have been addressed by an application to this Court for permission to file further affidavit evidence engaging with it. In the circumstances of this case an explanation for the significant irregularities which occurred, coupled with any available exculpation, should have been proactively provided by affidavit in the context of an application to admit further evidence. This step was not taken either before or during the appeal hearing, nor was it pursued in response to the Court's post-hearing direction.

[45] There is a further aspect of this issue which gives cause for concern. In the proceedings before McBride J the Appellant served notice to cross examine certain of the Bank's deponents, including the aforementioned Mr Stewart. This was resisted on behalf of the Bank, relying on *inter alia* Order 38, Rule 2 of the Rules and In Re Williamson [2008] NICA 52. The Appellant also applied for a subpoena requiring Mr Stewart to attend the trial to testify. The centrepiece of these applications consisted of asserted inadequacies and irregularities in the Bank's affidavit evidence, in particular the affidavit of Mr Stewart and the averments therein relating to the suggested assignment by the Bank of the subject mortgage loan to Dakota Financing on 16 December 2018 and the subsequent reassignment to the Bank on 14 June 2011. The first part of this transaction was affected by a mortgage sale agreement. The Appellant sought to contrast these averments with those of another Bank's deponents, William Smith, in an earlier affidavit, which contained the following:

> "*Legal title to the charge the subject of this action remained at all times vested in Halifax Plc until 17 September 2007 …..*"

This averment was the subject of certain manuscript alterations and interlineations which (a) are unclear and (b) were not initialled by the solicitor before whom the affidavit was (apparently) sworn.

[46] The affidavit of Mr Stewart, which dealt mainly with the securitisation issue, *inter alia* sought to make the case that the assignment of the Appellant's mortgage loan (along with many others) to Dakota Financing was equitable only. This constitutes sworn argument on a pure question of law which should not have been included in the affidavit. Furthermore, while the deponent expressly declined to exhibit the schedule containing the personal details of all of the borrowers and secured properties concerned, we consider that his lawyers should have advised him that an edited version of the schedule to the mortgage sale agreement and the corresponding schedule to the loan repurchase notice some three years later be produced. This affidavit also contains the dubious averment:

> "*I am able to make this affidavit from facts within my knowledge, information and belief and from information provided to me by the Plaintiff.*"

[47] The deponent makes no attempt to distinguish between these two quite separate sources of knowledge. This is compounded by the quite meaningless reference to "*the Plaintiff*". Finally, this affidavit contains a single exhibit. The only document in the exhibit is the decision in Swift First. While the affidavit contains the averment "*… the documents that are relevant to the securitisation of the mortgage loans are ….*", followed by a list of eight specific documents (including the mortgage sale agreement and the loan repurchase notice), none of these documents was exhibited, quite improperly. They surfaced ultimately only mid–trial, thanks to the painstaking efforts of McBride J.

[48] Given the foregoing analysis we are bound to observe that Mr Stewart's affidavit, which was of critical importance, was most irregular and unsatisfactory.

[49] The preamble in the immediately preceding paragraphs provides the backdrop to the issue which dominated the first of the three days of the trial before McBride J. A perusal of the transcript reveals the Judge's multiple questions and concerns about the inter-related and interlocking issues of securitisation of the mortgage loan to the Appellant, whether the equitable or legal interest had been assigned and, in substance, the significant lacunae and irregularities diagnosed in our analysis above. During lengthy exchanges counsel at one stage sought to make the wholly unsustainable submission that there had been compliance with the Swift First requirements enshrined in the Master's Order for specific discovery.

[50] Careful examination of the trial transcripts confirms the following indelible fact. It was only by reason of the Judge's incisive and proactive interventions that arrangements were made for the deponent concerned, Mr Stewart, to give evidence by video link. Remarkably, resistance to this course continued on the second day of

trial until the luncheon recess. What this demonstrates, *inter alia*, is that around one day of valuable court time was wasted due to the litigation conduct of the Bank. With obvious reluctance and following dogged resistance on the part of the Bank, steps to have Mr Stewart give evidence from a distance were eventually taken. The lamentable and protracted waste of court time which preceded this must be deprecated. This waste of judicial resources has been mirrored in this Court which, unavoidably, has had to embark upon a relatively microscopic examination of the proceedings at first instance. Furthermore, it has done so without the benefit of elementary aids such as chronologies, summaries and, in particular, a properly composed core bundle, in circumstances where the bundles contain almost 2000 pages of evidence.

[51] What transpired next at the trial was that Mr Stewart gave much additional evidence via examination in chief, cross examination and judicial questioning. This exercise highlighted the signal defects and inadequacies of his affidavit. It also exposed yet another unacceptable feature of his affidavit. The witness was questioned at some length by the Judge about the swearing of his affidavit. This was doubtless stimulated by the twofold facts that (a) while the witness is based in England, the affidavit was on its face, sworn in Belfast and (b) the "signature" of the solicitor who purported to attest the affidavit is an illegible squiggle. Once again this is wholly unacceptable. Finally this exercise exposed the fact that the key securitisation documents – the mortgage sale agreement and loan repurchase notice in particular – were produced to the Court mid-trial and were unsigned, undated and unexecuted.

[52] It is the case that the issue raised by this ground of appeal has not been addressed in the judgment of McBride J. The Judge is not to be criticised for this. This was clearly a highly challenging trial. Its ingredients included in particular an unrepresented litigant, a "McKenzie" friend, large volumes of documentary evidence, a significant fracturing of the trial dates and the ventilation of all manner of issues and arguments. A perusal of the transcripts of the hearings, available to this Court, reveals the strenuous efforts made by the Judge to impose control and coherence. Furthermore, we consider that the Judge did not receive sufficient assistance and co-operation from the Bank's legal representatives.

[53] Having received the parties' further written submissions, juxtaposed with our review of the transcripts, it is now apparent from the material in its totality that the discrete issue raised by this ground of appeal barely flickered in the hearings before the Judge. This failure in our judgment must be largely attributed to the Bank's legal representatives. Since the issue was a live one, we consider that there was a duty to candidly and proactively address it. The Bank's legal representatives failed to do so. Any apprehension of professional embarrassment or judicial censure cannot begin to excuse this failure. Furthermore while, as we have observed, there was potential for at least attempting to address the failure before this Court, this has not materialised.

[54] The net result of the foregoing is that a quite unsatisfactory state of affairs, pre-eminently avoidable, has been permitted to develop.

[55] The Bank's failure to comply with the Master's Order and to address this aberration in any rectifying way either at first instance or in the course of this appeal does not *per se* invest the ground with merit. We consider that the function of the Court is to search for an issue of substance arising out of this failure. In discharging this function the Court has focused in particular on the affidavit evidence, written submissions and transcript passages bearing on this discrete issue. The rationale and purpose of the Master's Order are of self-evident importance. The specific issue to which the Order was addressed was that of "securitisation" of the charge upon which the Bank's case was based. The effect of the Order was to probe beneath the then extant affidavit evidence and documentary exhibits with a view to ascertaining whether the proofs of the Bank, on whom the onus lay, were satisfactory.

[56] "Securitisation" is a term of art in the financial world. The Court takes judicial notice that it denotes a financial practice whereby various types of contractual debt – residential mortgages and others – are pooled and their related cash flows are sold to third party investors as interest bearing securities. In this way the security holder secures the financial benefit from the payment of interest and principal by the debtor, while the financial institution concerned raises finance – in this case £4 billion in consideration of the equitable assignment of 29,5000 mortgages – which can be devoted to investments of its choice.

[57] We take particular note of how the Appellant formulates his case on this discrete issue. In espousing this ground of appeal he seeks to further his contention that the Bank failed to demonstrate that any loss had been sustained by it in consequence of his default in repaying principal and interest. Neither the Appellant's contentions on this issue nor the economist's theory on which he relies engages with the inescapable reality that the currency of every loan arrangement is that of pounds and pence. In the specific context of mortgages and charges on land – this case - the debtor obtains the benefit of a loan and, in consideration of doing so, provides to the financial entity in question an asset which, in the event of the debtor defaulting in the payment of principal and interest, is liable to be forfeited by him. While McBride J was clearly of the view that the Appellant's "no loss" contention was without substance, she made unequivocally clear that the issue for the Court was whether the Bank had discharged its onus of establishing an entitlement to an order for possession of the secured asset. Issues of financial loss and the calculation thereof were not material. We consider that the Judge was incontestably correct in this. Furthermore, it is abundantly clear from the transcripts that while the Judge could quite easily and understandably have been diverted from the central issue, namely the Bank's legal interest in the mortgaged asset, she emphatically was not.

[58] In summary, the main hallmarks of this ground of appeal are bare assertion, mere suspicion and rank speculation. For the combination of reasons given we conclude that this ground of appeal has no arguable merit.

[59] The Court of Appeal takes this opportunity to emphasise the following:

(i) The Swift First requirements in every case to which they apply are to be observed. They are not optional. They express best practice in this sphere of litigation.

(ii) Self-evidently compliance with the Swift First requirements assumes added importance when the duty to do so is specifically enshrined in an order of the Court.

(iii) The present case illustrates the regrettably widespread *malaise* of a disturbingly widespread failure on the part of practitioners to appreciate and give effect to Order 41 of the Rules and Practice Direction 05/2005 "Preparation of Affidavits and Exhibits".

(iv) The practice of affidavit evidence being provided by the solicitors representing financial institutions in this field appears relatively entrenched. The Court considers this practice inappropriate. Solicitors, self-evidently, do not have first hand knowledge of the facts upon which repossession claims are pursued. Affidavits should be sworn by suitably senior and knowledgeable officials of the institutions concerned deposing to facts within their own knowledge and, where appropriate, containing statements of information and belief complying strictly with Order 41, Rule 5. This will apply unless there is some compelling reason to do otherwise. In this way in those cases where oral evidence is required the witness will be a person who can deal knowledgeably with the factual issues under scrutiny: in short, a real witness.

We are bound to observe finally that the Bank's failure in the present case to comply with the Master's Order for specific discovery was not less than egregious.

Other Issues

[60] We shall deal briefly with Bank of Scotland v Waugh [2014] EWHC 2117 (CH), a first instance decision of the High Court of England and Wales. There the Bank sought a declaration that a charge in respect of a particular property was effective as an equitable mortgage and could be perfected in accordance with the Bank's standard terms and conditions. The Bank applied for summary judgment based on a "facilities" letter. The Judge acceded to this application. By sections 1(3) and 52 of the Law of Property Act 1925 all conveyances of land or any interest therein are void for the purpose of convening or creating a legal estate unless made by deed and, further, an instrument is validly executed as a deed if and only if it is signed by the person concerned in the presence of a witness who attests the signature. It was an uncontested fact that there was no attestation. As a result the

charge was void for the purpose of conveying or creating a legal estate. By section 51 of the Land Registration Act 2002, a charge created by the registration of a registered estate at the Land Registry has effect as "*a charge by deed by way of legal mortgage*".

[61] The deputy judge, applying Briggs v Gleeds [2014] EWHC 1178 (CH), held that the trustees were not estopped from contending that the legal charge had not been validly executed as a deed. His further conclusion was that whereas the charge was not executed as a deed and therefore did not take effect as a legal charge, it was signed by the parties (though not attested) and contained all the terms that had been agreed, with the result that it took effect as an equitable mortgage: see [85].

[62] McBride J made no finding that the Appellant's signature had not been attested as appeared on the face of the deed, namely by Mr Annett, the solicitor. While we acknowledge that the Appellant made this assertion (see the transcripts), we have highlighted in [24] its late advent and the Judge did not accept it at any point in her judgment. Indeed the transcripts confirm that this discrete factual issue arose in a very *ad hoc* manner, at the periphery of a central factual issue, namely whether the signature on the deed was that of the Appellant. The Judge held unequivocally that it was. The effect of this finding is to render irrelevant the issue of attestation of the signature.

[63] Finally, we record that while on behalf of the Bank there was a fleeting reference to section 11 of the Land Registration Act (NI) 1970 – the "*conclusive evidence*" provision – the Court received no developed argument on this issue and, moreover, it does not appear that the Bank relied on this provision in the Court below.

Conclusion

[64] The appeal is dismissed for the reasons given.