THE HIGH COURT

[2023] IEHC 334

Record No. 2019/9810 P

BETWEEN

GERARD BYRNE

PLAINTIFF

AND

MARS CAPITAL IRELAND DAC

DEFENDANT

THE HIGH COURT

Record No. 2019/9811P

BETWEEN

GERARD BYRNE

PLAINTIFF

-AND-

MARS CAPITAL IRELAND DAC

DEFENDANT

THE HIGH COURT

Record No. 2020/220P

BETWEEN/

GERARD BYRNE

PLAINTIFF

-AND-

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

DEFENDANTS

JUDGMENT of Ms. Justice Siobhán Stack delivered on the 16th day of June, 2023.

Introduction

1. The defendants in the three above-named proceedings (which I will refer to as the First Proceedings, Second Proceedings, and Third Proceedings, respectively) have applied in each case to dismiss the plaintiff's claim on the basis that it is frivolous and vexatious and/or

discloses no cause of action and/or is bound to fail. The applications are brought both pursuant to Order 19, r. 28 of the Rules of the Superior Courts and pursuant to the inherent jurisdiction of the court.

2. The applications were heard together over two days and I think it is more convenient to deliver a single written judgment relating to all three proceedings, as the plaintiff's complaints in all three relate to the arrangement of certain loan facilities and the grant of related charges as security in favour of Irish National Building Society ("INBS") in the period between 2003 and 2006, and to the subsequent administration of those loans. It is convenient to set out the essentials of what occurred in 2006 before considering some common arguments made by the plaintiff in each case and then considering the applications of the defendants in each case by reference to the pleadings and, where relevant, affidavit evidence in each motion.

Factual background

3. In 2003, the plaintiff and his then wife took out a loan in the amount of €275,000 which was secured on their family home, which I will refer to as "*Property A*". This loan was to be secured by way of a first legal mortgage over Property A and was refinanced in 2006, when a further €40,000 was advanced. The charge was executed by the plaintiff and his wife on 13 June 2006 and was apparently subsequently registered as a burden on the relevant Folio.

4. By 2006, the plaintiff and his wife had separated, albeit that they both still lived in Property A. The plaintiff therefore obtained a further loan from INBS for the purpose of purchasing another property, Property B. The plaintiff and his wife, by this time, planned to divorce and the plaintiff says he intended living in Property B. I will refer to the taking out of

this loan and the execution of the relevant charge over Property B in favour of INBS as *"the 2006 Mortgage Transaction"*.

5. As discussed in more detail below, Property A was subsequently sold and the outstanding arrears on it paid off, and these proceedings concern Property B and the loans secured on it by way of charge.

6. The letter of mortgage offer dated 7 June, 2006, and signed by the plaintiff, has been exhibited to the grounding affidavit sworn on behalf of the defendant in the application made in the First Proceedings. This shows that the letter was dated 26 May, 2006, and referred to the approval of an application for mortgage facility subject to the terms and conditions set out in the letter. The letter is clear in stating that the type of mortgage to be granted was: *"First Legal Mortgage over Residential Investment Property"*. The sum of €395,000 was advanced and the period of the loan agreement was approximately 20 years. The type of loan was quite clearly stated to be *"interest only"* and the purpose of the loan was stated to be *"To Purchase A Residential Investment Property"*.

7. Special conditions were attached to that letter of loan offer including one at 8.11 which stated:

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

A further special condition, at 75.11, was that the INBS was to be granted a cross collateral charge on Property A.

8. A number of factual assertions have been made by the plaintiff concerning the 2006 Mortgage Transaction. In essence, the plaintiff alleges that he was told by the local branch manager of INBS at the time he took out the loan that, later, he could alter the terms of the loan, which was initially interest only and at a higher rate than would be applicable to a mortgage of a principal private residence. He alleges that the branch manager told him: *"I*

will get you your mortgage first then you can change it any way you like later." Specifically, it is alleged that the branch manager represented to him that, after three years, he could move from an interest only mortgage to the more usual – and less expensive - repayment mortgage that would be granted in respect of a borrower's home.

9. The plaintiff says that he clearly stated to the branch manager in question that Property B was in fact to be his principal private residence and not an investment property. It is also alleged that the loan application form was signed by him and later completed by the branch manager, with whom he had previous dealings and whom he trusted. It should be noted that this application would necessarily have preceded the Loan Offer letter already referred to, with the latter issuing on consideration by INBS of the former. The terms of the Loan Offer letter would then have been accepted by the plaintiff by signing and dating it, which he did on 7 June, 2006.

10. The plaintiff then drew down the monies, and executed the necessary Deed of Charge on 12 July 2006. This charge was then registered in the two relevant Folios in the Land Registry (as is evident from the Land Registry stamp on the backing page of the Deed), being the Folio in which Property B was registered and the Folio in which Property A was registered.

11. According to a replying affidavit sworn by the plaintiff in repossession proceedings brought in Monaghan Circuit Court against the plaintiff and his ex-wife by the Irish Bank Resolution Corporation ("IBRC") as successor of INBS, and bearing Record No. 75/2012 ("the 2012 Repossession Proceedings"), the couple divorced on 18 June, 2009. In July, 2009, the plaintiff approached INBS to make changes to his mortgage. He was told, apparently in a telephone call, that it was for a rental property and would attract much higher interest charges. A further affidavit in the 2012 Repossession Proceedings (which, confusingly, is headed *"Defence and Counterclaim"*), and his statement of claim delivered in High Court

proceedings bearing record no. 2014/8038P, both assert that this exchange took place over the phone. The plaintiff, in the 2012 Repossession Proceedings, asserted that he then entered into a dispute with INBS about the alleged misrepresentations of the branch manager and of his alleged false and misleading conduct. Indeed, he asserted in the 2012 Repossession Proceedings that he instructed a solicitor to write to INBS in September, 2009, presumably referring to his complaints and seeking redress.

12. The defendants submit that the plaintiff well knew in 2006 that he was being given a mortgage on terms relating to a residential investment or *"buy to let"* property, but their core submission in support of their application to dismiss the First Proceedings is that the plaintiff was aware from July, 2009, that the mortgage was on less favourable terms than he asserts he had been led to believe when he entered into it in 2006. They say, in essence, that the plaintiff was aware from July 2009 of the essential grounds on which he now maintains the allegation of fraudulent misrepresentation which he says vitiates the 2006 Mortgage Transaction and that these proceedings are therefore hopelessly statute-barred, such that the proceedings should be dismissed as being doomed to fail.

13. I should say, in passing, that I do not think that I could dismiss the entire proceedings at this stage on the basis that the loan application form and loan offer letter were signed by the plaintiff and that a solicitor acted for him, at least in connection with the drawdown and execution of the charge (as opposed, perhaps, to the arrangement of the loan itself and the agreement of its terms). The plaintiff's case is one of verbal misrepresentation which he says was to the effect that the lender would not rely on the strict written terms of the loan offer letter. I was not referred to an *"entire agreement"* clause or any other basis for alleging that the case could be safely struck out at this preliminary stage, nor, in fairness to the defendants, did I understand them to press for the dismissal of the proceedings on this basis although they made reference to it as part of the context in which any claim of fraud should be considered.

14. It is not in dispute that the plaintiff instructed a solicitor to write in September, 2009, complaining that the plaintiff had been told that he could not in fact change the mortgage as he wished. It is therefore clear that the plaintiff, as a result of the phone call in July, 2009, had sufficient knowledge of the terms of the loan and associated charge to instruct a solicitor to write to INBS about the matter. However, no proceedings were issued by the plaintiff until 2014. Those proceedings are referred to further below.

15. By letter dated 24 April, 2012, the plaintiff wrote to Mr. Michael Brady of IBRC, which had taken over the plaintiff's loan and charge from INBS, stating that he had *"strong grounds for taking legal action against the bank"* and this letter states that it had been prompted by a suggestion from IBRC's solicitors that he try to resolve matters directly with IBRC rather than engage in costly litigation.

16. Most of that letter is directed to issues surrounding the inability of the plaintiff to repay the loan secured on Property B and suggesting that there would have to be a write-down of the loan. However, it also purports to remind Mr. Brady that the plaintiff made several phones calls to INBS and its legal department in 2009 and provided *"proof"* that the property was in fact his family home. It also refers to earlier phone calls between the plaintiff and Mr. Brady, though it does not indicate when these took place. In any event, it seems clear from the content of the letter that it was provoked by threatened proceedings, which presumably were the proceedings subsequently issued by IBRC for repossession of Property B, and which were ultimately discontinued.

17. The plaintiff also wrote to IBRC by letter dated 17 October, 2013, purporting to repudiate the 2006 Mortgage Transaction on the basis of fraudulent misrepresentation, fraud and deceit, reckless lending practice, and negligence. That letter has been exhibited and the defendants submits that, even if the plaintiff was not found to be aware in 2009 of his potential cause of action, he was certainly aware of it by the date of this letter, and that,

insofar as they assert a cause of action based on the alleged fraud surrounding the 2006 Mortgage Transaction, all three proceedings which are the subject of this judgment are statute-barred as they were each issued more than six years from that date of that letter.

18. The defendant bought the plaintiff's loans and securities from IBRC and, by Order made 3 September, 2014, was substituted as plaintiff in the 2012 Repossession Proceedings.

19. The plaintiff then instituted two sets of proceedings, in which the allegations about the alleged misrepresentations of the branch manager in 2006 were pleaded. The first of these proceedings (Record No. 2014/8038P) was against Mars Capital Ireland DAC, which is named as a defendant in all three proceedings, the subject of this judgment, and the second (High Court Record No. 2014/9620P) was instituted against the first defendant and the solicitors acting for them in the 2012 Repossession Proceedings. It will be necessary to refer to those proceedings (cumulatively, "the 2014 Proceedings") in more detail below.

20. The 2012 Repossession Proceedings were ultimately settled on 3 July, 2018, the hearing date in the Circuit Court, and that settlement was reduced to writing and signed by the plaintiff on 20 November, 2018, and on behalf of the defendant on 8 January, 2019.

21. A copy of the Terms of Settlement has been exhibited. One of those terms was that the plaintiff would discontinue the 2014 Proceedings, which he did. The effect of the service of that Notice of Discontinuance is the basis for the second submission made in support of this application, which is that the plaintiff, by pleading the same matters in the First Proceedings is engaged in an abuse of process by seeking to relitigate matters the subject of the 2014 Proceedings, notwithstanding his agreement to abandon them.

22. In response, the plaintiff says that the Terms of Settlement specifically provide that they are in full and final settlement of the debt, mortgage and other disputes as between the defendant herein and the plaintiff and his first wife *"insofar as they relate to [the loan*

account referring to Property A] only." As a consequence, he says he is perfectly entitled to raise the issues canvassed in the First Proceedings as they relate to Property B.

23. The plaintiff's loan and associated security were in due course transferred from INBS to IBRC, who sued the plaintiff to regain possession of Property B. Those proceedings were discontinued by IBRC in 2013 and the plaintiff was afforded the benefit of the Mortgage Arrears Resolution Procedure which was applicable where lending institutions sought to enforce their securities over a borrower's principal private residences. This was not successful and no repayments have been made since Mars Capital took over the loan and mortgage in 2014. The plaintiff continues to reside in Property B.

Plaintiff's preliminary or general arguments

24. Prior to considering the applications in relation of each of the three proceedings, the subject of this judgment, it is appropriate first to consider some preliminary arguments made by the plaintiff which I understand were made in relation to all three proceedings.

i. Delay

25. First, the plaintiff claimed the defendant had delayed in bringing the application. The First Proceedings were instituted on 19 December 2019, and the defendant entered an appearance on 16 April, 2020. A statement of claim was delivered on 26 May, 2020, and nothing further then happened until the defendant served a Notice of Intention to Proceed on 29 April 2021. The motion to dismiss was issued on 23 August, 2021.

26. The Second Proceedings were issued on 19 December 2019, served in January, 2020, in which month an appearance was entered by the defendant, and a statement of claim was not delivered until December, 2020. The motion to dismiss was issued on 23 August, 2021.

27. The Third Proceedings were issued on 14 January, 2020, served in July, 2020, in which month an appearance was entered on behalf of all defendants, and a statement of claim was delivered in January, 2021. Again, the motion to dismiss was issued on 23 August, 2021.

28. By way of preliminary comment, I would note that the various lockdowns imposed from March 2020 may excuse some months of delay by the parties and that the plaintiff also seems to be guilty of some delay himself, for example in serving a statement of claim in the Second Proceedings. This is not an application based on *Primor*-type delay in which delay by a defendant is a relevant consideration, albeit that even in that context the primary onus is on a plaintiff to bring the case to hearing: see Irvine J. in *Millerick v. Minister for Finance* [2016] IECA 206 at para. 36.

29. In any event, an application based on *Primor*-type delay is one brought by a defendant to proceedings, and the defendants in these proceedings do not rely on that particular jurisdiction in support of their application to dismiss all three proceedings. This is an application for dismissal as being frivolous and vexatious and doomed to fail, the threshold for which is, as the defendants properly concede, very high. I am deciding the matter by reference to the legal principles relating to dismissal pursuant to Order 19, r. 28, and the inherent jurisdiction to dismiss claims which are frivolous and vexatious or have no prospect of success. I have not decided the matter on any ground relating to the *Primor* jurisdiction and I am therefore satisfied that, even if the defendants had been guilty of inordinate and inexcusable delay (which does not appear to be the case) this would not provide the plaintiff with a defence to the application.

ii. Clean hands

30. Secondly, the plaintiff asserted that the defendant has not come with clean hands as it is guilty of constructive fraud and unconscionable conduct. The defendant says that this is irrelevant as the equitable principle that one must come to court with clean hands applies where equitable relief such as an injunction is sought. The defendant is applying pursuant to the Rules and the inherent jurisdiction of the court and is not seeking equitable relief, and therefore the principle is irrelevant.

31. I therefore agree with the defendants' submission but I would also add that the plaintiff has not in fact proven any fraud by anyone. He certainly asserts fraud but the current state of the evidence is such that it is not possible to make any finding of fraud. Only after the relevant witnesses have given evidence could any conclusions be reached as to what happened.

32. However, the point is that neither has the plaintiff actually proved fraud: he has only alleged it. In order to defeat a claim based on the *"clean hands"* provision, the allegation of unconscionable conduct has to be actually proven, which is not the case here.

33. This submission, therefore, does not provide a defence to the application.

iii. Lack of candour

34. Thirdly, the plaintiff makes a similar submission that the defendant has demonstrated a lack of candour by failing to exhibit all of the correspondence between the parties. While of course no party should ever misrepresent the factual situation to the Court, the duty of candour in the sense of full disclosure normally applies to an *ex parte* application where the other party is not on notice and in a position to make submissions. It is then incumbent on the

moving party to inform the Court of matters which the party not yet on notice might wish to rely on.

However, this is an *inter partes* application where the plaintiff has had a full opportunity to file replying affidavits and to exhibit any document he feels is relevant. He has availed of that opportunity and there has therefore been no non-disclosure to the Court of any matter the plaintiff thinks should be before the court. This is therefore not a ground on which relief should be refused.

iv. Defendant should have sought trial of a preliminary issue

35. Fourthly, the plaintiff relies on the judgment of Laffoy J. in *Costello v. Garda Commissioner* [2007] IEHC 330 for the proposition that this application can only be dealt with by way of trial of a preliminary issue. It should be noted that the entire jurisdiction to dismiss pursuant to the inherent jurisdiction of the court was restated in modern times by Costello J. in *Barry v. Buckley* [1981] I.R. 306, in which Costello J. was satisfied to dismiss proceedings which were doomed to fail on the basis of a motion grounded on affidavit, as has been done here.

36. Furthermore, it is clear from the judgment of the Court of Appeal in *Byrne v. National Asset Management Agency* [2020] IECA 305 which is binding on me, that that Court was satisfied that proceedings could be dismissed as being hopelessly statute-barred on foot of an application to dismiss, such as is brought here. Indeed, it is essential that the courts would have the jurisdiction to strike out cases at an early stage if they were satisfied that they were frivolous or vexatious, or doomed to fail. Trial of a preliminary issue of law on agreed facts takes place where the application of the Statute of Limitations, for example, is not so clear as to permit resolution of the point on a motion such as this. The threshold for success in this

application is, as already stated and as conceded by the defendants, very high. However, the procedural objection to their making that argument is not, in my view, well-founded.

37. I now turn to consider each of the applications to dismiss the three proceedings.

Application to dismiss First Proceedings

38. In the plenary summons, the plaintiff claims an order for rescission and an order directing the defendant to remove or vacate the charge registered in its favour on the relevant Folio.

39. A lengthy statement of claim has been delivered by the plaintiff in which he seeks, *inter alia,* a declaration that the 2006 Mortgage Transaction is *"vitiated by fraud on the part of the original lender and/or its successors in title"* and is therefore void.

40. A good example of the style of pleading adopted by the plaintiff is found in the claim for *"[d]amages for fraud and/or misrepresentation and/or deceit and/or negligence and/or breach of duty (including breach of statutory duty) and/or negligent misstatement and/or economic loss, to include aggravated and/or exemplary and/or punitive damages".*

41. This is typical of the drafting of the proceedings as a whole, as the plaintiff invokes every possible cause of action. However, the lengthy pleadings which have been delivered by the plaintiff in the First Proceedings do not alter the fact that the core of the plaintiff's claim is based on alleged misrepresentations made to him by the INBS branch manager when he took out the loan in mid-2006. These specific pleas against the defendant commence at p. 11 of the statement of claim and relate to the fact that the plaintiff raised these issues with the defendant in 2014, including his attendance at a meeting in October, 2014, with three named

employees of the defendant (one of whom is sued in the Third Proceedings), but they refused to accept the validity of his complaints.

42. The primary basis upon which the defendant seeks to dismiss the First Proceedings as being frivolous and vexatious and/or disclosing no cause of action rests on the proposition that the plaintiff's claim is hopelessly statute-barred. Secondly, the defendant claims that the plaintiff is guilty of an abuse of process as he has sought to relitigate in these proceedings the issues raised in the 2014 Proceedings which were discontinued in compliance with the Terms of Settlement reached between the plaintiff and Mars Capital in the 2012 Repossession Proceedings.

43. The defendant also relies on *Ó Dómhnaill v. Merrick*-type delay (see [1984] IR 151), that is, pre-litigation delay which renders a fair trial impossible. This is an important jurisdiction which may be exercised in those exceptional cases where proceedings are not statute-barred but, often due to the extension of the limitation period by reason of a disability suffered by the plaintiff (as occurred in *Ó Dómhnaill v. Merrick* itself), a trial would take place so long after the events complained of that it could not be conducted fairly. This is distinct from the *Primor*-type jurisdiction which primarily addresses delay in the conduct of proceedings themselves, albeit that pre-litigation delay is a factor which is relevant.

44. By reason of my conclusions on the arguments relating to the Statute of Limitations, it is not necessary to consider the effect of the Notices of Discontinuance served in relation to the 2014 Proceedings or the defendant's submission based on *Ó Dómhnaill v. Merrick*.

Whether the First Proceedings are hopelessly statute-barred

45. As already stated, this application rests primarily on the proposition that any claim the plaintiff may have in relation to the events of mid-2006, is hopelessly statute-barred. The

summons in these proceedings was issued on 19 December, 2019, a period of approximately thirteen and a half years from the acceptance of the Loan Offer, execution of the charge, and drawing down of funds, that is, from the 2006 Mortgage Transaction. It is also a period of over ten years from the time at which the plaintiff admits that he became aware that INBS were insisting that the loan was one relating to a residential investment property or *"buy to let"*, and that the higher interest rates offered in relation to such a loan were applicable in the plaintiff's situation, and would not be changed.

46. The recitation of those fundamental dates, none of which are in dispute, makes it clear that any claim based on contract or tort, insofar as it is derived from the events in mid-2006 relating to the 2006 Mortgage Transaction, is hopelessly statute-barred as s. 11 of the Statute of Limitations, 1957, fixes a six year period of limitation for any such claim. It should be noted that this includes any claim for breach of statutory duty occurring in the course of the arrangement or conclusion of the 2006 Mortgage Transaction, as this is a tort.

47. The plaintiff says he is not statute-barred by reason of s. 71 of the Statute of Limitations Act, 1957, which provides:

> *"(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either—*
>
> *(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or*
>
> *(b) the right of action is concealed by the fraud of any such person,*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.*
>
> *(2) Nothing in subsection (1) of this section shall enable an action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which has been purchased for valuable consideration by a person who was*

not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed."

48. It is difficult to see how s. 71 can assist the plaintiff. It is clear from the facts recited above that the plaintiff was told in July, 2009, that he could not alter the terms of his mortgage to those applicable to a home loan. Therefore, even if the plaintiff had signed the letter of loan offer in 2006 without understanding the clear statement in it that it did not relate to a principal private residence and was an offer relating to a residential investment property, or in the belief that its terms would not be enforced against him, he knew from July, 2009, that INBS was denying this. Indeed, he instructed a solicitor to write in September, 2009, to complain of these matters and therefore he was aware from that time that it might be necessary to institute proceedings in order to litigate any issues arising out of the alleged misrepresentations made to him in 2006 and to obtain any suitable remedy to which he might be entitled.

49. As a result, I am satisfied that the plaintiff *"discovered the fraud"* in July, 2009, and therefore any action based on that fraud became statute-barred by the end of July, 2015.

50. If I am wrong in that, it is in any event absolutely clear from the plaintiff's letter of 17 October, 2013, to IBRC, that he was claiming that the 2006 Mortgage Transaction was vitiated by *"fraudulent misrepresentation"*, *"fraud and deceit"*, *"reckless lending practice"* and *"negligence"*. The plaintiff explicitly sought rescission and threated proceedings. There is, therefore, no doubt that the plaintiff had *"discovered the [alleged] fraud"* by that date and that the First Proceedings are consequently statute-barred as they were issued on 19 December, 2019, a period in excess of six years from the date of that letter.

51. In making these findings, I wish to repeat that I am not finding that there was any fraud by INBS, as such a finding could only be made after a full hearing, and the fraud

referred to in the preceding paragraph is one alleged by the plaintiff rather than one found to exist.

52. The plaintiff relies on a number of matters in support of his submission that the proceedings are not statute-barred, and his essential proposition is that events later than July 2009 are the relevant ones for the purposes of section 71. It is not clear to me how the plaintiff cannot assert that he did not discover the alleged fraud in July, 2009, given his account of his telephone conversation with a representative of INBS at that time, but I will in any event consider the matters he relies on in the interests of being as comprehensive as possible.

i. Qualification as a barrister

53. First, the plaintiff appeared, from his oral submissions, to rely on the fact that he qualified as a barrister in 2013 and then became aware that the actions of the branch manager could be regarded as fraud. This clearly does not entitle him to rely on s. 71 of the Statute, however, as this is not the discovery of new grounds but an allegedly new perception of the significance of the matters which he discovered at 2009. The plaintiff discovered in 2009 that he would not be able to alter the terms of his mortgage and, on his case, was aware from that time of the alleged fraud, that is, that the representations made to him in 2006 were inaccurate. He was then in a position to invoke any right of action available to him.

54. It should be noted that this discovery occurred within the limitation period and, indeed, he acted on that discovery by suing the defendant in 2014, in two separate sets of proceedings, both of which set out details of the alleged fraud.

55. However, the key point for the purposes of this part of my analysis is that this is not the discovery of the fraud, but an alleged reinterpretation of facts already known to him since July, 2009.

ii. Loan application form and rental income statement

56. On 5 September, 2013, the plaintiff received a letter from an IBRC representative indicating that the plaintiff's loan was to have been self-financing, serviced by rental income of €1,400 per month. When the plaintiff queried this, he was told that this was entered on the loan application form which the plaintiff says he simply signed and left the branch manager to complete. By letter dated 10 December, 2013, from IBRC, a copy of the loan application form was sent to the plaintiff.

57. First, I should say that I do not accept that this is separate and distinct from the matters discovered by the plaintiff in July, 2009. The loan application form is evidence as to the nature of the transaction entered into in 2006 between the plaintiff and INBS. It is not a new or separate transaction, or even a new ground for alleging fraud. It is evidence which the plaintiff says tends to show that the branch manager acted fraudulently in filling out his loan application form for him, and in procuring a residential investment property or *"buy to let"* loan rather than a home loan.

58. The fact that the plaintiff did not obtain the loan application form until receipt of the letter of 10 December, 2013, does not mean that he did not *"discover the fraud"* until that date. He had been aware since 2009 of the fact that INBS were, on his account, resiling from the alleged representations and the later disclosure of a document relating to the 2006 transaction did not alter that fact.

59. Similarly, in late December, 2014, the plaintiff received, in response to a data subject access request ("DSAR") which he had made, further documentation relating to the loan application and the basis upon which it was made. The documentation received was a copy of a rental income statement sent by a local estate agent to the INBS branch manager in April, 2006, which contained an estimate of the rental income which Property B would command. The estimate was €1,400 per calendar month and this was then used to fill in the loan application form.

60. Again, this is evidence as to how the 2006 Mortgage Transaction had been dealt with by INBS in 2006 and does not relate to any separate transaction. It goes to the core complaint which the plaintiff has had since July, 2009, which is that he thought he would obtain a home loan and instead he got a residential investment property or *"buy to let"* loan, or alternatively, that the terms of the loan could be changed afterwards.

61. Like the loan application form obtained in December, 2013, this was evidence relating to the alleged fraud, and not discovery of the alleged fraud.

62. If I am wrong in my analysis of the matters under this heading, it is in any event clearly the case that these matters would have been discovered had the plaintiff exercised reasonable diligence in seeking them. In fact, they could have been sought shortly after July, 2009, in the period in which the plaintiff instructed solicitors to write to INBS alleging fraud. In particular, had proceedings been instituted in 2009 to litigate the alleged fraud, these documents would have been discoverable in those proceedings.

63. These matters therefore, do not affect the relevant date for the purposes of s. 71 of the Statute.

iii. Alleged lack of engagement by defendant

64. The plaintiff seeks to get around the Statute by pleading that, from the transfer of his loan and security to the defendant in 2014, he sought to raise these issues with the defendant's employees and representatives and they refused to engage with him. This, however, does not disclose a cause of action in fraud, misrepresentation, deceit, negligence, breach of duty, negligent misstatement or economic loss, as against the defendant. It is clear that any discussions with the plaintiff referred to in the statement of claim related to the plaintiff's assertion that the defendant could not enforce its rights on foot of the loan and associated charge by reason of the matters alleged against INBS and occurring in 2006.

65. For these purposes, the defendant steps into the shoes of INBS and its rights are no more and no less than INBS enjoyed on foot of the loan agreement and the charge. There is no assertion of any fresh agreement with the defendant from the time it acquired that loan and charge. On the contrary, the statement of claim asserts that the defendant would not come to any fresh arrangement with him and would not renegotiate the terms agreed in 2006, nor would it agree that the loan and/or charge were vitiated by the alleged fraud perpetrated by INBS in 2006

Conclusion on argument relating to Statute of Limitations

66. I am therefore satisfied that, insofar as the lengthy statement of claim attempts to assert a cause of action against the defendant, it does no more than to plead that the cause of action allegedly originally enjoyed against INBS, and which has been statute-barred since

July 2015, is enforceable against the defendant as successor of INBS. Furthermore, any reference to the plaintiff's subsequent communications with the defendant and its employees does not plead any cause of action known to law.

67. In particular, there is a reference in passing to undue influence (which is required by Order 5(2) of the Rules of the Superior Courts to be pleaded with particularity) but no plea of a cause of action in that no transaction is said to be entered into by reason of such influence, nor is any presumption or particulars of such influence identified. In fact, the plaintiff's complaint is that the defendant would not agree to alter the pre-existing terms of the loan and associated charge. This does not disclose a cause of action known to law.

Miscellaneous pleas in the statement of claim

68. There are a variety of other complaints made against the defendant on the basis of statutory provisions and I can deal with these briefly.

69. Insofar as the plaintiff pleads s. 39 of the Sale of Goods and Supply of Services Act, 1980, it is clear that this is linked to the 2006 Mortgage Transaction and can therefore only be a claim based on terms allegedly implied into the loan agreement by that provision. Indeed, it is pleaded against the defendant only in its capacity as successor to INBS.

70. It is not necessary for me to examine whether there were any such implied terms or how the Act applied to that transaction, as any claim based on this section is a claim for breach of contract, i.e., breach of the 2006 loan agreement, and therefore a claim for breach of contract which is clearly statute barred as already found above.

71. Global references at para. 28(g) of the statement of claim to the Consumer Protection Act, 2007, the Consumer Information Act, 1978, and *"legislation and/or regulatory provisions and/or financial services legislation including, inter alia, codes promulgated by*

the Central Bank of Ireland and in particular the Consumer Protection Codes", which again are pleaded against the defendant only in its capacity as successor of INBS, are manifestly too general in nature to disclose a cause of action, and are therefore liable to be struck out pursuant to Order 19, r. 28 of the Rules.

72. Insofar as the plaintiff relies on the defendant's refusal to accept his claim of fraud, I accept his submissions that Case C-357/16 *UAB 'Gelvora'*, a decision of the CJEU of 20 July, 2017, confirms that the provisions of the Unfair Commercial Practices Directive EC/2005/29, ("the 2005 Directive") which the Consumer Protection Act, 2007 ("the 2007 Act") implements in this jurisdiction, apply to the assignee of the original lender. I also accept that it is authority for the proposition that *"product"* in the Directive includes debt recovery activities as these were held by the CJEU to be related to the underlying credit agreement and therefore to constitute *"services"* within the meaning of the Directive.

73. However, as the reliefs in the plenary summons and statement of claim do not seek any damages or other relief arising out of a breach of the 2007 Act, no cause of action has been pleaded in the statement of claim delivered in the First Proceedings. These references do not add anything to the claim of unlawfulness surrounding the 2006 Mortgage Transaction which is manifestly statute-barred and therefore doomed to fail.

Conclusion on application to dismiss First Proceedings

74. I am satisfied therefore that the complaints apparently made against the defendant directly are either entirely dependent on the statute-barred claim against INBS and its successors under the loan and charge, or fail to disclose a cause of action known to law and should therefore be struck out pursuant to the inherent jurisdiction of the court.

75. In the circumstances, I do not need to deal with the other bases upon which the defendant moved to dismiss the First Proceedings.

Application to dismiss Second Proceedings

76. The Second Proceedings were also instituted on 19 December, 2019. These proceedings are directed mainly at the enforceability of a Settlement of the 2012 Repossession Proceedings which was agreed on 3 July, 2018, between the plaintiff and the defendant at Monaghan Circuit Court and subsequently recorded in writing.

77. In the Second Proceedings, the plaintiff seeks a variety of reliefs which are grounded on claims that the defendant:

i. breached the Terms of Settlement, in several respects;

ii. acted wrongfully or unlawfully in relation to the negotiation and conclusion of the settlement.

78. It should also be noted that, as already stated, one of the terms of the loan relating to Property B was that Property A would also be security for that loan. As a result, the plaintiff and his first wife raised the allegations of fraud and other causes of action which they say arise out of the 2006 Mortgage Transaction in their replying affidavits sworn in 2015 in the 2012 Repossession Proceedings.

79. The Terms of Settlement essentially provided that Property A would be sold and the balance of the indebtedness of the plaintiff and his first wife, a sum of €314,214.91, would be written off. In addition, it provided that the 2014 Proceedings would be discontinued.

Alleged breach of Terms of Settlement

80. A number of breaches are claimed and the first of these is that it was a term of the settlement that two costs orders obtained by the defendant against the plaintiff and his first wife in the course of the 2012 Repossession Proceedings would be vacated, conditional on vacant possession of Property A being delivered up by 3 October, 2018. I understand possession was in fact delivered up in August, 2018, and that Property A has since been sold.

81. The plaintiff's case , as I understand it is that, as the Terms of Settlement did not provide for that the costs orders would be vacated within any particular period of time, the obligation on the defendant was to arrange for the vacation of those orders within a reasonable time. The remedy for breach of contract is usually in damages and it is a necessary element of a claim for breach of contract that loss be shown.

82. No attempt was ever made to enforce the costs orders but no specific application to vacate the orders was made until 23 October, 2020. The plaintiff acknowledges in his statement of claim that this was done but complains that it was not done until after he instituted the Second Proceedings.

83. I should first say that the Order made on the day the 2012 Repossession Proceedings were settled, 3 July, 2018, provides:

> *"Provided the Defendants vacate the subject Property on or before the 3rd October 2018, the Order for costs in favour of the plaintiff to be vacated."*

I think it is at least strongly arguable that it was not necessary to make any specific application to vacate the Orders for costs as the Order of 3 July, 2018, seems to actually vacate them, albeit that it would have been preferable to list them specifically in the Order of 3 July, 2018. However, I don't think it is appropriate to enter into a debate about the meaning of the Order of 3 July, 2018, in the course of this motion to dismiss, as the defendant has to demonstrate that the case is doomed to fail and that requires a clarity which the Order of 3 July, 2018 does not really achieve.

84. The plaintiff does not seek an order rescinding the settlement and this is perhaps to be expected as it is difficult to see how this could now be achieved, given that the indebtedness of the plaintiff and his ex-wife on foot of the relevant loan has been written off and Property A has been sold. In addition, his ex-wife was a party to the Settlement and she is not a party to the Second Proceedings, so it is difficult to see how such relief could be claimed in any event.

85. Instead, the plaintiff claims various reliefs including damages and pleads in the statement of claim that he has suffered loss in three ways. First, he says that he agreed to discontinue the 2014 Proceedings and has therefore suffered *"loss of chance"*. Secondly, he claims the continued existence of the costs orders negatively affected his credit rating, and thirdly, he claims the costs and expenses incurred in bringing the Second Proceedings.

86. The third alleged loss is a matter to be determined as part of the relevant costs application in the Second Proceedings themselves, at which any pre-litigation correspondence from the plaintiff designed to alert the defendant to the proposed proceedings and to give an opportunity to remedy the breach, so as to avoid the costs of litigation, will no doubt be central to any consideration, along with the fact that the proceedings were maintained and indeed a statement of claim delivered, after the costs orders had been vacated. It is not otherwise recoverable as a loss in these same proceedings.

87. Similarly, there is no loss to the plaintiff arising out of his discontinuance of the 2014 Proceedings. He agreed to do this as part of the Terms of Settlement. Having complied with his part of the bargain by serving Notices of Discontinuance, he has affirmed the Terms of Settlement. That is not a loss occasioned by the defendant's breach of the terms, but rather compliance with his own obligations, which he undertook voluntarily as part of the *quid pro quo* involved in the settlement. As already noted, he and his first wife obtained a significant benefit in return for, *inter alia,* the discontinuance of the 2014 Proceedings, as their

indebtedness has been written off. The plaintiff, with the benefit of legal advice, agreed to discontinue the 2014 Proceedings in exchange for that write off, which was of considerable value to him. He cannot now sue for what he asserts is the value of the 2014 Proceedings, as he has agreed to discontinue them in the settlement on which he sues in these proceedings.

88. Finally, there is no evidence of any loss in terms of an effect on the plaintiff's credit rating. As the defendant's Head of Recoveries and Litigation has pointed out in the grounding affidavit, the plaintiff's negative credit rating is down to the fact that the last loan repayment made by him in relation to the loan secured on the Property A was on 30 May, 2010. It is not in dispute that the plaintiff is in significant default on his loan and was in significant default prior to the conclusion of the 2018 Settlement. Indeed, I understand that he has made no repayment whatsoever in relation to the loan secured on Property B since the defendant acquired the plaintiff's loan and charge in 2014.There is, therefore, no stateable case for damages.

89. However, the plaintiff claims that there is no bar to him claiming declaratory relief, relying on Order 19, r. 29, which provides:

> *"No action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not."*

90. However, it seems to be well established that a declaration cannot be sought absent a real controversy between the parties. As Clarke J. stated in *Omega Leisure Ltd. v. Barry* [2012] IEHC 23, at para. 4.4, (applying the judgment of Walsh J. in *Transport Salaried Staff's Association v. Córas Iompair Éireann* [1965] IR 180, at 202-3):

> *"In approaching claims for declaratory relief, the court must first be satisfied that there is a good reason for so doing. Second, there must be a real and substantial, and*

not merely a theoretical, question to be tried. Third, the party with carriage of the proceedings must have sufficient interest to raise that question and finally, that party must be opposed by a proper contradictor. It should, of course, be borne in mind that, by its very nature, a declaration is a discretionary relief and involves a jurisdiction which must, therefore, be circumspectly exercised and in accordance with the circumstances of the case."

91. This passage was recently quoted with approval by the Supreme Court (*per* Baker J. at paras. 50 to 51 of her judgment) in *M.C. v. The Clinical Director of the Central Mental Hospital* [2021] 2 I.R. 166, [2020] IESC 28.

92. In this case, there would be no purpose to granting a declaration that the Terms of Settlement had been breached in circumstances where an application to vacate the costs orders was made on 16 January, 2020, which, after Covid-related delays, was dealt with in October, 2020. The grant of a declaration now would not clarify or resolve any extant dispute between the parties. Accordingly, this aspect of the claim is obviously doomed to fail and should be struck out pursuant to the inherent jurisdiction of the court. However, as stated above, the reasonableness of the plaintiff in bringing and maintaining the Second Proceedings will be relevant to the costs application which follows on that decision.

Alleged breaches of the 2007 Act in the course of negotiating and concluding the Settlement

93. As regards the alleged wrongful acts of the defendant in negotiating and concluding the Terms of Settlement, it should first be noted that the settlement was reached in the context of ongoing litigation between the parties, and the plaintiff and his ex-wife were represented by solicitor and counsel in the course of the negotiations.

94. In the statement of claim, however, the plaintiff contends that, because it pertained to consumer debt, the provisions of Articles 5, 6 and/or 8 of the 2005 Directive, and ss. 42 and 52 of the 2007 Act applied to the settlement of the 2012 Repossession Proceedings. It is clear from the statement of claim that the plaintiff relies on these provisions for the contention that he was misled in the negotiation of the settlement agreement and/or that the defendant acted aggressively, unconscionably or in bad faith in the manner in which it agreed the settlement with the plaintiff and his ex-wife.

95. I am satisfied that the plaintiff's action is frivolous and vexatious and/or doomed to fail, as these provisions simply do not apply to a settlement reached in the context of repossession proceedings.

96. Article 2(d) of the 2005 Directive provides that a *"commercial practice"* means *"any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".* This is implemented in Irish law by the definitions of *"commercial practice"* and *"consumer transaction"* contained in s. 2(1) of the 2007 Act, which must themselves be interpreted in line with the 2005 Directive.

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

98. As a result, neither Articles, 5, 6 and 8 of the 2005 Directive nor sections 42 and 52 of the 2007 Act have any application to the settlement negotiations which took place in Monaghan Circuit Court in 2018.

99. However, even if I am wrong in that, the pleadings do not identify any conduct by the defendant or its representatives in the course of the negotiation and conclusion of the settlement which would suggest that these provisions, even if they did apply, were breached. No misrepresentation or misleading commercial practice is in fact identified.

100. It should be borne in mind that it is not sufficient, in order to identify a cause of action against a particular defendant, to set out various causes of action known to law. The pleadings must also set out the essential factual basis on which the cause of action has said to arise as between the parties to the proceedings. Order 19, r. 3 provides:

> *"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."*

101. As stated by Finnegan P. in *A.S.I. Sugar Ltd. v. Greencore Group plc* [2003] IEHC 131 (at p. 2):

> *"The function of pleadings is to define with clarity and precision the issues of fact and law between the parties. Where issues are so defined each party will have given fair and proper notice to his opponent of the case he has to meet and each party will be enabled to prepare his own case for trial."*

102. The problem here is that the statement of claim pleads at great length various breaches of the 2007 Act and the 2005 Directive without ever identifying any statement of material facts which support reliance on those provisions. For example it is pleaded (at para. 25 l.) that the defendant breached s. 41 of the 2007 Act by *"withholding information from the plaintiff"*. But no information is identified nor is the date or period within which this is said to have occurred, or how it could give rise to a claim for damages pursuant to s. 74, ever identified.

103. There is no assertion of any misrepresentation to the plaintiff or his legal representatives during the negotiation of the settlement nor is there any plea of facts and

matters which could amount to aggression. Indeed, the complaint of aggression and undue influence is clearly gratuitous and unfounded in circumstances where the plaintiff was represented in negotiations by solicitor and counsel. He was separately advised and indeed obtained a substantial benefit from the settlement in the form of the write down of a very significant sum which was due on the loan account relating to Property A.

104. Apart from the three alleged losses already referred to above, the only specific matter pleaded in the statement of claim is that the loans were not promptly written off. However, they have been written off. As no time limit for the writing off of the loans was included in the Terms of Settlement, the defendant had a reasonable time in which to make the administrative arrangements to reflect that formally. More importantly, it could not have sought to recover the debt which it agreed to write off.

105. But the defendant, it is admitted, did not seek to resile from the settlement or to recover the debt it had agreed to write off. It is asserted in the pleadings that, until the loans were formally written off, arrears continued to accrue in the relevant loan account. However, no steps were ever taken to seek to recover those additional arrears. There is therefore no loss to the plaintiff from any delay and therefore no actionable relief available to him.

106. I will therefore dismiss the Second Proceedings as being frivolous and/or vexatious and/or doomed to fail.

Application to dismiss the Third Proceedings

107. The Third Proceedings are instituted, not just against the corporate entities named as first and second defendant (together, *"Mars Capital"*), but also ten named individuals who have had contact with the plaintiff over the years in their capacity as employees of Mars Capital. I will refer to these as the *"Personal Defendants"*.

108. The statement of claim runs to 28 pages and can only be usefully examined on a section-by-section basis, by reference to the headings contained in it. However, before turning to consider each section in sequence, it is appropriate to deal first with the claim against the Personal Defendants.

Preliminary issue: Claim against the Personal Defendants

109. It is expressly pleaded that the Personal Defendants are servants and/or agents of Mars Capital and in the case of the fourth, fifth, seventh, eighth, ninth, eleventh and twelfth defendants, that they may be officers of the first and/or second defendants.

110. It is specifically pleaded at para. 25 that the plaintiff holds these individuals personally liable pursuant to s. 74(2) of the 2007 Act for the acts of Mars Capital.

111. I would add that, even though it is not specifically pleaded in this part of the statement of claim, s. 74(2) of the 2007 Act does not provide for any cause of action against employees. Instead, it provides for individual liability on the part of directors, managers, secretaries, or officers of bodies corporate (but not their employees) for any *"prohibited act or practice"*, as defined in s. 67 (but excluding those set out in s. 74(1)). The plaintiff does not, anywhere in the statement of claim, identify any material facts which would ground a claim against the Personal Defendants. They are sued in their capacity as employees, against whom no cause of action arises, and the plaintiff suggests, but without positively asserting, that they may be officers of Mars Capital. In my view, this is insufficient to plead a cause of action against an individual.

112. Even if I am in wrong in that, no specific breach which would allow any of the Personal Defendants to know the essentials of what is claimed against them is set out in the statement of claim. There are copious, very generalised pleas of breaches of many provisions

of the 2007 Act which may, depending on the applicable facts, be actionable as a matter of law. However, no case against these individuals is identified..

113. In the circumstances, I am satisfied that the proceedings should be struck out as against the Personal Defendants.

Preliminary Issue: Application of the 2005 Directive and 2007 Act

114. At paras. 16 to 26 of the statement of claim, the plaintiff again complains that the 2006 Mortgage Transaction was vitiated by fraud. I have already stated that any complaint in contract or tort in relation to that transaction is hopelessly statute-barred.

115. However, this section of the statement of claim also asserts that the 2007 Act applies to the loan and charge which make up the 2006 Mortgage Transaction.

116. Indeed, immediately before this section, at para. 14 of the statement of claim, it is pleaded:

"The within proceedings concern an alleged mortgage agreement between a business on the one part and consumer on the other part. As such, this case involves the application of EU law including inter alia*, Directive 2005/29 (the Directive on Unfair Commercial Practices), as implemented in Irish law by the Consumer Protection Act, 2007. Accordingly, the Plaintiff's claim falls within the scope of EU Directive 2005/29, and thus the Charter of Fundamental Rights of the European Union (the Charter) is engaged in the within proceedings."*

117. It will therefore be obvious that the applicability of the 2005 Directive and the 2007 Act to the matters complained of is a central plank of the plaintiff's case as pleaded in the Third Proceedings. However, neither the 2005 Directive nor the 2007 Act applied to the 2006

Mortgage Transaction, as that transaction predated both the date for implementation of the Directive and the date of commencement of the 2007 Act.

118. Article 19 of the Directive required Member States to give effect to it in national law on or before 12 June, 2007. The 2007 Act was passed on 21 April, 2007, and was commenced with effect from 1 May, 2007, by the Consumer Protection Act, 2007 (Commencement) Order, S.I. 178 of 2007 (other than ss. 47 and 49 which have not yet been commenced).

119. As a result, the 2007 Act does not apply to the 2006 Mortgage Transaction, or any of the circumstances surrounding its arrangement, as that transaction was concluded no later than the execution of the Deed of Charge on June, 2006.

120. The 2005 Directive could not, under Union law, have direct effect prior to 12 June, 2007, and therefore it is similarly inapplicable to 2006 Mortgage Transaction.

121. The plaintiff seeks to get around this by asserting a fresh cause of action against Mars Capital after its acquisition of the plaintiff's loan and charge from IBRC. Central to his claims against Mars Capital is the judgment of the CJEU in Case C- 357/16 *UAB Gelvora* EU:C:2017:573 for the proposition that the 2005 Directive and the 2007 Act apply to the activities of Mars Capital as assignees of the loan and charge.

122. There is no doubt that *Gelvora* confirms that the activities of debt collection form part of the *"product"* originally sold to the consumer, the *"product"* in question being the provision of credit, as the after sales activities of recovering the debt could influence the borrower to agree the loan in the first place: see paras. 27 of the judgment of the CJEU.

123. Furthermore, the activities of debt collection were held to fall within the commercial practices to which the Directive applied. At para. 20, the Court stated:

"Article 3(1) of the Unfair Commercial Practices Directive, read in the light of Recital 13 thereof, … applies to unfair commercial practices in which an undertaking

engages, even outside any contractual relationship, either before or after the conclusion of a contract, or following the conclusion of a contract or during the performance thereof."

The plaintiff is therefore correct in asserting that the activities of the assignees of an original lender, such as Mars Capital, can in principle fall within the Directive and the 2007 Act which implements it in this jurisdiction. However, it is important to understand the reasoning of the CJEU.

124. At para. 27, the Court stated:

"[T]he conditions in which a debt owed by a consumer may be recovered may be so important as to decisively influence the consumer's decision to take out a loan, particularly where the measures taken to recover the debt take the form of those at issue in the main proceedings."

125. From this I think it is follows that debt collection is not regarded as a separate transaction in itself but as part of the performance of the credit agreement originally entered into. If that is correct, then my preliminary view is that neither the Directive nor the 2007 Act apply to actions taken to enforce payment of loans entered into prior to the commencement of the Act on 1 May, 2007.

126. However, the decision in *Gelvora*, which does not give the dates of the relevant transaction or indeed say much about the underlying facts, other than that judgment had been entered on foot of the loan, does not identify the point at which the Directive might be said to apply to debt collection activities, nor does it specify that the credit agreement itself must have been concluded after the implementation of the Directive in national law or after the Directive (even if not implemented by the deadline) became capable of having direct effect.

127. I think the better view is that it is unlikely that the Directive — and consequently the 2007 Act — apply so as to affect the recovery of loans advanced on foot of agreements which pre-dated them, but I am acutely aware of the high threshold which applies on a motion such

as this and it is well established that I should not determine any novel points of law on this application. I have not been referred to any decision on this point other than *Gelvora* and the submission of the defendant was, in essence, to the effect that the 2006 Mortgage Transaction pre-dated the 2007 Act and that no *"transactional decision"* had been identified in the pleadings.

128. Bearing in mind, therefore, that the 2005 Directive and 2007 Act may be found, either at full hearing or in a future relevant decision of the CJEU, to be applicable to the activities of Mars Capital in seeking to recover the debt due by the plaintiff, I now propose to consider the plaintiff's pleas based on the 2005 Directive and the 2007 Act in light of the defendants' submission as to why they should be dismissed at this point. As already stated, for convenience, I will consider the application by reference to the headings used in the statement of claim.

Background

129. Under this heading, at paras. 27-31, the plaintiff refers again to the alleged wrongdoing surrounding the 2006 Mortgage Transaction. As he acknowledges at para. 30, these matters are more fully elucidated in the First Proceedings. He then refers to the repossession proceedings in respect of Property B which were discontinued on 4 December, 2013. While he refers to contentions he will make at the trial of the action, he does not plead any cause of action against any of the defendants in this section of the statement of claim, other than alluding to the cause of action to be made in the First Proceedings. This section is therefore, as the name suggests, at best an introduction to the rest of the statement of claim and therefore stands or falls, for the purposes of this application, with the remainder of the statement of claim. As a result, and as this section of the statement of claim adds nothing to

the only portion of the pleadings which arguably discloses a cause of action, it should therefore be struck out.

Purported Transfer of Mortgage Agreement

130. At paras. 32-35, the plaintiff complains that, after the transfer of the plaintiff's loan and charge to the first and second defendants in June, 2014 (for €194,747.00), he sought to raise his complaints with the defendants. This is a reference to all defendants, including the Personal Defendants. He refers to negligence and breach of statutory duty, otherwise his complaint is of a failure to listen to his complaints and to resolve them (presumably to his satisfaction). The only causes of action pleaded are, therefore, negligence and breach of duty.

131. As regards negligence, he does not identify any duty of care which would be owed by any of the defendants, and in particular the Personal Defendants, to him. It is evident from the statement of claim that no fresh agreement of any kind was made and, in particular, no financial product of any kind was sold by any of the defendants to him after Mars Capital acquired the loan and charge relating to Property B in 2014. The negligence alleged is a failure to resolve the plaintiff's complaints about the 2006 Mortgage Transaction to his satisfaction, but the plaintiff has identified no breach of contract or breach of any duty known to law arising out of the failure of Mars Capital to concede his claim.

132. The appropriate course to take where a wrong is alleged and where it is alleged that the successor of the original alleged wrongdoer is liable to redress the wrong, is to litigate that issue by instituting court proceedings. As set out above, despite retaining a solicitor no later than September, 2009, these proceedings were not instituted until 14 January, 2020, by which time any cause of action arising out of the alleged wrongdoing in 2006 was long since statute-barred. The failure to concede that such wrongdoing took place or that redress is due

does not constitute a cause of action separate from the original claim. In particular, the effect of the Statute cannot be avoided by simply raising the complaint with the successor of the original alleged wrongdoer at a later date.

133. Insofar as this section of the statement of claim contains very general references to the Central Bank Act 1942, as amended, the 2007 Act (which for reasons already stated did not apply to the 2006 Mortgage Transaction as it post-dates that transaction) and the *"Central Bank CPC's"*, no particular statutory duty binding any of the defendants has been identified and general references of this kind do not disclose a cause of action. It is quite simply impossible to identify with any precision what para. 35 of the statement of claim refers to.

134. This section of the statement of claim therefore does not disclose a cause of action.

Meetings October 2014

135. It is pleaded that the plaintiff met on three occasions with servants or agents of the second Defendant including the fourth and ninth defendants. Another individual is named at para. 36 but he is not sued.

136. Under this heading, at paras. 36 to 45, the plaintiff makes various allegations that the named defendants refused to accept his claims of fraud and threatened to repossess his house and were aggressive, but no cause of action against any of them is pleaded. For the reasons stated above, even if one were to read the earlier references to the 2007 Act into this section of the statement of claim, no cause of action can be identified.

137. The reference to undue influence clearly fails to meet the requirements of Order 5(2) of the Rules, which have already been referred to, and again fail to identify the decision made or transaction entered into by the plaintiff which is said to have been made by reason of undue influence.

138. The only thing that comes close to a cause of action in this section of the statement of claim is that the plaintiff claims that a DSAR submitted in June, 2016 was not properly dealt with by the defendants as they denied sharing any of the plaintiff's personal data with a UK corporate entity which is related to Mars Capital. The plaintiff believes they have shared that data because the various individuals named in this section of the statement of claim had represented to him that the ultimate decision on any issue relating to the Mortgage Agreement rested with the UK entity.

139. No cause of action is pleaded in this section and the plaintiff's remedy was to complain to the Data Protection Commissioner under the Data Protection Acts, 1988-2003, which was the law in force at that time. Apparently, the Commissioner did not make any finding in favour of the plaintiff and, in fact, the file is concluded as the plaintiff did not respond to requests for further information. Apparently, the only reason the Commissioner has not formally dismissed the complaint is that there is no provision to do so in the relevant legislation.

140. At para. 29 of his replying affidavit in the motion in the Third Proceedings, the plaintiff appears to say that he has pleaded the data protection issues only *"for the purposes of supporting my claims for breach of my rights under financial services and/or consumer protection law".* It also appears from his affidavit that the plaintiff is not saying that he has not been given access to data, but that it was not given to him in a clear and transparent manner. Furthermore, in his oral submissions, the plaintiff stated that he was not seeking relief on the basis of any data protection breach at present but would, in effect, see if he could find something on discovery.

141. So far as Order 19, r. 28 is concerned, the onus is on the plaintiff now to identify his cause of action. This has not been done and this portion of the statement of claim should be struck out.

Maladministration of Mortgage Account

142. The plaintiff complains at paras. 46 to 55 that he became aware in early 2019 that Mars Capital had failed to correctly administer the account in that they had overcharged for interest, incorrectly calculated repayment amount and unlawfully or wrongfully capitalised arrears.

143. It is pleaded that Mars Capital acknowledged by letter dated 25 January, 2019, that the plaintiff's mortgage account had not been administered correctly and/or the monthly repayment and/or charges had been incorrectly calculated and applied to the account for a period of more than 13 years. This is a reference to the practice of *"auto-capping"*, that is, adding arrears to the monthly repayments. However, the plaintiff says that he sought full and complete information on this issue by letter dated 13 May, 2019, and that, while he received a reply dated 13 June, 2019, the information received was obscure, ambiguous and incomplete. Further letters of 26 July, 2019, and 25 October, 2019, failed, according to the plaintiff, to secure the requested information.

144. The letters of 25 January, 13 May and 13 June, 2019, have been exhibited in the grounding affidavit sworn on behalf of the defendants in the application to dismiss the Third Proceedings. From the letter of 25 January, 2019, it appears that the plaintiff's repayment of €1,988.11 was reduced to €1,983.00 with effect from 1 March, 2019, and that the plaintiff's arrears were reduced by €2,897.51, with the result that the amount owing (including arrears) as at 1 March, 2019, was €658,869.25.

145. The letter of 13 June, 2019, effectively states that Mars Capital cannot say what occurred before they took over the mortgage account. In response to point 1 of the plaintiff's letter of 13 May, 2019, Mars Capital indicated that the plaintiff's mortgage account

transferred to IBRC in September, 2014, and was serviced by Acenden Limited. It further states that Mars Capital took over the mortgage account in February, 2018. However, I think it is clear from the letter as a whole that Mars Capital took over the mortgage account in September, 2014, but that Acenden Limited, who had serviced the mortgage on behalf of IBRC, continued in that role on behalf of Mars Capital until Mars Capital took it over in February, 2018. They then commenced a review of the administration of the account.

146. It is acknowledged in the letter of 13 June, 2019, that *"auto-capping"* is *"not considered best practice"* and the adjustments identified in January, 2019, were obviously designed to correct for it.

147. The defendants say there is manifestly no case to answer because the errors were corrected, no damages lie and therefore there is no cause of action.

148. However, in the letter of 13 June, 2019, at point 15, Mars Capital say that the repayment was adjusted based on financial data from September, 2014. It appears from the letter that Mars Capital simply don't know how repayments were calculated before that but, as they say in response to points 2 and 10, the apprehension is that auto capping occurred prior to September, 2014. Nevertheless, it appears from this letter, and in particular point 14 where it is stated that *"the remediation of your account was based on financial data from September 2014, when your mortgage account transferred to Mars Capital Ireland DAC"*, that the adjustment did not take into account any overcharging which occurred prior to September, 2014, and presumably this is reflected in the arrears balance outstanding which is said in this letter to amount to €214,673.42.

149. At point 17, it is confirmed that the adjustment of €2,897.51 was carried out *"based on the financial data made available to us following the transfer of your mortgage account to Mars Capital Ireland DAC"*, which could be interpreted as including data provided by the former owners of the loan, IBRC and INBS. However, this is not clear and earlier in the same

letter it is stated, in a response to a request for *"full and complete details of how the ... account was previously administered"*, that *"unfortunately, we are unable to comment on the practices and administrative methods undertaken by [INBS and IBRC]"*.

150. Reading the letter as a whole it is less than clear on whether the adjustment made to the account refers to overcharging from September, 2014, only, or whether it relates to the entire period of the mortgage. It is therefore not clear whether the entire amount of the overcharging has in fact been credited to the plaintiff. The threshold for success on an application such as this is high and clarity is required. It would therefore seem that there is at the very least a stateable case for saying that the adjustments made are insufficient and do not take into account the alleged practices of INBS and, subsequently, Acenden Limited, as agents for IBRC, in engaging in *"auto-capping"*.

151. At para. 49 of the statement of claim, it is pleaded that the letter of 25 January, 2019, admitted that the mortgage account had been administered incorrectly and the monthly repayment incorrectly calculated and applied to the account for a period of more than 13 years. While paras. 51 and 52 stress the actions of Mars Capital and its agents for the four and a half year period to January, 2019, I think the pleadings are just about sufficient to contain an allegation of overcharging from the commencement of the mortgage term in 2006.

152. It seems unlikely, given that the plaintiff has apparently made no repayments whatsoever since at least 2014, that any of this will alter the apparent right of Mars Capital to repossess Property B on foot of the charge of which it is now registered as owner. Furthermore, the arrears are such that it seems unlikely that any sum will be payable to the plaintiff on the sale of the property. I wish to stress however that I am fully aware that that is only an assumption on my part — I have no evidence as to the market value of the property.

153. However, it will affect the balance due on the mortgage and a mortgagor has a right to an accurate redemption figure. The history between the parties strongly suggests that the

plaintiff will not be in a position to redeem the mortgage and, further, that he is not willing to do so. But, again, that is speculation on my part as the issue simply doesn't arise in this application. Furthermore, it seems likely that any correction is a matter within the jurisdiction of the Circuit Court, or perhaps even the District Court. However, that cannot be ascertained at present.

154. At this preliminary stage, I am being asked to dismiss the entire claim on the basis that no cause of action has been pleaded and, on this particular point, I do not think that the defendants have established that they have no claim to answer.

155. It is, however, unclear from the statement of claim what relief the plaintiff is seeking on this point. He has not sought an order directing the provision of information, nor has he sought damages for breach of the relevant contract, that is, the loan agreement. However, it is the case that, where proceedings can be amended to properly reflect the cause of action, they will not be dismissed at this early stage. (This, in my view, contrasts with the position in relation to the data protection complaints where the plaintiff has conceded in his affidavit that these are not relied upon for any relief under the 2018 Act but are matters pleaded only in support of other complaints.)

156. Paras. 46 to 55 disclose, to the limited degree required at this stage, a cause of action against the first and second defendants directed at identifying the correct balance due on the mortgage account, given that it appears to be acknowledged as likely that *"auto-capping"* took place prior to the acquisition of the mortgage and loan by Mars Capital in September, 2014. I will not, therefore, strike out this section of the statement of claim.

Refusal to investigate claims of fraud

157. Under this heading, at paras. 56 to 61, the plaintiff restates his complaint that the first and second defendants are seeking to take advantage of the fraud on the part of INBS in 2006 and have refused to investigate it further or to meet with him. For the reasons set out in my judgment on the First Proceedings, that claim is, in my view, clearly statute-barred, and no new cause of action is created by the ongoing complaints or requests for engagement with the first and second defendants as successors of INBS.

158. This third defendant is named in para. 58 as being the *"servant or agent"* of the second defendant and of writing a letter on its behalf. No basis whatsoever for asserting personal liability on his behalf appears from the statement of claim.

159. For the reasons already stated, global references to the 2007 Act, the Central Bank's Consumer Protection Codes and the 2005 Directive do not identify a cause of action. This is leaving aside the fact that neither the 2005 Directive nor the 2007 Act apply so as to give any cause of action in relation to the 2006 Mortgage Transaction which pre-dated both the commencement of the Act and the date upon which the 2005 Directive became directly effective, as already set out above.

Failure to provide personal data and information in a clear and transparent manner

160. The section of the statement of claim under this heading comprises paras. 62 to 69. Paras. 62 to 67 make a complaint about the treatment by the second defendant of a DSAR submitted to it by the plaintiff by letter dated 21 October, 2019. It is specifically pleaded that this complaint has been referred to the Data Protection Commissioner but that it has not been determined.

161. A further DSAR was submitted by letter dated 4 May, 2020, and it seems that there is a dispute between the parties as to whether this is a new claim or simply a repeat of the plaintiff's initial request.

162. However, the central point about the data protection pleas is that no relief whatsoever is claimed by reference to the 2018 Act. Given the high threshold for success in an application such as this, I have afforded considerable leeway to the plaintiff in considering what he might claim under the 2018 Act, but the real problem is that no relief of any kind is sought by reference to the 2018 Act. The replying affidavit of the plaintiff and his oral submissions indicate that he has no present intention to seeking any relief on the basis of his dissatisfaction with the processing of his DSAR. Neither the Particulars of Loss and Damage nor the prayer contain any reference to any claim based on a data protection breach. As such, the pleadings insofar as they rely on alleged data protection breaches fail to meet the requirements of Order 19, rule 28.

163. The entirely non-specific reference in this section to *"the CPC and the provisions of the CPA 2007"* only has the effect of informing the reader that the plaintiff himself is not clear as to the basis on which he is including any of these matters in the statement of claim. Further, extremely general pleas at paras. 68 and 69 do not advance the matter any further.

Consideration of particulars

164. The remainder of the statement of claim consists of what are said to be purported particulars or a wide variety of causes of action and, given the high threshold for this application, it is appropriate to consider whether they disclose any stateable cause of action.

165. Para. 70 contains particulars lettered a. to u., some of which area broken down into up to ten sub-paragraphs.

166. Despite the many and varied list of particulars, no claims other than those already considered above are set out in this portion of the statement of claim.

167. There are references to new statutory provisions, such as s. 44 of the Central Bank (Supervision and Enforcement) Act, 2013, which provides for an action in damages where a consumer suffers loss as a result of any failure by a regulated financial service provider to comply with financial services legislation. However, this provision can have no application as the only financial services legislation identified is the 2007 Act, which I have already stated post-dates the 2006 Mortgage Transaction and the pleadings does not assist in identifying how it could apply to any subsequent dealings of the plaintiff with any of the defendants. In particular, no *"transactional decision"* has been identified and therefore there is nothing in the pleadings which explains how the 2007 Act is engaged. The pleadings therefore do not disclose any cause of action under the 2007 Act or s. 44 of the Central Bank (Supervision and Enforcement) Act, 2013.

168. There is reliance also on the Central Bank's Consumer Protection Codes, no breach of which has been identified as there is no reference to any specific provision of such codes, for example. However, as the defendants' counsel rightly points out, *"legislation"* manifestly does not include non-statutory codes. An extract from Murphy and Bergin-Cross, *Financial Services Law in Ireland: Authorisation, Supervision, Compliance, Enforcement* (Round Hall, Thomson Reuters, Dublin, 2018) at para. 21-124 was relied on for the proposition that s. 44 applies to breaches from 25 July 2013, and therefore could have no application to the 2006 Mortgage Transaction. However, it seems that s. 44, along with the greater part of the 2013 Act, was commenced with effect from 1 August, 2013, by the Central Bank (Supervision and Enforcement) Act, 2013, Commencement Order (S.I. 287 of 2013), and could not apply to the 2006 Mortgage Transaction. The plaintiff has simply not identified how the 2013 Act is engaged.

169. The particular at para. n., which contains six subparagraphs, makes it reasonably clear that the unfair commercial practice relied upon is that in s. 41 of the 2007, but the 2007 Act does not apply to the 2006 Mortgage Transaction and the plaintiff has not pleaded any later transactional decision which he either made, or was considering making at any time thereafter, and which might therefore attract the provisions of the 2007 Act.

170. For the same reasons, ss. 42 and 46 of the 2007 Act, which are referred to in particular p., and paras. 52 and 53 of the 2007 Act, which are referred to at particular q., can have no application either to the alleged events of 2006, or to the plaintiffs dealings with any of the defendants. The plaintiff has simply not identified a relevant *"transactional decision"* made by him after the commencement of the 2007 Act in respect of which he could claim damages pursuant to section 74.

171. As regards the provisions of the Central Bank Act, 1942, as amended, which are cited at particular r., as there is no s. 34AN, I will presume that it is intended to refer to s. 33AN as the following three subparagraphs which purport to particularise that plea and they refer to section 33AN. However, s. 33AN is an interpretation section applicable to Part III C of the Act, and there is no plea relying on any substantive provision in Part III C of the Act.

172. There is a reference in s. 33AN to *"prescribed contravention"*, but this has six different definitions, depending on which Regulations are said to have been contravened (and it should be noted that these Regulations were all adopted in 2015 or later, so that any possible application of them to the events complained of in these proceedings is extremely dubious as they seem to post-date all specific events pleaded, other than the response to the DSAR requests).

173. Even if they did apply, the particular provisions said to be contravened would have to be identified, given that the various definitions of *"prescribed contravention"* in s. 33AN refers to at least 30 individual provisions, a list of provisions in another regulation and a more

general definition which incorporates the contravention of any designated legislation, designated statutory instrument, or non-statutory code.

174. The reference, therefore, to a *"prescribed contravention"* tells the defendants little or nothing about what is alleged, and therefore fails to disclose a cause of action.

175. Furthermore, s. 33AN was originally inserted into the Act by s. 10 of the Central Bank and Financial Services Authority of Ireland Act 2004 with effect from 1 August, 2004, as alluded to in particular r., it has been frequently amended since that date, with the bulk of the amendments to *"prescribed contravention"* dating from 2016 onwards. If it was really intended to rely on these provisions, the specific contravention (and the essential facts giving rise to the specific claim of the plaintiff) should be pleaded so that the defendants know the case they have to meet. The manner in which the Act is pleaded here makes that impossible.

176. Similarly, the relevance of the reference in particular to s. 34G of the Central Bank Act, 1997, as inserted by s. 5 of the Consumer Protection (Regulation of Credit Servicing Firms) Act, 2015, is not discernible from the pleadings. I would make the same comment in relation to t., which refers to the Central Bank's Authorisation Requirements and Standards for Credit Servicing Firms pursuant to Part V of the Central Bank Act, 1997, as amended, but gives no clue as to how it is said these apply or how any of the defendants might have contravened them.

177. The result, therefore, despite the copious references to statutory provisions in particulars r., s. and t., is that no cause of action whatsoever is disclosed.

178. At particular u., there is a global reference to the EU Charter, which contains over 50 provisions applying to everything from criminal trials to the right to protection of one's personal data. No provision is cited, let alone its relevance pleaded, and indeed the only specific reference is to the *"fraudulently procured Mortgage Agreement"*. This is the statute-

barred claim, discussed in more detail in the context of the application made to dismiss the First Proceedings.

179. At para. 72, the plaintiff pleads that the corporate and Personal Defendants are guilty of criminal offences contrary to the 2007 Act. The prosecution of offences is a matter for the Competition and Consumer Protection Commission but it is at least equally important to point out that absolutely nothing has been pleaded in relation to any of the individual defendants which would suggest any criminal liability.

180. This suggestion is therefore without foundation and regarded in law as a frivolous and vexatious plea, which is sufficient for the purposes of this application.

181. There then follows yet another repetitious (and therefore lengthy) portion of the statement of claim which, though purporting to plead deceit, fraud and conspiracy on the part of the defendants, in fact does no more than repeat the allegation of fraud allegedly committed by INBS in connection with the 2006 Mortgage Transaction, and claim – without giving any basis for the allegation – that the defendants were on express notice of that fraud when they purchased the plaintiff's loan and security.

182. In all of these efforts by the plaintiff to recast the statute-barred claim against the defendants by referring to apparently independent causes of action arising in 2014 or later, it should be recalled that the documentary evidence material to the 2006 Mortgage Transaction (the loan application form, the supporting documentation, the loan offer letter which the plaintiff accepted, and the deed of charge) all refer to the plaintiff taking out a residential investment mortgage or buy to let, and there is nothing on the face of the documentation to suggest that the plaintiff thought that he was taking out a home loan or that he was told that he could change to the terms of a home loan later. The plaintiff's evidence for that is his own oral evidence as to what was said by the branch manager in 2006. He does not identify how it could be said that the first and second defendants were on *"express notice"* of those

statements by the branch manager, though they may well have been on notice that the plaintiff was asserting fraud. That is not the same thing as being on notice of the alleged fraud itself.

183. In those circumstances, the plaintiff has failed to do one of the key things that has to be done to plead a cause of action, i.e., to set out the material facts on which it is alleged that a cause of action exists. He has failed to refer to any facts which would suggest that any of the defendants were on notice of fraud by INBS but has in fact repeatedly stated that they are on notice of his claims, a materially different thing. He has in fact complained about the defendants refusal to agree that fraud took place.

184. My view on that is supported by the plaintiff's plea as to particulars of loss and damage which appears at para. 82-84, and which makes it abundantly clear that the plaintiff's claim is that he was mis-sold a loan and associated mortgage in 2006, and has had to endure the accrual of interest on the loan account, as well as repossession proceedings (discontinued by IBRC in 2013), and that he has failed to convince the defendants, after their acquisition of the said loan and mortgage, of the existence of the alleged fraud.

185. The abundant and repetitious references to common law causes of action and statutory provisions (many, if not all, of which were not in force in 2006) do not alter that position. Causes of action do not exist in isolation and are not considered by the courts as an academic exercise, they arise on the occurrence of certain material facts which must be pleaded in order to establish that they have relevance to the dispute and to let a defendant know the case he or she has to meet.

186. In those circumstances, it is my view that the Third Proceedings, other than the claim relating to maladministration of the plaintiff's loan account, fail to disclose a cause of action and therefore should be struck out pursuant to Order 19, r. 28.

187. If I am wrong in that, I would in any event conclude that the proceedings are, for the most part, an attempt to litigate an alleged fraud committed in 2006, of which the plaintiff has been aware since, at the latest, July 2009, and which is therefore clearly statute-barred and therefore bound to fail. As such, the Third Proceedings – other than the claim relating to maladministration of the loan account – should be struck out pursuant to the inherent jurisdiction of the Court as being frivolous and vexatious and doomed to fail.

188. In addition, I am satisfied that the attempt to sue the Personal Defendants is an abuse of process. The unnecessary joinder of individuals purely on the basis that they are officers or employees of a corporate entity without any attempt to identify a basis on which they could be personally liable should, in my view, be treated similarly to an attempt to sue a solicitor purely because he or she happens to act for a party with whom a plaintiff is in dispute.

189. The latter was described as an abuse of the process of the court in *Ó Siodhacháin v. O'Mahony* (Unreported, Supreme Court, 7 December, 2001) and the same logic would apply to the unnecessary and oppressive joinder of individuals for simply doing their jobs. There are of course cases where a statute may provide for personal liability on the part of officers of a company, as discussed above, but where it is attempted to fix the officer of a company with personal liability, the statutory basis for doing so should be clearly pleaded. There is no basis for attempting to fix employees of a company with personal liability and imposing on them the stress and anxiety of High Court proceedings when the complaint is clearly, in law,

against the body corporate who employs them. For this reason, the Third Proceedings should be dismissed as against the Personal Defendants.

Conclusion

190. Despite the voluminous, and indeed possibly prolix, pleadings which have been served, the plaintiff has failed to identify a cause of action which is not doomed to fail, other than that relating to the earlier maladministration of his account in respect of which I could not conclude that the plaintiff has no cause of action. The amounts involved may not be very meaningful but that is a matter for another day.

191. I will therefore dismiss the First and Second Proceedings in their entirety and I will dismiss the entire of the Third Proceedings other than paras. 1 to 3, 16, 18, 19, 46, 47, and 49 to 55.

192. I am striking out para. 48 as the plaintiff, if he wishes to join another party to the proceedings, should make the appropriate application to do so, and I express no comment at all on the merits of any such application.

193. I will therefore direct that the plaintiff file an amended statement of claim with those paras., suitably renumbered, and with a claim for relief relating to the alleged maladministration of the mortgage account. The matter will be listed for mention in early course so as to deal with costs and the defendants' application for an *Isaac Wunder* order.