THE HIGH COURT

CIRCUIT APPEAL

[2019 No.248 CA]

[2024] IEHC 407

BETWEEN

EBS MORTGAGE FINANCE

and MARS CAPITAL FINANCE DAC

PLAINTIFFS

AND

DWAYNE BEDFORD AND NICOLA BEDFORD

DEFENDANTS

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 1st day of July, 2024

1. Introduction

1.1 This is a summary application for an order for possession of a principal private residence. The Plaintiffs claim to be the owners, one succeeding the other, of loans secured by way of registered charge upon the property the subject matter of the application ("the Property"). The Defendants in the Circuit Court are now Appellants, appealing an order for possession made in the Circuit Court on 7th May, 2019.

1.2 An *ex parte* application to add Mars Capital Finance DAC as co-respondent to the appeal was made in advance of this hearing. This appeal is heard by way of a full rehearing from the Circuit Court whereby the Plaintiffs must again establish that they

are entitled to the summary order sought and the Defendants may point to an issue which provides a full defence or which requires a plenary hearing.

1.3 For clarity, the parties will continue to be referred to as Plaintiffs and Defendants, Mars Capital DAC is now a co-Plaintiff, effectively. It is this Plaintiff who seeks the order for possession, having purchased loans from an entity called EBS DAC which, as EBS Limited, owned the initial Plaintiff, EBS Mortgage Finance ("EBS MF"). I will refer to this party, Mars Capital, as "the Plaintiff". EBS MF was not separately represented.

1.4 The Defendants appeared as litigants in person and are a married couple. They bought the Property in 2004 and challenged the Plaintiff's right to possession on several grounds, including that they did not have sufficient information in relation to the transfer or sale of the loans to various entities. Arguments in relation to employee status were not repeated at the hearing, nor was there a positive submission that no money was received. In this Court, the Defendants emphasised that they had no dealings with EBS Mortgage Finance, EBS Limited or this Plaintiff but dealt with EBS Building Society. Accordingly, they challenge the right of the Plaintiff to possession.

1.5 It is not seriously disputed that EBS Building Society lent money to the Defendants and that the Defendants' principal private residence was the security for several such loans. The proceedings issued when there had been defaults in payment on the primary loan, which EBS MF argued triggered its right to possession of the property under the mortgage deed. This Plaintiff must show that it has obtained valid title to that loan and the consequent right to seek possession.

1.6 The Plaintiff submits that the Defendants obtained a mortgage in 2003 from EBS Building Society, which became EBS Limited. EBS Limited assigned the loans to EBS

MF, the initial Plaintiff, which was a wholly owned subsidiary of EBS Limited, created in 2008. In 2014, in accordance with the Companies Acts, EBS Limited became EBS DAC. The loans were transferred from EBS MF to EBS DAC in 2020. The Defendants' loans were then assigned, as part of a loan book, by EBS DAC to Mars Capital Finance DAC in 2021 and, as a result, the Plaintiff was joined to these proceedings.

1.7 The conversion of the EBS Building Society to EBS Limited has been established by the Plaintiff. As for all the steps between that event and the transfer of a loan book from EBS DAC to this Plaintiff, in particular the role played by EBS MF, there is little evidence. The purpose of giving notice to the borrower in the event of a sale or assignment of a charge is to ensure that borrowers are given sufficient information about the identity of every entity involved so as to be confident that they are paying their mortgage instalments to the right party. While the entity in this case may have borne the same title, in various guises, until it transferred its loan book to this Plaintiff, this is not sufficient proof that it is the same entity or that it acquired the same loans.

1.8 The rights and obligations of EBS Limited are identical to those of EBS DAC, but the latter is a separate legal entity to EBS MF. The original lender had every right to sell or assign its loans, but the borrowers must be reassured as to the identity of the purchaser or assignee. Likewise, the Court must be satisfied that EBS DAC was the owner of the relevant loans and thus entitled to transfer ownership to this Plaintiff and that the loans (or any one of them) in respect of which there has been a default event are those underlying the charge registered in the name of the Plaintiff, entitling that entity to an order for possession.

1.9 There is evidence to the effect that the entity EBS MF was a wholly owned subsidiary of EBS Limited, but the averment is not entirely clear and it has not been supported by any exhibit or other evidence. There is no exhibit or detailed evidence proving the transfer of the loans, the subject matter of this case, to EBS MF, or explaining its role.

1.10 A further issue was raised on affidavit about the legitimacy of a signature on one of the acceptance letters. I asked both parties whether this issue was on affidavit but was not directed to such an averment and concluded that it was being raised for the first time at hearing. Having reviewed the papers, it is now clear that this matter was put on affidavit. I prevented the Defendants from addressing me further in that regard and they abided by that direction. In fact, the first named Defendant had sworn an averment to this effect and should be permitted to address it in submissions.

1.11 Having considered the papers, including the exhibits, and submissions made, The Plaintiff has not established the full chain of title in respect of EBS MF. It is also necessary to hear the Defendants on the issue of the signature. As there are issues on both sides which must be addressed, I will order a plenary hearing. No positive defence to the claim has been made out as yet, but the Plaintiff's evidence in respect of its claim is not sufficient for judgment to issue on a summary basis.

1.12 The early affidavits of the Defendants contained a number of spurious arguments about a potential challenge to the Constitution and allegations of perjury on the part of the deponents for the Plaintiffs and their lawyers. The former points were expressed to be an attempt by Start Mortgages to fast track the Defendants out of their home. As that entity had no part in these proceedings, and the arguments were not repeated in the High Court, I will not deal with them further.

1.13 The allegations of perjury appeared in the affidavits of 1st November 2016 and 14th of July 2017 which alleged criminality on the part of a deponent on two grounds: errors in comparing one figure with another and failing to expressly consider that an averment regarding a signature might constitute evidence of forgery.

1.14 In his affidavit of 14th July 2017, the first Defendant suggests that the lawyers involved have either offered flawed proofs or have not read the papers and concludes that, in either case, they are in breach of their duties to the court. This position appeared to be moderated to an extent in 2018 when the same deponent confirmed that his suggestion that one employee may have been creating an affidavit with another signing it "*was not an accusation of any kind*" but pointed to inconsistencies and credibility issues. To be clear, saying: *"this is not an accusation"* does not affect the character of these averments, it merely attempts to change the tone from direct accusations of perjury to disguised accusations which amount to the same thing.

1.15 When the matter proceeds to hearing, any accusations must be founded on established facts. In cases such as this, where the allegations in respect of deponents made to date appear to affect the reliability of the witnesses rather than their credibility, it may be sensible to avoid making such allegations at all. That said, the effectiveness of the questioning and the impression created in the mind of the decision-maker are matters for the person conducting the cross-examination. Where allegations of fraud are made, these must be pleaded, if they are to be pursued further.

2. The Test for Possession and the Land Register

2.1 This is an application for possession of a property under section 62(7) of the Registration of Title Act 1964. The Plaintiff must establish that the money secured by a charge on the property has become due and that it is entitled to an order for possession. The relevant Circuit Court Rules envisage a summary application on affidavit evidence alone but the Circuit Court and, in turn, the High Court, is given a discretion in terms of directing a full plenary hearing, requiring additional evidence or granting the order sought. If, therefore, there is a matter which has not been established on the evidence or if a defence has been raised, this is a case in which a further affidavit or a further hearing can be directed in order to consider the matter in more detail and to hear witness evidence, if that is required.

2.2 The test to be applied in exercising this discretion was set out in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381 by Baker J., who explained that there are many cases which fall between the situation in which a plaintiff establishes its right to possession and that in which a defendant can establish a defence, noting:

"Many applications for summary judgment would fall between these two extremes and will involve the proffering of evidence or argument by a defendant … which is not sufficient to rebut the evidence of the plaintiff to enable the judge to make a positive finding against the plaintiff, but which offers enough doubt as to the truth or completeness of the plaintiff's evidence, or credibly presents reasonable arguments or evidence that a defendant has a basis of defence which merits further scrutiny, evidence or argument. In that instance the trial judge is constrained by the inability to decide between contested affidavit evidence of fact, or resolve complex questions of law, the action cannot therefore be disposed of summarily and will be adjourned to plenary hearing."

2.3 The test to be applied in determining whether an order for possession should be made was set out in *Cody*:

"The owner of a charge who seeks to obtain possession pursuant to s. 62(7) [of the 1964 Registration of Title Act] has to prove two facts:

(a) that the plaintiff is the owner of the charge;

(b) That the right to seek possession has arisen and is exercisable on the facts."

2.4 The relevant entry in the land register folio is sufficient proof of ownership of property or of ownership of a charge on that property. The register is, under s. 31 of the Registration of Title Act, 1964, conclusive proof of ownership. This was discussed and confirmed in *Tanager DAC v. Kane* [2018] IECA 352, [2019] 1 I.R. 385. There is no need, accordingly, for intermediate owners of this charge to have registered their title.

2.5 A copy of the folio entry in the land register in respect of the relevant property ("the Property") was exhibited. The Defendants are listed as the owners of the Property, having bought it in 2004, and the Property is described by its postal address and a folio number: 44623F. There was an argument that the Property was registered under a different folio number as there is another number cited in the Mortgage Agreement: MH 35094F. The reference in the agreement reads that the plot of ground in question is "*part of the property described in folio 35094F of the Register County of Meath known as site no 3* [full address redacted]"

2.6 Looking at the copy folio entry, the first entry in respect of 44623F records that this is a plot of land in a named townland. Beside this entry is the information "*From Folio MH35094F*". Folio MH35094F was, therefore, created when the original parcel of land was registered and 44623F became a separate folio entry as a plot of land within that

parcel and was, at the time of the mortgage, plot number 3, which became No 3, the Drive [address redacted] with its own folio number, 44623F.

2.7 A certified copy of the deed of mortgage has been exhibited, labelled "C", in the grounding affidavit of Paula Duffy. The folio number 44623F appears on the stamp on the cover of the deed of mortgage, which stamp confirms that the charge created by the agreement is a registered charge on the Property at that folio number.

2.8 Going back to folio entry 44623F, the EBS Building Society was listed as the entity which owned two charges on the Property in 2014. It is clear that there is only one folio number for the Property, the link between the two is set out in the folio entry itself, number 44623F, which number is stamped on the mortgage agreement.

2.9 The entry at 44623F describes the two charges in very broad terms. In respect of the first, dated 15th March 2004, no sum is recorded but the charge is "*for present and future advances, repayable with interest. EBS Building Society is the owner of this charge*." The Plaintiff claims this confirms its ownership of the charge relating to a loan of €147,150 offered to the Defendants by letter dated 13th May 2002 and agreed on 10th February 2003, in a document signed by them both, and paid to them on 11th February 2003.

2.10 A sum of €49,000 is recorded in respect of the second charge, which is dated 30th April 2004. Within the entry, beside the date and the reference number D2004XS006265A, is the note that this is a charge "*for €49,000 and such other sums as may become payable under the terms of Instrument no. D2004XS006265A repayable with interest. EBS Building Society is the owner of this charge*." I note that a different reference number but in similar format appears beside each entry in the register and has no matching reference number in documents exhibited by the Plaintiffs. This appears to be a land register reference number and not a reference emanating from the lender.

2.11 The same folio shows later entries, dated 24th June of 2021, in an updated exhibit from the grounding affidavit of Ronan Hopkins, in which this Plaintiff is listed as owner of the same two charges on that property, with a note added to the earlier entries to the effect that ownership of the charges has been transferred.

2.12 This is sufficient proof that this Plaintiff owns two charges on the Property. There is minimal evidence as to the underlying debts or loans, however, save in regard to the second charge which is said to relate to a loan of €49,000. This is a sum that is not referred to in the Plaintiff's civil bill initiating these proceedings. The Plaintiff must prove that one or both charges entitles it to an order for possession.

3. <u>Required Proofs: The Loans Underlying the Charges</u>

3.1 The Defendants argue the Plaintiff has not proven that the specific amounts of four loans that it claims are outstanding and that the Plaintiff has not shown exactly what sum of money is outstanding. They accept that one loan of €5,000 was advanced in November of 2007 and claim that another, of €6,500 advanced in February of 2008 has been repaid in full. The Plaintiff claims that there were four loans in total, with payments made in five tranches. The Defendants suggest proofs offered in respect of repayment are insufficient, noting differing figures as to what is outstanding.

3.2 While there is no positive averment to the effect that they did not receive any of the monies referred to in any of the Defendants' affidavits, they point out, correctly, that it is for this Plaintiff to prove that money is owed to the Plaintiff in circumstances which permit the Court to make an order for possession of the property in its favour. While the Plaintiff does not normally have to prove the exact sum outstanding in a case for possession of a property the subject of a relevant mortgage, the Plaintiff does

have to show that it is entitled to possession of the property as a default event has occurred. Mere ownership of the charges is not sufficient to prove this.

3.3 As to the differing sums, there are two clear answers in that regard: one is the straightforward process of calculating an updated figure in respect of each of the four loans. The other is in respect of an alleged loan of €49,000 which is not pleaded in the Civil Bill and in respect of which there is no corresponding offer letter. In fact, there is a document which establishes that a facility in that amount was afforded to the Defendants and a Deed of Further Charge was signed by them to that effect.

3.4 As set out in *Cody*, the Plaintiff must establish that the principal monies under the security are due and that the mortgagee's right to possession has arisen. A copy of the deed of mortgage was exhibited, it is stamped and registered. There, one can read that on the 10th of February 2003, EBS Building Society agreed to lend €147,150 to the Defendants on the security of the property. At paragraph 3 the borrowers charge the Property with payment of the total debt. At paragraph 4, the "Total Debt" is described as the loan specified in the schedule, €147,150, and "*all loans made by EBS to the Borrower in the future*". The deed was signed by both Defendants and witnessed by a solicitor on 11th February 2003. The mortgage account number is set out: 59277157R. The certified copy of the agreement bears a stamp from the land registry confirming the folio number of the Property and its description by address.

3.5 The Plaintiff has exhibited letters in respect of four loans which can be listed as follows: €15,000 was accepted on 9th January 2007 and paid in two tranches, €4,104.22 on 9th January and €10,895.78 on 10th January 2007; this €15,000 went to an account number 51659821. There is evidence that a further €5,000 was offered on 28th November, and accepted on 29th November 2007, this went to account number 53101566; €6,500 was

offered on 21st February 2008, and accepted on 22nd February 2008, this was paid to account number 53143287. The principal sum of €147,150 is associated with account number 59277157. In Exhibit A of Ms. Duffy's affidavit the offer letters and most of the acceptance letters in respect of the loans are exhibited, though many are not signed.

3.6 In a later affidavit sworn by Mr. Hopkins, Exhibit RH 1 contains the offer and acceptance letters in respect of the last two loans, signed by both Defendants. Issues in relation to the signatures are discussed further at Part 11 (Signatures, Seals and Pens).

3.7 Clause 10 of the Mortgage Agreement provides that the Total Debt, as defined above, becomes immediately payable in full if the Defendants default for three consecutive months in respect of "the agreed payment" under the mortgage.

3.8 The agreed payment means, and can only mean, the agreed monthly instalment, in full, in respect of every one of the loans. If any one instalment is not paid in full, for three consecutive months, all debts become payable in full. In other words, even if part payment is made, this may still trigger the right to payment in full, triggering a right to possess the property if full payment is not made for three months; a failure in respect of any one loan, for three consecutive months, constitutes a default event.

3.9 The Defendants have not replied to this specific submission, and it is in line with the plain words of the mortgage deed between the original parties, EBS Building Society and the Defendants, which must guide the Court. If, in the first place, this Plaintiff can show its right to possession in the event of a default in respect of any of the loans the subject of the registered charges, it must also show that a default event has triggered the right to possession of the property before such an order can be made.

4. Transfer of the Loans to the Plaintiff

4.1 The Defendants submit that the Plaintiff has not proven that it is entitled to repossess the property as the Defendants never entered into a contract with either Plaintiff, but with an entity called the EBS Building Society. The same type of issue arose in *Mars Capital Finance Ireland DAC v. Temple*, [2023] IEHC 94. There, the same plaintiff sought an order for possession, but the defendant sought proof that his loan had been validly transferred to that entity. The plaintiff exhibited a redacted copy of the deed of transfer. Simons J. held that there was insufficient evidence of the transfers of the underlying loan by EBS Building Society, to EBS Mortgage Finance and to the Plaintiff.

4.2 In *Temple*, commenting on the deed, Simons J. held:

"*A deed of transfer dated 30 April 2021 has been exhibited. This deed is between a number of companies within the AIB Group and EBS DAC (who are identified as the sellers) and Mars Capital Finance Ireland DAC (who is identified as the buyer). The exhibit consists of three pages containing what might be described as operative clauses. Thereafter, there are two additional pages which appear to be extracts from a schedule to the deed. These pages are heavily redacted and all that is legible is a series of headings and a single entry which references, inter alia, the name of the defendant and the address of the property the subject of the charge. There is then a column which identifies the "legal entity" as EBS Mortgage Finance Ltd. There is nothing in the first three pages of the exhibit, i.e. the operative part of the deed, which makes any reference to, still less explains the legal effect of, the schedule*."

The learned Trial Judge concluded that the document did not establish that the defendant's debt had been transferred to the plaintiff. That being so, Simons J. directed that a plenary hearing was required.

4.3 As Simons J. pointed out, when it was argued that the registration of the charge, together with the deed of charge, could satisfy him as to who was entitled to possession:

"The 'loan' as defined under the deed of charge simply refers to a figure in euros. It does not refer to any account number. It is correct to say that there is an annotation on the front of the deed of charge which does refer to an account number, and that if one cross-references that to the statement of account one might deduct that the charge refers to a particular debt. The difficulty for Mars Capital, however, is that this annotation does not have any particular legal status in the deed. It does not form part of the definition of the loan and, for all the court knows, may simply be something that was added for administrative purposes long after the deed had been executed."

4.4 In paragraph 1 of the first grounding affidavit, sworn in December 2014, Ms. Duffy avers that she is employed by EBS Limited and states that the Plaintiff, EBS Mortgage Finance, is a wholly owned subsidiary of that company. She sets out the history of these events and exhibits a banking licence in respect of EBS Limited. The relevant certificate of incorporation in respect of EBS Limited is also exhibited.

4.5 This establishes that the entity known as EBS Building Society converted from a building society to a bank, namely, EBS Limited. That conversion took place pursuant to the Assets and Covered Securities Act of 2012. As set out in paragraphs 12 - 13 of the same affidavit, EBS Building Society transferred its contracts and mortgages to this entity and the debts owed to EBS Building Society and securities held by it were now payable to and available to EBS Limited as security for the discharge of that liability.

4.6 Ms. Duffy avers at paragraph 2 that *"the plaintiff is a wholly owned subsidiary of EBS Limited, to whom a portion of the EBS Residential Mortgage Book, including the Loan*

Agreement and mortgage / charge referred to hereinafter, were transferred by EBS Limited, at that time known and incorporated as EBS Building Society." This averment is not supported by exhibiting the transfer agreement itself.

4.7 At paragraph 12 Ms Duffy sets out, in some detail, the terms of the acquisition conversion. This makes it clear that in the case of all mortgages, the successor company (EBS Limited) replaced the EBS Building Society and that the successor had the same rights and obligations as those held by the Building Society and that any cause of action could continue without amendment against the new entity.

4.8 At paragraph 13, it is stated that that the interest of EBS Building Society in these loans was assigned to the Plaintiff, meaning EBS MF, on 1st December 2008. But EBS MF is not EBS Limited (or EBS DAC) or, if it is, we have not been told this.

4.9 The sole reference with information as to who that Plaintiff was is in paragraph 2, the statement that EBS MF is a wholly owned subsidiary of EBS Limited. Again, there is no exhibit setting this out. It is not clear from early affidavits what the relationship between EBS MF and EBS Building Society was until one sees an exhibit in a much later affidavit, that of Ronan Hopkins in 2021. As set out in more detail below, a letter written in 2020 informs the reader that EBS MF was only established in 2008. It appears, given this letter and the fact that Mortgage Finance references first appear in the exhibits in loan statements for the year ending December 2008, that it was a subsidiary of EBS Limited, and that this averment means that the loans were transferred by EBS Building Society to EBS Limited, and perhaps then to EBS MF. In any event, there is insufficient evidence here to enable a court to make a summary order for possession, or to satisfy a court as to the transfer of the benefit of the

mortgage agreement entered into by EBS Building Society and the Defendants, to EBS Limited and/or to the initial Plaintiff, EBS MF.

4.10 I have examined the exhibits to test whether I may be satisfied that the transfer of loans with the same apparent reference numbers from EBS DAC to this Plaintiff is sufficient proof that they are the same loans as those agreed between the EBS Building Society and the Defendants but, given my reservations about proofs in respect of EBS MF, I cannot be so satisfied. The gaps may be small and capable of easy proof, but this must be done by the Plaintiff. While it may also appear to be a rigorous standard to set, the process is one of summary justice and if this fast and paper-based remedy is used, the proofs on paper must be satisfactory. They have been challenged in several respects and there are a number of areas of uncertainty which make this Court reluctant to proceed to making an order for possession on a summary hearing alone.

4.11 In two significant documents, the Deed of Transfer dated 30th April, 2021 (Exhibit RH2 in the grounding affidavit of Ronan Hopkins sworn in September 2021) and the Mortgage Agreement dated 10th February 2003 (Exhibit C in the grounding affidavit of Ms. Duffy sworn in 2014, "PDC") there is no reference to EBS Mortgage Finance. RH2 later confirms that the loans owned by EBS DAC were sold to Mars Capital and Ms. Duffy exhibits the agreement between EBS Building Society and these Defendants, she also explains how EBS Limited is the legal successor of EBS Building Society, but there is insufficient explanation as to how EBS MF obtained ownership.

4.12 Letters dated the 10th of May, 2021, were exhibited at paragraph 16 of Mr. Hopkins' affidavit of 10th September 2021. In these letters, the Defendants are advised that EBS DAC sold their loans to Mars Capital. There is no document to link EBS Mortgage Finance to EBS DAC so that EBS DAC can transfer anything to Mars Capital.

Again, one can guess as to how this separate entity came about but it must be established clearly to justify a summary order for possession.

4.13 While the loans are set out in a schedule to the transfer document between EBS DAC and Mars, this still does not complete the chain of title, which must be done in order to link the letters of demand and indeed the letters of information about the entity to which their repayments should be made, with the default event said to trigger this Plaintiff's right of possession.

4.14 This was an issue that was flagged in *Mars Capital v. Temple* so this Plaintiff is aware of the particularity with which owners of a debt should be described in order to establish that the Defendants may be confident about repayments to an identified entity and the Court, in turn, confident about making such a significant order.

4.15 In 2008, on the Defendants' annual loan statement, the line appears: Lender: EBS Mortgage Finance. On the 10th of November 2014, a solicitor acting on behalf of EBS Mortgage Finance wrote to the Defendants advising that they had taken out four loans, gave the associated four account numbers, and that they had executed a charge over the property in favour of "our client". The letter writer advises that legal proceedings will issue if all monies due are not discharged within 7 days. (The statements are Exhibit F and the letters Exhibit G in Ms. Duffy's grounding affidavit).

4.16 Two affidavits were sworn by a general manager of EBS Mortgage Finance, Mr. McCutcheon, averring that the Plaintiff, meaning EBS MF, has complied with the Code of Conduct on Mortgage Arrears and setting out the amount of the arrears in 2016.

4.17 In Ms. Duffy's second affidavit, sworn in 2017 to reply to the Defendants' assertions that she was not an employee of the relevant company, there is more information in that she avers that AIB plc acquired EBS Limited in 2011. Here, EBS MF

is described as the secured debt department of AIB Group entities and the deponent describes the AIB group of companies as one that includes the Plaintiff, i.e. the only Plaintiff at that time, EBS MF.

4.18 In 2018, Mr. Ffrench, a Manager at EBS MF exhibited a copy of a deed of further charge which explained the reference in the land register to a charge in the amount of €49,000. The deed was executed on 9th February 2004, between the Defendants and "EBS Building Society". This specific sum is not referred to in any offer letter, as noted above, but the figure is noted on the charge registered on the folio in the land register. This deponent exhibited letters to the Defendants to support the averments of Mr. McCutcheon to the effect that EBS MF complied with the Code of Conduct on Mortgage Arrears. The letters refer to EBS Limited, not EBS Mortgage Finance.

4.19 In the grounding affidavit of Ronan Hopkins, sworn in September of 2021, at paragraph 8 he avers that "*the Facility and the Mortgage or Charge the subject of the within proceedings were transferred and assigned by EBS MF to EBS*" on the 1st of September 2020, pursuant to s. 58 of the Asset Covered Securities Act of 2001. He confirms that the Defendants were notified of the transfer by exhibiting the relevant letters. The letters refer to EBS DAC and while there is no explanation therein as to how EBS Limited became EBS DAC, this issue has already been addressed, above. The deponent refers to a single charge but a plural transfer.

4.20 The affidavit filed to support the application by this Plaintiff to be named in the proceedings was the first reference to EBS DAC. The legislation necessitating that re-registration explains this timing (these proceedings began in 2014 and the provisions in relation to registration were contained in the Companies Act of 2014).

4.21 In *Kavanagh v Start Mortgages* [2019] IEHC 216 Simons J. held that an entity that changes its status from a limited liability company to a designated activity company does not have to take any procedural steps to reflect this such as applying to amend the proceedings, as they are the same legal entity. However, in this case, a third entity, EBS MF, was the initial Plaintiff. Given that one of the main objectives of the law, in relation to applications for possession of property which is a principal private residence, is consumer protection, it is arguable that the consumer should be alerted to this change so that they may be aware that the title of the borrower has changed. This may not affect any entitlement to the right of possession and may not arise directly in this case, as EBS MF is the original Plaintiff here.

4.22 The Certificate of Incorporation on Conversion to a Designated Activity Company has not been exhibited. Had the matter been straightforward in other respects, the Plaintiff could have simply filed another affidavit in this regard. If this, or any other issue, arises in this regard it will now be the subject of a plenary hearing.

4.23 A limited company is the same entity as a designated activity company so the Defendants cannot point to this change of title in order to assert an entitlement to the same suite of protections as apply when a loan is transferred. EBS DAC was the named seller of the loans to this Plaintiff, according to the mortgage sale agreement, which is examined further in Part 6 (Redactions, Reasons and Peruvian Guano), below.

5. <u>Formal Proofs of Assignment of Debt: Goodbye and Hello Letters</u>

5.1 Clause 9 of the mortgage deed provides that the EBS Building Society may, at any time, transfer all or any part of the mortgage to any person. While it also provides that this can be done without notice to the borrower, in truth, the law requires such notice.

5.2 The Plaintiff must show a proper assignment of the debts has been made and the formalities are provided in the Supreme Court of Judicature Ireland Act 1873, summarised in *AIB v Thompson* [2017] IEHC 515 by Baker J., who set out the requirements: a debtor must receive express notice in writing of an assignment of his debt to another party, the assignee must be identified and the notice must contain sufficient information to enable the debtor to know with reasonable certainty that he will be repaying the debt to the identified assignee with confidence that this is the correct recipient. This information is contained in the so-called "*Goodbye Letter*" and "*Hello Letter*" from the assignor and assignee respectively. These letters are a separate proof. The purchaser of debt must satisfy the Court that the specific loan has been transferred to it and, as a separate matter, that the debtor was informed of the transfer.

5.3 The Plaintiff cannot rely on its Hello letter alone to fulfil that proof. In an exhibit to that first affidavit of Ronan Hopkins, a letter dated 26th June of 2020, the writer explains that EBS Mortgage Finance is a wholly owned subsidiary of EBS DAC and was set up in 2008. According to this letter, "loans which were originally made by EBS DAC had been transferred to EBS Mortgage Finance." Not to labour the point, but these loans were made by EBS Building Society which then transferred them to EBS Limited in an agreement which has not been exhibited and, if there was an assignment of interest in these charges to EBS MF, that is not exhibited either.

5.4 Two other letters are exhibited in the same affidavit. One from a Mr. O'Mahony, dated 10th of May 2021 and headed simply "EBS", warning of an impending sale. The other letter is from the deponent (although the signature is difficult to decipher and there is no typed name, Mr Hopkins identifies himself as the author). Here, the Defendants are informed, in this letter dated 14th May 2021 and headed Mars Capital, that AIB plc

has sold their loan to Mars Capital, this Plaintiff. Only during the course of these proceedings have the agreement and deed of transfer been exhibited clarifying the identity of the entity which sold the loan to Mars Capital, this Plaintiff.

5.5 In *Promontoria (Oyster) DAC v. Lynn* [2022] IEHC 99, Simons J. rejected the argument that a notice of assignment must be given on a separate basis to a demand for payment, noting that the statutory purpose can be fulfilled through a single document.

5.6 *AIB v. Thompson* is also authority for the proposition that as a matter of statute an entity acquiring a loan cannot sue at common law unless the requirements of the statute are met. Thus, these Defendants cannot object to the fact that their debt was assigned but the assignee cannot sue them without showing express notification of the assignment, which has been done in this case in respect of the final transfer to this Plaintiff.

5.7 The notice need not expressly state that it is intended to constitute a statutory notice but must expressly notify the recipients as to the identity of the assignee. The notice, if any, from within the same commercial entity may not require the same detail or, it may be argued, there is no need for such express notice. While this is not a point specifically raised by the Defendants, it relates to their argument about the transferal of the loans to different entities and the Court invites submissions on whether or not they are entitled to know the precise name of the legal entity to whom they owe money and whether the matters exhibited, including letters and bank statements, had the effect that the Defendants were sufficiently well informed in this regard.

6. Redactions, Reasons and *Peruvian Guano*

6.1 A Deed of Transfer and a mortgage sale agreement have been exhibited to explain how the Plaintiff, Mars Capital, became involved in these proceedings. As in *Temple*, that

transfer deed shows that an entity called EBS DAC was one of a list of sellers who transferred a number of outstanding loans and underlying loan documents "including the Facility" to the buyer, named as Mars Capital Finance Ireland DAC, this Plaintiff. At paragraph 12, the deponent confirms the four loans involved and the relevant account numbers, which tally with the original account numbers initially assigned to each loan by EBS Building Society.

6.2 The Defendants argue that they, and as a consequence, the Court, cannot understand or meaningfully examine the exhibits, in particular the sale agreement, due to the extent of redactions made in the exhibit. They argue that the Plaintiff has not proven that their loans were so transferred and argue that this agreement is not sufficient proof to the Court that any loan was transferred and, if it was, that there is insufficient proof of the terms of sale.

6.3 This issue was dealt with in *Temple* as set out above and, more recently, in the Court of Appeal in *Farrell v. Everyday Finance*, [2024] IECA 16. There, Whelan J. endorsed, in large part, the approach of Stack J. who had examined redacted material and directed that further information be provided. The case involved interpreting the parameters of Order 31 Rule 15 of the Rules of the Superior Courts which permits the inspection of any document referred to in pleadings.

6.4 In *Farrell*, Stack J. had required solicitors (as officers of the Court, not employees of the parties and therefore independent deponents) to confirm that the contents of a document which had been disclosed were the relevant portions and to depose to the details of the omitted sections. There, the applicant sought inspection of documents in circumstances where he proposed buying out a loan himself and was seeking more information than that sought by these Defendants, who put the Plaintiff on proof that

it is entitled to an order for possession and that it is entitled to the benefit of the registered charges, but do not seek specific information such as the purchase price in respect of the alleged loans and underlying securities.

6.5 The authority is a highly relevant one in this context and accords with the earlier judgment in *Temple* where Simons J. directed a plenary hearing to examine the nature and terms of the transfer of underlying securities more fully, rather than making a summary order. Perhaps as a direct result of these decisions, the papers in this case include much more extensive material than that exhibited in *Temple* and in *Farrell*.

6.6 One effect of these judgments may be said to boil down, as in many other cases, to *Peruvian Guano*: does the material relate to the matter in question and would it assist one party to either make her case or to damage her opponent's case? The seminal case on relevance and discovery, *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano* (1882) 11 Q.B.D. 55, was cited in *Farrell*, as was the English Court of Appeal decision in *GE Capital Corporate Finance Group Limited v. Bankers Trust Co.* [1995] 1 WLR 172 which applied *Peruvian Guano*. There, Hoffman L.J. held that "*The Peruvian Guano test must be applied to the information contained in the covered-up part of the document, regardless of its physical or grammatical relationship to the rest. Relevant and irrelevant information may, as in this case, be contained in the same sentence. Provided that the irrelevant part can be covered without destroying the sense of the rest or making it misleading, a party is permitted to do so.*"

6.7 In *GE Capital*, Leggatt L.J. added, in his concurring judgment:

"*The plaintiffs are obliged to disclose the relevant parts of documents, but not the irrelevant. There can be no argument that in doing so they were in some way waiving any rights not to disclose each of the documents as a whole…The court will not ordinarily disregard the oath of*

the party that the parts concealed do not relate to the matters in question." Both these conclusions were quoted with approval by Whelan J. delivering the judgment of the Court of Appeal in *Farrell*.

6.8 Adapting the phrasing of Leggatt L.J., a useful test, therefore, in assessing whether or not redactions should be permitted, is to ask: is it reasonable to suppose that the redactions hide information which would assist these Defendants in defending this claim or would damage the Plaintiff's case?

6.9 The relevance of the material exhibited unredacted here is clear and the Global Deed of Transfer is unredacted, save as regards the price paid for the loans. The affidavit of Mr. Hopkins, who is a manager of the Plaintiff entity, explains the redactions in some detail. Unlike the papers provided in *Temple*, the schedules listing the properties are exhibited showing four facilities and giving identification numbers, albeit not the value of the loan in each case. In each case, the "Facility ID" shows a number, the last digits of which are identical to the account numbers assigned by the EBS Building Society to the four loans at issue in these proceedings.

6.10 In addition to this document, the mortgage sale agreement is exhibited. Here, again, Mr. Hopkins refers to legal advice obtained in order to confirm that the operative part of the sale agreement was clause 2, which is exhibited unredacted, save as regards the price paid.

6.11 Again, in contrast to the case in *Temple*, the interpretation sections of the agreement are exhibited with few redactions, enabling the Court to confirm the averments of Mr. Hopkins with reference to terms in the agreement itself. Adopting the approach endorsed in *Farrell*, it is difficult to identify anything in the exhibit, as explained in Mr. Hopkin's affidavit, that suggests the redactions are hiding something

that would assist these Defendants in defending the case or that would damage the Plaintiff's case. It is reasonable to conclude that the material exhibited, together with the relevant averments, disclose the basis of the agreement and the terms, insofar as it is necessary to do so, clarify how this Plaintiff came to own the loans in question.

6.12 In this case, the same Mortgage Transfer Deed was exhibited as that which was exhibited, in heavily redacted form, in *Temple* as this Plaintiff is the same entity as that involved in *Temple* and the loan in question was created with the same lender in the first place, EBS Building Society. The Plaintiff's case is that these loans formed part of the same transfer of loans as was described in *Temple*, both cases involving loans transferred to this Plaintiff. As noted, in both cases, the Transfer Deed was exhibited but in this case, with fewer redactions and where the mortgage sale agreement was also exhibited.

6.13 Early in the sale agreement, the purchase price for the total number of loans, which is said to be commercially sensitive and of little relevance, was redacted. In most cases, the redactions are easily identified, due to the formatting, as redactions of details which would identify other borrowers. In the case of templates and letters forming part of the sale agreement, these have been omitted entirely as being irrelevant, according to the grounding affidavit of Mr. Hopkins. There is no reason, in the surrounding document, to suspect that this is not the case. Noting the rationale of *GE Capital*, as endorsed in *Farrell*, the averments that what has been redacted is irrelevant (while they might carry more weight from an independent solicitor, as an officer of the court) can be accepted as there is nothing in the exhibit itself, raised in the submissions of the Defendants, or based on any other exhibit, which suggests otherwise.

6.14 The unredacted portions of the agreement identify the relevant parties, set out the operative part of the agreement and define the key terms used in the document. These include terms which identify at least one loan form the subject matter of the agreement, explain how it can be cross-referenced to parties and properties using unique identification numbers and which, taken together with the operative clause, show that the benefit and responsibilities attaching to that identified loan have been transferred to this Plaintiff.

6.15 Here, unlike the case of *Temple*, the portions of the sale agreement which have not been redacted show that the sellers agreed to sell and the buyers agreed to purchase "*all the Sellers' rights, titles, interests and benefits… in, to and under the Mortgage Assets, the Underlying Loans and the Finance Documents and including the Sellers' rights, titles and interests in and to the respective Ancillary Rights and Claims on the Completion Date on the terms of and as provided in the Transfer Documents, and subject to and in accordance with the terms and conditions of this Agreement*."

6.16 After a somewhat tortuous trip through the interpretation section, one can determine that the "underlying loans" mean those loans set out in the "initial portfolios" and the "closing portfolios" and that these terms, in turn, mean the Connections set out in Part 1 of Schedule 1. "Connection", according to the agreement "means a group of Mortgage Assets which are identified by the relevant Connection ID as contained in the Data Tape". The "Data Tape" is "an electronic file containing information about the Mortgage Assets, the Underlying Loans and the Properties contained in folder 2.1 of the OAK – Phase 2 section of the Data Room." The "Data Room" is "a data site made available by the Sellers to the Buyers in respect of the Mortgage Assets and Finance Documents." "Connection ID" "means the unique

reference included in the Data Tape which facilitates the identification of connected debt, providing a connection level view", according to the agreement.

6.17 Finally, one turns to Schedule 1, Part 1. All entries are redacted except four, all bearing one number under the heading Connection ID: EBS9901957. The Borrower ID is: 9901957. The Sub-Borrower ID is 450826112;450849418 in each case.

6.18 The last column in this Schedule 1 of Part 1 is headed: Facility. Under this heading all details are redacted save four different numbers: 93902151659821, 93902153101566, 93902153143287 and 93902159277157. All are identifiable on the papers as outlined: they include the account numbers for each facility granted, the last being for €147,150, which was given account number 59277157R. In part 2, entitled "Properties", I read that the same unique Connection ID refers to the mortgage asset sold to the Plaintiff, has a property ID which is the same as the last 8 digits of the facility number and reflects the account number allocated to the first mortgage loan: 59277157. The address is set out under the same heading: it is that of the Defendants and matches the land register entry at folio 44623F. These entries link the first loan, i.e. the principal sum, with the property and, more importantly in this context, with the transfer of that loan from the seller EBS DAC to the buyer Mars Capital, this Plaintiff.

6.19 In *Farrell*, Whelan J., considered the argument that all documents in the chain of title would require to be seen by the court to understand their nature and effect. While not going that far, the Court of Appeal concluded that documents had to be considered in their context and in respect of the issues raised. There, the Global Deeds exhibited could not be understood without seeing other documents which had been referred to in a general way but not disclosed. Here, the Court has more information.

6.20 The Court of Appeal in *Farrell* was considering an order of Stack J. who directed that documents, hitherto redacted, be disclosed in more detail. When this was done, it became apparent, as Whelan J. noted, that "*the redacted operative parts of the Global Deeds were entirely relevant and highly material to a number of key matters in question in the litigation and as such prima facie met the* Peruvian Guano *test. The justifications advanced for the redactions as including commercial sensitivity /confidentiality/ irrelevance would not withstand even the most cursory scrutiny and were potentially misleading*."

6.21 This finding affected the credibility of that respondent insofar as it became more difficult to believe its deponents on the issue of relevance. Whelan J. went on to quote from Haughton J. in *Courtney v. OCM Emru Debtco DAC* [2019] IEHC 160, in passages which are worth repeating:

"*…there is no reason why the other side should not be asked to identify with precision the basis of the redaction – not merely whether it is on grounds of privilege, but explaining whether it is referring to legal advice or some other basis."*

"In GE Capital the Court of Appeal said that it was incumbent on the legal adviser to examine the communications in question critically to see whether there are any non—privileged parts which should be disclosed to the other side. At present, however, the right to redact is being regularly abused, and the courts should be vigilant to stop this."

6.22 Whelan J. considered the extent to which protective measures can be taken, in discovery, disclosure or inspection, to protect a genuine claim of confidentiality which might not defeat the right of the litigant to sight of the document. As she concluded:

"*It is self-evidently in the public interest that litigants are not deprived of documentation or instruments which directly affect their rights and interests in circumstances where the very substance of those rights and interests are the subject matter of litigation."*

6.23 The substantial ruling in *Farrell* was that, in light of the pleaded claims and the defence, whereby the benefit of loans and securities and associated rights concerning the plaintiff were claimed to have vested in Everyday, Mr. Farrell was entitled to see Everyday's title to the mortgaged property, including the Mortgage Sale Agreement.

6.24 Mr. Farrell, having asserted a prior agreement to buy back the loan and underlying security, at a fair price, was also entitled to consider the purchase price paid by the respondent for the loan. Given the excessive redactions, exposed as being misleading, to use the language of Whelan J., she ruled that the documents identified in the pleadings (the Deeds of Transfer and the Mortgage Sale Agreement, needed as a part of the proof of title and in order to make sense of the Deeds) should be disclosed in full to restore trust between the parties, save for redactions to protect third parties. Whelan J. also noted that the documents could only be used for the purposes of the litigation, not for any other purpose, per Murphy J. in *Gormley v. Ireland* [1993] 2 IR 75.

6.25 The present case can be contrasted with that of *Farrell* and with the recent case of *Start Mortgages DAC v. Ramsmeyer* [2024] IEHC 329. There, Simons J. was again dealing with over-enthusiastic redaction. As he put it, "*whole swathes of the operative clauses of the deed*" had been omitted. That was not the case here. The relevant documents in respect of the last two parties in the chain of title were exhibited in this case and I am satisfied that the redactions have been explained and, in the circumstances, to paraphrase Leggatt L.J., I will not disregard Mr. Hopkins' oath to the effect that the redactions made were necessary and do not conceal relevant material. Without further evidence to suggest it is necessary, I will not seek unredacted copies.

7. Addition of New Plaintiff

7.1 Here, one transfer of ownership occurred between the making of an order at first instance (in the Circuit Court) and the appeal to this Court. The proper order is to add the new purchaser as an additional party, rather than to substitute them in lieu of the original financial institution, as was done here. The original plaintiff must remain in the proceedings for the reasons set out by the Court of Appeal in *Irish Bank Resolution Corporation Ltd v. Halpin* [2014] IECA 3, applied to the High Court, in cases of appeals from the Circuit Court, by Simons J. in *Permanent TSB v. Morrissey* [2021] IEHC 18. The transferee has not been a party to the original action and the plaintiff who instigated the proceedings must remain, but the interest of the transferee makes it appropriate that it be joined as co-plaintiff rather than requiring new proceedings to issue.

7.2 In an application to substitute or add the purchaser of a debt to such proceedings, the usual practice is to exhibit a redacted version of the global deed of transfer giving effect to the sale of the loan agreement and underlying security. While a certain level of redaction is permitted, as the cases discussed above make clear, this must be done on a transparent and reasonable basis. The applicant must exhibit sufficient material so that the court may know the nature of the contractual obligation.

7.3 The extent of the redactions has already been considered in light of *Farrell* and of *Mars Capital Finance v. Temple* [2023] IEHC 94, above. The plaintiff in *Temple* had redacted material which meant that the Court could not read key passages in the agreement. Here, the Plaintiff has redacted names and addresses of other parties whose loans were set out in the loan book, which is not only reasonable but required under GDPR legislation. It has also redacted the amount the entity paid for the purchase of the loan book. While this may be commercially sensitive it is also arguable that, in another case,

it may be unfair to the debtor. In this case, there has been evidence that no payments have been made for some years, there is no suggestion that the Defendants ever sought to buy their loan and it is difficult to construct an argument that the transfer might be unfair based on the purchase price for the loan book.

8. Details of the Debt

8.1 The affidavits for the Plaintiff were sworn by several deponents. In the case of three, Ms. Duffy, Mr. McCutcheon and Mr. Hopkins, as noted, the amounts loaned and the amounts repaid in each case were set out and supported by exhibits. The Defendants raised issues about their employment status which are addressed at Part 9, below.

8.2 There were some errors in the information set out. In the first affidavit, a loan apparently agreed in 2007, was dated 2011 in error. A later affidavit corrected this error. In the Civil Bill, as noted, three sums were nominated in respect of the second charge registered in the land register. The sum of €49,000 is noted in the folio itself as one of the charges against the property, owned by this Plaintiff. This sum does not tally with any specific figure in the loan agreements and is not the sum of any loans which would have explained it; the sum is not even close to that figure, though I am told that this facility represents the sum of all loans after the principal loan of €147,150.

8.3 There is a Deed of Charge exhibited in respect of the primary loan, which both Defendants have signed, confirming that the EBS Building Society agreed to lend them the sum of €147,150 and a Deed of Further Charge, again signed by both Defendants, recording that the EBS Building Society agreed to lend them a further sum of €49,000.

8.4 The first grounding affidavit also refers to the loans in the body of the affidavit, gives the account numbers and exhibits the offer letters in each case. When the deponents

refer to default events, it is not clear if this relates to all five alleged loans or one of them, but given the terms of the agreement, there is no need to prove more than a default event in respect of one loan. The bank statements show how payments tapered off and, eventually, stopped altogether. I am satisfied that by the time the warning letter issued, a default event had occurred.

8.5 The last payment made by the Defendants before proceedings issued was a part-payment of €30 made on the 5th of September of 2014. By December, in other words, there had been no full payment for over three months. The owner of the charge was, from that time, entitled to an order for possession of the Property. A warning letter was sent on 10th of November 2014 in respect of the mortgage accounts. On the 5th of December 2014, 3 months later, these proceedings issued.

9. <u>The Hearsay Rule: Caselaw and the 2020 Act</u>

9.1 These Defendants argued that several deponents were not in a position to swear to the contents of documentation from the relevant EBS Building Society accounts and, following the transfer, from the accounts now held by this Plaintiff. They argue that a court cannot rely on documentary evidence offered by those other than the original author or one who has personal knowledge of the contents of the document. The law has long recognised the unreliability of hearsay evidence but nearly as ancient is the legal history of creating exceptions to the rule against hearsay.

9.2 The status of such evidence is now governed by the Civil and Criminal Law (Miscellaneous Provisions) Act 2020 ("the 2020 Act"), which permits receipt of hearsay evidence but requires that it be subjected to careful scrutiny as to its provenance and the accuracy of the record or copy made. The Plaintiff relies on this legislation.

9.3 The 2020 Act reflects the position on the ground before its enactment, to a large extent. Even in cases where the original author or the declarant is unavailable for cross-examination, it is clear that there are many cases in which a person may provide reliable evidence of a state of affairs or of facts, even with evidence that originated with another person's direct knowledge of events, memorably encapsulated in the Irish phrase "dúirt bean liom go ndúirt bean léi". One such example is business records. This exception was provided for in criminal cases in 1992 but has long been the subject of a statutory exception for bankers' books.

9.4 The requisite proofs under the Bankers' Books Evidence Acts are cumbersome and rarely used other than in criminal proceedings. The Acts are of no assistance to entities such as this Plaintiff, which is not a bank. The 2020 Act clarifies that evidence of debt can be given by a person who has familiarised herself with the banking history of the debtor, including perusing their bank statements. In *Feniton Property Financial DAC & Anor v. McCool* [2022] IECA 217, Murray J. concluded with:

'[*Confirmation] that in those cases in which it is not possible to rely upon statutory exceptions to the hearsay rule, evidence can be given of debt by a person who had no personal knowledge of the underlying transactions where they can establish a course of dealings between the parties supportive of the claim, and that this requires proof of the sending of periodic statements from the original lender to the defendant or, possibly, clear evidence from the deponent that he has consulted the original documents of the lender and is in a position to aver on the basis thereof to a liability in the amount claimed*.'

9.5 There, Murray J. refers to *Promontoria (Aran) Limited v Gerry Burns and Anne Burns* [2020] IECA 87, in which Baker J. gave the principal judgment. Mr. and Mrs Burns, defending an application for summary judgment, noted that the application was

grounded on an affidavit sworn by an employee of a debt servicer, not an employee of the plaintiff lender. Noonan J. in the High Court had ruled that the evidence of this deponent was inadmissible hearsay, adjourning the matter for further evidence. Three subsequent affidavits on behalf of the plaintiff confirmed that the employee of the debt servicer was given access to the relevant books and records.

9.6 The deponent did not state, in other words, that his evidence was drawn from his own analysis of the records of the original lender, including customer account statements. The deponent exhibited copies of the documents to which he referred, but these were not certified copies, nor did he confirm that originals or certified copies were held by Promontoria or by his employer, the debt servicer. Given the fact that the opening balance on the statement of account prepared by the plaintiff was the amount of debt *outstanding* on the date of transfer and not the amount of the loan, there were significant concerns about this evidence. At best, the evidence established that the original lender told Promontoria that a specific sum of money was due, which was described by Baker J. as '*classic hearsay*' and therefore insufficient proof of the debt. A short concurring judgment by Collins J., bemoaning the lack of statutory provision for admitting such records in civil cases probably hastened the enactment of the 2020 Act.

9.7 As in this case, the issues raised by Mr. and Ms. Burns related to the proofs required for an order for possession, including the admissibility of the evidence adduced in support of the plaintiff's application for summary judgment. There was no argument that they had not received the money and no defence was raised on the merits, as such.

9.8 As Baker J. noted, in respect of the hearsay rule, that '*the exceptions made have at their root the balancing of the inconvenience and onerous nature of a rigid application of the rule as against the requirement that evidence be reliable and dependable*'. Baker J. emphasised that

the course of dealing exception requires attentiveness to the reliability of the underlying documentation. Such documentation can be sufficient to establish a claim in the absence of a specific challenge but, as in this case, Mr. and Mrs. Burns had put the plaintiff on full proof of the deponent's knowledge of the matters in his affidavit.

9.9 Chapter 3 (ss. 12 – 18) of the Civil and Criminal Law (Miscellaneous Provisions) Act 2020, commenced on 21st August 2020, may have superseded the cases in this regard but the underlying rationale of the cases summarised here is instructive. The reforms introduced by the 2020 Act require similar vigilance in that a trial judge must still satisfy herself as to the reliability of the business records themselves. In this respect, the authorities remain relevant even in cases where the 2020 Act now applies.

9.10 Section 16 of the 2020 Act provides that a court may, in the interests of justice, refuse to admit evidence adduced under the business records exemption. A series of factors are listed for the court's consideration in deciding on admissibility. These factors ensure that the court is vigilant as to the reliability of the information, the authenticity of any document, and the scope to authenticate information through oral evidence. In other words, the exercise carried out in *Feniton v McCool* and *Burns*.

9.11 In *Farrell v Everyday*, these arguments were considered by the Court of Appeal in a case in which the 2020 Act does not appear to have been raised. It was submitted that the purported evidence from Everyday as to the contents of documents sought to be produced was either inadmissible, or ought not to have been admitted, and amounted to hearsay without verification that the copies exhibited were true and accurate by reference to comparison with the originals. No officer of the court on record for the defendant / appellant company, or any other deponent, averred to having inspected the originals.

9.12 In *Farrell*, the plaintiff / appellant relied on *Dubai Bank Ltd. v. Galadari & Others (No. 3)* [1990] 2 All ER 738, another inspection case in which Slade J. had considered the effect of pleadings containing references to a compendium of documents. As Whelan J. noted, the case was relied upon for its emphasis on context, and she quoted his conclusion to the effect that "… *the task of the court must always be to extract the fair meaning of the words used in their context*." If the context is not available, the submission was that the court could not carry out this task. Whelan J. quotes from the same judgment further, in support of her conclusion that documents named in pleadings must be open to inspection but must be specifically identifiable. Slade J. had considered exactly the phrase used in O.31 r.15, "any documents" and reached the conclusion that:

"To our minds, the phrase imports the making of a direct allusion to a document or documents. If the plaintiff were correct in its broad submission, this would oblige the court to enter into a process of inference and conjecture in order to determine the document or the class of documents in question even existed."

9.13 Here, demands were made for the deponents to produce their employment contracts. This was not pursued in oral argument before me, and wisely so. While the Defendants quite properly pointed to deficiencies in some averments, it does not, as yet, appear necessary to challenge averments as to the deponent's employment status. The issue here is the opportunity of the deponent to verify her facts by checking the relevant books and records and not necessarily her employment status unless that affects her ability to review the records and offer evidence on the contents thereof.

9.14 As for the submissions in respect of the hearsay nature of averments in respect of EBS MF and its entitlement (if any) to the loans the subject matter of this case, as set

out above, I will hear the parties further at a plenary hearing. The 2020 Act applies to all civil proceedings and provides, in Chapter 3, for the admissibility of business records in a manner similar to that set out in the relevant caselaw, summarised above.

9.15 The effect of the 2020 Act has been considered by McDonald J in *Nolan v Dildar Limited* [2024] IEHC 4, at paragraphs 253 – 267 and in his rulings at paragraphs 285, 293 and 294. In *Nolan*, various arguments were made, including submissions based on the notice requirements of section 15(1) of the 2020 Act and what might be required by way of authentication when producing copy documents. McDonald J. considered that where documents had already been disclosed, the requirements of section 15(1)(a) of the 2000 Act have been satisfied. He found that oral evidence that a document was a copy would usually be sufficient to establish this fact, commenting:

"*in most cases, the court at trial would expect that authentication would be effected by the giving of some evidence by an appropriate witness to show that the document purporting to be a copy can reliably be treated as a true copy of the original ... However … there might be other ways of authenticating a copy document. Everything would depend on the circumstances. In cases where the document is of major importance in the proceedings, I believe that a court would be concerned to ensure that credible evidence is given that the copy document is a true copy of the original.*"

9.16 As this application has been heard on affidavit, to date, the business records on which the Plaintiffs rely have been provided by way of exhibits to affidavits. Therefore, if the Plaintiffs seek to rely on documents not already exhibited, a specific notice under section 15(1) should be served.

10. <u>Amendments to the Pleadings</u>

10.1 It was argued that the averments of Ms. Duffy and Mr. McCutcheon to the effect that a Deed of Further Charge was created which confirmed that the Defendants owed a sum of €49,000 as opposed to the sums claimed in the civil bill. This, it was submitted, amounted to an amendment of the pleadings and should not be permitted without an application to amend.

10.2 The Defendants rely on the case of *Promontoria (Pluto) Limited v. Nolan* [2023] IEHC 200 in this regard. *Nolan* was a decision of Bolger J. in which, as here, a financial institution sought possession of a property. Promontoria sought to amend the pleadings to extend the claim to cover a portion of unregistered land with, as Bolger J. noted, no explanation as to how the mortgage included that unregistered land and why it was not included in the original proceedings.

10.3 This case appears to be wholly different. Here, the Plaintiff has identified the Property with particularity and has proven that it owns two charges on that property. This Plaintiff does not have to prove the exact amount due in respect of any loan although the Defendants' submissions have drawn my attention to the discrepancy between the four amounts in the civil bill and the registered charge. This in itself, if all other proofs are in order, does not affect the evidence in respect of the principal loan and does not require amendment of the pleadings. As Counsel for the Plaintiff pointed out, there is no requirement to prove exact figures owing in a case such as this one, what is sought is an order for possession.

11. <u>Signatures, Seals and Pens</u>

11.1 In respect of a number of exhibits, the Defendants raised queries as to the authenticity of the first named Defendant's signature. They alleged that in one case, the signature shown was not his. The first named Defendant also made an oral submission that he did not recall signing this document. In a second submission, the Defendants argue that the pen appears to have been different to that used by other signatories. Finally, the absence of a seal was raised in relation to any document in which the phrase "signed, sealed and delivered" was used but no seal was visible.

11.2 Dealing with each in turn, the first Defendant has averred that he did not sign one of the documents which appears to be signed by him. Contrary to what was suggested at hearing, there are sworn averments by him to this effect in respect of a letter at Exhibit A in Ms. Duffy's first affidavit. The Court cannot make a definitive finding of fact in this regard having refused to hear the Defendants on the issue. As set out above, the appeal is now to be heard by plenary hearing, but I would have reopened the hearing to allow this issue to be addressed in any event.

11.3 Unless there is evidence to substantiate an argument, it must be rejected as an assertion only, to which little or no weight can be attached, particularly when being evaluated against the averments of the opposing party whose assertion is supported by the sworn evidence that the documents which appear to be signed were created in the ordinary course of business. However, this averment had been made and should have been considered further at the summary application stage, but was not.

11.4 The issues discussed in *Mars Capital v. Temple*, at paragraphs 25 and 26 of the judgment of Simons J., to the effect that the Defendants need not raise legal arguments in advance by way of affidavit, do not apply in this instance as these are clearly

submissions based on facts that must be established, rather than legal arguments as arose in *Temple*. There, the defendant raised the issue of proof of the transfer of the debt to the Plaintiff.

11.5 In respect of the second submission, that regarding the different pen, this was not on affidavit but is easily dealt with: even if a different pen was used by all the different signatories, this could not affect the authenticity of the signature without more evidence, relevant to the issue of who signed the document. Furthermore, there is no challenge to the signature of the second named Defendant in any of the documents produced and, in every case, both signatures appear on the same page.

11.6 At its height, the above arguments amount to a claim that one signature is false. It would be strange indeed if the second named Defendant did not notice that either her husband had not signed at all or that someone else signed in his place.

11.7 I note in this context the comments of Heslin J. in *Elaine Madigan v. Promontoria DAC*, [2023] IEHC 741, where the sole issue was that a signature of that Plaintiff was forged - not only on a letter but on the mortgage itself. As Heslin J. put it, the inescapable inference, if Ms. Madigan's signature was forged by another, was that the mortgage is a fraudulent instrument. The Defendants, in their affidavits, note the seriousness of such a forgery and this Court agrees.

11.8 Finally, in this regard, the Defendants point to documents which are signed and argue that on some such documents, the words "signed, sealed and delivered" appear but there is no visible seal. This may appear to suggest that the copy is not a certified copy but it also may be that the authors (whether those that signed it or others who created a template) are using what appears to be solemn and legal language to

create a sense that the document will be authentic but without actually realising that it may instead have implications if the document is described as sealed when it is not.

11.9 There was a time when wax seals were commonly used but this is very rare nowadays. I note the challenge and the issue can be addressed at the plenary hearing.

12. <u>Conclusions</u>

12.1 This Plaintiff has not, to date, established with sufficient clarity how it claims to be entitled to an order for possession. While I am satisfied that it is the registered owner of two charges on the Property, and that a default event has occurred in respect of loans agreed with a third party, the chain of title linking the loans with the charges is not robust enough to justify a summary order for possession of the Property.

12.2 Equally, the defendants have not, to date, persuaded me that they have a full defence to the proceedings. In the circumstances, and having regard to the principles expressed in *Bank of Ireland Mortgage Bank v. Cody*, I will direct that the appeal be remitted to plenary hearing. That hearing will take place before the High Court rather than before the Circuit Court. The Circuit Court is now *functus officio*.

12.3 I will not limit the grounds of defence by refusing to allow the Defendants to pursue any of the allegations made, including that of forgery, but I will direct a full exchange of pleadings between the parties. If the Defendants decide, having considered the matter, to pursue an allegation of fraud, they will be required to set out, in their written defence, detailed particulars of the allegations. It is a requirement of the Rules of Court and of fair procedures that a party who alleges fraud or other serious wrongdoing must set out the details of their allegations in advance of the trial.

12.4 This matter was listed for case management, including directions as to the exchange of pleadings.