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Judgment: approved by the Court for handing down | *Delivered:* **04/08/2014**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Record No 13/16477

Between:

BANK OF SCOTLAND PLC

Plaintiff

and

ROSEMARIE REA

Defendant

- and -

Record No 11/006165

Between:

BANK OF SCOTLAND PLC

Plaintiff

and

1. TERENCE McGREADY
2. ANN McGREADY

Defendants

- and -

Record No 09/108433

Between:

BANK OF SCOTLAND PLC

Plaintiff

and

1. FRANK PATRICK LAVERTY
2. MARY CHRISTINE LAVERTY

Defendants

MASTER ELLISON

Background

[1] These are claims for (a) possession in the first intituled action ("Rea"), (b) a stay of enforcement of an order for possession in the second intituled action ("McGready"), and (c) leave to enforce a suspended order for possession in the third intituled action ("Laverty"). In each case the plaintiff's claim to possession arose pursuant to a charge over a dwelling. The dwellings are occupied by, respectively, Ms Rea in the first action (her later partner and co-mortgagor Mr Donnelly having died in 2012), both Mr and Mrs McGready in the second action and Mr Laverty the first defendant in the third action. Significant arrears of monthly instalments have arisen in each of the cases. However, in the first and second actions significant and regular monthly payments have been made by the defendant borrowers for some time now. In the normal course of such proceedings arrangements for payment of arrears might have been agreed between the parties or imposed by the court in the form of orders for possession suspended on terms that the defendants pay the ongoing monthly instalments and a monthly sum towards the arrears to address their default. Those observations do not however apply to the third action in which the first defendant, Mr Laverty, as the only defendant in occupation of the dwelling following a relationship breakdown with Mrs Laverty some years ago, was stated by his Counsel at hearing to be unable to afford to put a proposal to address the arrears.

[2] All three cases raise a point of some importance, namely whether the lender may both (a) consolidate (or, as it is often called, "capitalise") arrears of monthly instalments with the mortgage balance upon which the instalments are calculated with the effect of increasing the contractual monthly instalments to spread those arrears over the residue of the mortgage term and also (b) rely on the arrears so consolidated as outstanding arrears for the purpose of possession proceedings.

[3] Broadly, the plaintiff insists that it can do exactly that. It argues that the consolidated arrears were not extinguished qua arrears (which is normally what happens when arrears are consolidated) because the plaintiff took the step of consolidation unilaterally, ie without the consent of the borrower specific to that step save insomuch as consent had been given to such a step in the mortgage contract. Indeed the plaintiff does not accept that the relevant restructuring of the mortgage accounts that I have just described is either capitalisation or consolidation, and avoids the use of either word when referring to it. However for the purpose of this judgment (and without doing so by way of prejudgment) I will refer mostly to the practice of the plaintiff which I have just described as "unilateral consolidation".

[4] The defendants (save Mrs Laverty who has not engaged in these proceedings) contend that, for reasons I shall explain, the practice is an unconscionable one because it prevents them from putting a proposal to repay the arrears to the court and prevents the court from exercising, or exercising properly, its discretion to defer possession. That discretion arises under the Administration of Justice Act 1970 ("the 1970 Act") section 36 and the Administration of Justice Act 1973 ("the 1973 Act") section 8 and, if exercised, allows the court to make either an order adjourning the proceedings or a suspended order for possession on terms which would allow the defendants to pay the arrears within a defined or ascertained time which the court regards as reasonable. The defendants also argue that the plaintiff's practice compromises the affordability of payments towards arrears under pre-existing and future suspended orders for possession.

[5] The plaintiff's practice came to light at hearings in each of these cases in the Spring of 2013 in the context of what the plaintiff describes as the "migration" of the relevant mortgage accounts by reason of the fact that the lenders (save Birmingham Midshires), comprised in the Lloyds Banking Group were adopting the same

automation system as Lloyds Bank PLC. This resulted in a proliferation of "subaccounts" for borrowers whose mortgages were affected by the change so that typically there now appear to be 3 or 4 subaccounts serving different purposes whereas prior to the change there were only 2, namely for the capital and interest repayable by instalments and for, in the other subaccount, charges, expenses and so forth associated with the mortgage account. I shall not dwell on the detail of the respective subaccounts save to say that it does not seem to me that they are aids to ready comprehension of the mortgage account overall, especially as the documentation purporting to explain the change to the affected borrowers appear to me to be inadequate for that purpose. As affidavit evidence on behalf of the plaintiff in Laverty unfolded – which it did, in a piecemeal and unsatisfactory way over many months – it became clear that this one-off "migration" was merely one of a number of types of "trigger event" upon which the plaintiff relies to effect the consolidation of arrears in mortgage accounts. I quote paragraphs 6 to 9 from the affidavit dated 2 May 2014 of Ms Emmeline Stead, a Collections Officer of the plaintiff, in Rea (but addressing principles common to all three cases):-

> "6. When a customer takes out a mortgage with the bank, a contractual monthly instalment ("CMI") is set to take into account the applicable interest rate, term of the loan and amount advanced to ensure that for a repayment mortgage the entire balance is repaid within that term or for an interest-only mortgage, the interest is met and there is no additional sum owing at the end of the term.
>
> 7. If a customer pays the CMI as and when it falls due, there will be no increase to the CMI during the lifetime of the mortgage unless there is an interest rate change, a change to the mortgage term, a change to the repayment type or any change to the debt ie debiting of insurance premiums, ground rent, service charges etc. Upon such changes or "trigger events" the CMI is reviewed in accordance with the obligations within the mortgage terms and conditions. The bank will notify the

customer in writing of the changes to their account and CMI.

8. If a customer has not paid their CMI the bank will record an arrears balance. There is no arrears account. The arrears balance is an accounting principle which simply records the amount of any missed payments. When a CMI payment is not made, the overall balance of the mortgage account does not decrease as expected in relation to the capital element of the CMI. In relation to the unpaid interest element of the CMI this is an additional debt which is added to the overall balance in accordance with the mortgage contract and is to be repaid within the term along with associated charges and expenses in connection with the default. Interest is charged on this one overall balance.

9. If a customer has defaulted on paying their CMI and one of the "trigger events" as set out in paragraph 7 takes place, the bank will calculate a new CMI based on the overall balance of the mortgage. This will therefore include any unpaid interest and charges. In a case where the trigger event is a small increase to an interest rate but there has been considerable default and a short remaining term, the resulting increase of the CMI can be significant. This can be seen in the case of Bank of Scotland v Laverty when the CMI was reviewed in March 2013".

(Emphasis added.)

[6] It appears to me from paragraphs 7 and 8 that in default situations it would be likely that there would be "changes to the debt" by the accretion of administration charges and expenses arising from the arrears (referred to in the plaintiff's skeleton argument as "ancillary charges"). Therefore in essence default in payment would itself seem to be a trigger for initiating unilateral consolidation of arrears. I quote from the plaintiff's online statement of fees and charges (stated to be "For the use of mortgage intermediaries or other professionals only"), which may give some idea of the rapidity with which a significant sum of default charges is likely to arise in a given case:

"**The following fees may apply depending on the conduct of an account**:

Arrears (action taken)	
Each telephone call and/or each letter requesting payment	£35
Where it becomes necessary to instruct an external debt counsellor any costs paid to the counselling agency will be debited to your clients mortgage which would be no more than £100 per visit	£100
If we instruct solicitors to collect arrears or seek possession	£100
If we take the mortgaged property into possession	£350

In addition, your clients will have to pay any costs we pay to third parties that we may instruct to recover any money owed to us or to create or protect our security or in using our legal rights. Examples of costs we pay include:

- Solicitor's charges.
- Possession management fee."

The Hearing

[7] At the hearing of these matters on 24 June 2014 Mr Shaw QC leading Miss Simpson of Counsel appeared for the plaintiff instructed by TLT Solicitors and Mr John Coyle of Counsel appeared for the defendants instructed by the solicitors of Housing Rights Service (whose own services were on a *pro bono* basis, albeit I understand Counsel's fee is underwritten by the Public Interest Litigation Service). I am obliged to them for their helpful submissions.

[8] In Rea the outstanding balance on the capital and interest repayment mortgage was announced as £137,968.71, the arrears of monthly instalments at £13,285.48, the contractual monthly instalment £667.20, the last payment having been £710 on 27 May 2014. The loan term is not due to expire until 1 April 2043 and the plaintiff's understanding of the value of the property would put it in some negative equity. As at the hearing (though not before) the plaintiff's stance was that no order for possession was being sought against Ms Rea and the plaintiff was not going to stand on its contractual rights in respect of costs, albeit this was not to be regarded as a precedent. However, her legal team were unable at the time to take instructions on this and I am therefore to assume for the purpose of this judgment that she wants what Mr Coyle describes as the security of an order for possession suspended on terms of payment which are clear, ascertainable and reliable. The arrears arose because she had to leave her home for some time on police advice that she was at risk there of being an innocent victim of a criminal conspiracy connected with her job as a bank official. In addition, she suffered the loss of her partner Mr Donnelly who passed away in 2012. She has now returned to the property and established a pattern of regular payments in excess of the contractual monthly instalments for well over a year.

[9] At hearing the figures in McGready were also announced. The outstanding balance on this capital and interest repayment mortgage was stated to be £95,081.33, the arrears £27,227.23, the contractual monthly instalment £1,103.72 and the last payment £1,364.72 on 24 April 2014. The mortgage term is due to expire on 1 April 2022 and there appeared to be equity in the security. This was an application by the defendant to stay eviction on foot of a suspended order for possession made on 13 November 2011 by Deputy Master Minnis under which the defendants were to pay the sum of £780 (all-in) monthly. The defendants failed to

comply with that suspended order and an order lifting the suspension was made on 18 September 2012. Eviction was scheduled for 22 July 2013 but the defendants brought an application to stay enforcement grounded on an affidavit of Mr McGready in which he explained that he and his wife and 6 children between the ages of 9 and 17 lived in the dwelling, that the arrears and the default in compliance with the suspended order had arisen and continued because of a failed dairy farming project but that he was now free of the financial burden to which it had given rise. Mr McGready stated that his head had been in the sand with respect to his obligations under the plaintiff's mortgage and that this had been compounded by the fact that during the proceedings his father had become very ill and he had had to care for him to the detriment of his work and attention to financial matters generally. However, he had secured employment as a driver on the advice of Housing Rights Service that his income from farming alone would be too sporadic to address the mortgage default. While his ability to make payments had improved and stabilised to the point where he would otherwise be in a position to put a proposal, it transpired in the course of the stay proceedings that this was a case affected by the migration of accounts in March 2013 shortly after which the contractual monthly instalment had increased dramatically from £960.83 to £1,103.72 notwithstanding the fact that the interest rate had remained the same at 3.99% per annum. Mr and Mrs McGready have been making payments regularly and, as with Ms Rea, the plaintiff's Senior Counsel indicated in the course of the hearing (for the first time) that it was prepared to seek "no order" in the proceedings and would not be standing on its contractual rights in respect of costs (albeit again that concession was not to be regarded as a "precedent"). Instructions were taken from Mr & Mrs McGready at hearing and they were to the effect that they continue to seek the protection of an order suspending the order for possession upon terms as to payment of an appropriate monthly amount as soon as

possible after the plaintiff rectifies its current practice with respect to the consolidation of arrears.

[10] Also at the hearing on 24 June, in Laverty the outstanding balance was stated to be £209,295.44, the arrears of monthly instalments £27,507.13, the contractual monthly instalment £1,004.87 and the last payment £150 on 1 February 2013. The mortgage term is due to expire as soon as 1 November 2015, the mortgage is an interest only one and there is significant negative equity in the security. The originating summons had been issued on 5 October 2009 pursuant to a charge dated 3 December 2007 and the claim for possession arose as a result of arrears which Mr Laverty attributes to the relationship breakdown with his wife and significant employment difficulties. A suspended possession order was made on 8 September 2011 and the proceedings before me are an application for leave to enforce that order. Mr Laverty had sought the help of Housing Rights Service at an early stage in the context of this application and the case was the first of those in which the problem of unilateral consolidation came to light in proceedings before me. In Laverty the monthly instalment was increased quite dramatically over a short period from £809.92 to £1,004.87. Moreover it also transpired that the plaintiff accepted that in August 2012 the monthly instalment had been increased on a consolidation made in error (there having been no ascertainable trigger event) and that significant increase had continued for a period of some 8 months before being identified by the plaintiff. The case was one in which I had to give numerous and sometimes lengthy directions to endeavour to obtain clarification of the situation by way of affidavit evidence on behalf of the plaintiff.

Evidential Difficulties

[11] That problem, and an aspect of the entire problem with these cases, is perhaps exemplified by an affidavit received in response to the following direction

in my order of 22 April 2013 (when I had read a late and very perfunctory affidavit from a solicitor in response to an earlier direction that the plaintiff provide an affidavit "clarifying the reason for the dramatic increases in the monthly instalment and whether the plaintiff has in fact recomputed the monthly instalment to enable the arrears to be discharged within term"):-

> "The plaintiff's solicitors do within 14 days notify Housing Rights Service of the condition or conditions of the mortgage contract upon which it relies to capitalise the arrears and on what basis arrears can be said to exist if they have been capitalised."

Another of the plaintiff's former solicitors in this matter, Mr Carvill of the firm Arthur Cox, gave what I assumed to be his client's response almost 6 weeks later by an affidavit which reads as follows (so far as relevant):-

> "2. I make this Affidavit from facts and matters within my own knowledge which are true or from information provided to me by the Plaintiff or (sic) any fact or matter which is not within my knowledge, I identify the source and confirm that it is true to the best of my information and belief.
>
> …
>
> 4. The arrears on the mortgage account currently stand at £15,448.69 as of today's date and at no time have the mortgage arrears been capitalised."
>
> (Emphasis added.)

[12] The averment denying that any capitalisation had ever taken place was quite erroneous - even by the very restricted definition of the word relied on by the

plaintiff right up to and including the submissions of its Senior Counsel at hearing. In a much later affidavit Ms Emmeline Stead, a Collections Officer of the plaintiff bank, conceded that there had been an "automatic capitalisation" in line with the plaintiff's previous practice in February 2009. She further made the concession I have already mentioned that there had also been an "informal consolidation" of arrears, albeit in error, in August 2012. However in this judgment I find there were a total of no less than four capitalisations in this account, namely, that in February 2009, and those on 1 May 2012 (increase in CMI from £502.86 to £796.70) on 1 August 2012 (increase in CMI from £796.70 to £814.96) and on 1 April 2013 (from £814.96 to £1,004.87). (Incidentally, copies of the above affidavit and three others in this application and sworn by solicitors previously acting for the plaintiff were not included or indexed in the trial bundle.) Accordingly before finalising this judgment I invited Mr Carvill to file and serve an explanatory letter or affidavit about the relevant averment. The result was a letter dated 30 July 2014 from a colleague of Mr Carvill in the firm of Arthur Cox which reads as follows (so far as relevant):-

> "On 30 May 2013 and in accordance with the Courts (sic) directions our Cahal Carvill lodged an affidavit and stated at paragraph 4: '*The arrears on the mortgage account currently stand at £15,448.69 as of today's date and at no time have the mortgage arrears been capitalised*'.
>
> Paragraph 4 of the affidavit of Cahal Carvill is correct and relates specifically to the arrears on the account as at 30 May 2013, being £15,448.69 in which we were instructed upon (sic) and which were the subject of these proceedings. We obtained this information from our computer system which is linked to the Plaintiff's internal computer systems and details the information about the Defendants' mortgage account. At the swearing of the affidavit the computer system was checked and it

> confirmed the arrears of £15,448.69 remained on the account. If the aforementioned arrears had been capitalised they would not have appeared on the bank's computer system at all and our firm would have then been de-instructed. Our Cahal Carvill, therefore, was content to make the statement as at paragraph 4.
>
> We were directed to confirm whether or not capitalisation had taken place in respect of the arrears on the account which had resulted in the current action and were not requested to nor did comment on historical arrears on the account which did not form part of the ongoing action."

[13] My request had been for clarification of the precise source of his information or belief when the deponent denied that the mortgage arrears had ever been capitalised. This reply is unsatisfactory not only because it did not come from the deponent himself and because it relies on the plaintiff's somewhat back-to-front definition of "capitalisation" (ie it cannot be capitalisation if thereafter we continue to treat the entire arrears as immediately due), but because it conveys the impression that someone other than Mr Carvill checked the computer system and fails to identify that individual. Indeed it appears to confirm the averment of the plaintiff's Collections Officer Ms Stead that there was nothing to suggest that Mr Carvill had taken instructions from the plaintiff on the point before making the averment in his affidavit. Ms Stead's affidavit was filed on 10 January 2014 which was some 5 weeks after the expiry of the time for its filing in compliance with the following direction (as contained in my order dated 7 November 2013):-

> "(d) The Plaintiff do on or before 4 December 2013 file and serve an affidavit by an appropriate senior officer, in accordance with the relevant principles set out in the judgment of the Chancery Judge in **Santander -v- Carlin**, explaining on what basis the first sentence of paragraph 23 of Miss Dunn's affidavit filed on 2 September 2013 is consistent

with the averment by Mr Carvill in his affidavit filed on 30 May 2013 that 'at no time have the mortgage arrears been capitalised', and explaining fully and with clarity the precise effect on the mortgage account and the current arrears figure of the apparent capitalisation or consolidation of arrears as mentioned in 'sub account 2' in the Plaintiff's statement to the Defendants dated March 2013, and how it can be said that no capitalisation or consolidation of arrears has ever taken place, and if it has taken place, on what basis did the Plaintiff rely on the alleged arrears figure of £18,463 announced at the hearing on 10 September 2013.

(e) The said originating summons do stand adjourned on a peremptory basis to 9 December at 3:00pm;"

The terms of the above direction and the peremptory adjournment reflect some of the problems I had down to that point in obtaining clarifying evidence in Laverty.

[14] I refer to the following comments about some hearsay evidence made by the Chancery Judge Mr Justice Deeny in the recent case of Santander (UK) plc -v- Carlin [2013] NI Ch 14 (involving an erroneous averment about securitisation in evidence before me which ultimately resulted in the Judge allowing the defendant's appeal and dismissing the application for possession):-

> "A most unhappy situation has developed here. Santander UK plc sought the Order for possession. They put in an affidavit in support; they chose to do it in a particular way, that is through their solicitor. … Parties are entitled to put in an affidavit and to rely on hearsay evidence with the court assessing its weight. … This is often done, particularly in originating summonses cases. But it is important that it is done carefully and conscientiously. The system only works if both the lawyer is scrupulous in what the lawyer says and the client is honest in what they inform the lawyer."

In the same judgment Mr Justice Deeny endorsed the procedure recommended by Mr Justice Horner in Swift 1st Limited -v- McCourt [2012] NI Ch 33. It is the procedure I directed to be followed in my order of 7 November 2013 in Laverty. Mr Justice Deeny described it as follows:-

> "… the solicitor acting for the financial institution should expressly warn the proposed deponent on behalf of the financial institution of the serious consequences he or she bears personally and the consequences for his or her employer if he or she swears an affidavit that is false in any respect. Next, their solicitor should confirm to the court that the deponent has been so advised before the affidavit is sworn. Thirdly, the deponent on behalf of the financial institution should then swear the affidavit dealing with the plaintiff's title to seek an order for possession."

[15] While the sequence of directions and affidavits - including an affidavit by an officer of the bank sworn after a solicitor's warning as to perjury as directed in line with Mr Justice Deeny's ruling in another context in Carlin - has finally come to a close, Mr Laverty's Counsel Mr Coyle announced at hearing that his client was not in a position to put a proposal addressing the arrears, however computed. That being so, I am minded to accede to the plaintiff's insistent application at hearing that I make an order in its favour for leave to enforce the suspended order for possession dated 8 September 2011 already in place (albeit with a direction facilitating the taking of an account to ensure no unfair prejudice occurs). However none of the evidential difficulties which generated so many directions, affidavits and delays in this matter were the fault of Mr Laverty. I am satisfied that he is not paying his mortgage simply because he, despite earlier expectations of improved circumstances, cannot afford to do so. The plaintiff was well able to have given me a much fuller and franker explanation at a much earlier stage about its practices and how they affected the arrears etc figures upon which they are relying. The

defendant did not ask the plaintiff to engage in what seems to me to have been obscurantism for the better part of a year or ask me to issue numerous directions requiring onward adjournments. The relevant costs will be dealt with accordingly in the order I shall make in this case.

Unilateral Consolidation/Capitalisation

[16] It eventually became clear that the "migration" or restricting of the loan accounts into several subaccounts was merely a one-off "triggering event" for consolidation. I now accept the plaintiff's explanation that there is no account or subaccount dealing specifically with arrears. As already indicated, the migration was evidently considered necessary because of a change in the automation systems of the plaintiff and other banks in Lloyds Banking Group. However as already indicated there are several trigger events in reliance on which those banks engage in unilateral consolidation and I believe the practice is much more widespread than was understood from the affidavit evidence until far into these proceedings. After a hearing on 10 June at which I peremptorily fixed a date for hearing on 24 June, I promulgated a written version of the indication I had given of my general disinclination to make further orders for possession or leave to enforce in cases brought by the plaintiff and other lenders in Lloyds Banking Group until the outcome of these proceedings is known. The written version was notified to the parties and posted outside my Chambers on 11 June as follows:-

"NOTICE

MORTGAGE APPLICATIONS FOR POSSESSION AND APPLICATIONS FOR LEAVE TO ENFORCE

SUSPENDED POSSESSION ORDERS BROUGHT BY BANK OF SCOTLAND PLC AND OTHER LENDERS IN LLOYDS BANKING GROUP

> With immediate effect, until further notice and unless in a particular case there are compelling circumstances which persuade the Master to take a different view, he is not minded to make orders for possession or for leave to enforce in applications by the above lenders in the absence of a certificate by a solicitor (for cases before the Master this week), or, if considered appropriate by the Master for particular cases this week and in all cases listed on and after Monday 16 June, an affidavit stating that the regular and timely payment of the current and ongoing monthly instalments as calculated in accordance with the plaintiff's current method of computation in respect of the mortgage account or accounts will not of itself discharge part or all of the arrears of contractual monthly instalments on or before the end of the mortgage term."

As at the handing down of this judgment I have not been aware of a single such affidavit having been filed.

[17] As authority for unilateral consolidation the plaintiff relies primarily on the mortgage contract. In Laverty the plaintiff relied on paragraph 8 of the Halifax Mortgage Conditions 2004. In Rea and McGready it relied on the Halifax Mortgage Conditions 2007 at paragraph 7 (which appears to be identical to paragraph 8 of the 2004 conditions) which reads so far as relevant:-

> "7.1 We may change your monthly payments or the repayment period (or both) at any time. We may do this if we cancel your interest-only arrangement or we ask you to start paying capital again (see conditions 4.3 and 4.4), or if we need to reflect a change to:
>
> (a) the interest rate (including a change caused by us applying, cancelling or changing an added rate or a special rate);

(b) the period during which an added rate or a special rate applies;

(c) the part of the capital which an added rate or a special rate applies to; or

(d) the amount of the capital.

7.2 We may also change your monthly payment if we need to take account of a change to the repayment period or the accounting period.

7.3 If the flexible options apply to your mortgage, we may also change your monthly payment to take account of the way in which you have used your flexible options.

7.4 If we change your monthly payment, we will work out the new monthly payment in a way that can reasonably be expected to ensure that:

(a) the interest we charge in each month is covered by the monthly payment which is due in that month;

(b) you pay interest only on any capital which is covered by an interest-only arrangement; and

(c) any capital which is not covered by an interest-only arrangement is repaid with interest by the end of the repayment period.

7.5 We will give you notice, as set out in condition 2.2, if we change your monthly payments or the repayment period."

(Emphasis added.)

Senior Counsel for the plaintiff submitted that his client had a contractual duty to consolidate by reason of the above and the like provision in the 2004 Mortgage Conditions. I do not agree. I find that these provisions confer a discretion, albeit a discretion partially dressed up as a duty by use of the word "need" in

paragraphs 7.1 and 8.1 of the respective mortgage conditions (when "decide" would have been more apt).

[18] The plaintiff also relies on the definition of "capital" which again is essentially the same as between the 2004 and 2007 Mortgage Conditions and is defined as follows in paragraph 1.1(e) thereof:-

> "Capital - The part of the debt you can charge interest on under these conditions. This is made up of:
>
> - Any money we have lent and you have not repaid;
> - Any expenses that you have not paid;
> - Any interest you have not paid off by the end of the accounting period in which it became due."

[19] The position of the defendants is that they do not understand how these provisions could have allowed the plaintiff on the one hand to revise their monthly instalments to include contributions towards outstanding arrears and on the other hand to claim in proceedings for possession that those arrears remain overdue, given that the plaintiff itself has arranged for them to be repaid by way of monthly instalments over the remainder of the mortgage term. The defendants also claim that these provisions permitting unilateral steps to be taken by the plaintiff constitute or include unfair terms under the Unfair Terms in Consumer Contracts Regulations 1999.

[20] All of these mortgages comprise first legal charges on residential properties and are therefore "regulated mortgage contracts" within the meaning of the Financial Services and Markets Act 2000. Accordingly they fall to be regulated by the Financial Conduct (formerly "Services") Authority (FCA) under that Act and the regulatory framework and guidance incorporated principally in the Mortgage Conduct of Business but also in related documentation.

[21] In Unfair Contract Terms: improving standards in consumer contracts (January 2012) the FCA is generally critical of "unilateral variation" clauses. However, I consider there are sufficiently "valid" reasons for a mortgage lender to consolidate some items such as administrative fees, expenses and legal costs by spreading them over the residue of the mortgage term (rather than demanding their immediate payment or postponing any payment until redemption) to justify a provision such as that relied on by the plaintiff – in part because the word "reasonably" is used in Conditions 7.4 and 8.4 of the respective mortgage contracts to affirm that any exercise of the discretion must be reasonable. Moreover, a like unilateral discretion was considered by Mr Justice Horner in Swift 1st Limited -v- McCourt (in a judgment later approved by the Chancery Judge Mr Justice Deeny in Carlin) in which the plaintiff mortgagee had a "power to change the rate of interest" it charged under the secured credit agreement to "reflect the change in the cost of (its) funds". I quote from Mr Justice Horner's judgment so far as relevant:-

> "**[32]** The Defendant claims that the term is 'unfair and open ended'. In *Paragon Finance Plc v Nash & Others* [2002] 1 WLR 685 the Defendants sought to defeat a claim for possession even though they were in arrears with their mortgage repayments. The Defendants admitted the arrears but claimed that the loan agreements were extortionate credit bargains within Section 138 of the Consumer Credit Act 1974. On appeal the Court of Appeal held that:
>
> > 'The power of the mortgagee to set the interest rates from time to time was not completely unfettered; that in order to give effect to the reasonable expectations of the parties it was an implied term of each mortgage that the discretion to vary interest rates should not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily or in a way in which no reasonable mortgagee, acting

> reasonably, would do: that it was not a breach by the claimant of that implied term if, as a commercial organisation, it raised interest rates paid by mortgagors in order to overcome financial difficulties it had encountered; and that, since there was no evidence that the decision to widen the gap between the rates charged by the claimant and standard market rates was motivated by other than purely commercial considerations, there was no real prospect of the Defendants proving a breach of the implied term at trial.'

[33] In his judgment Dyson LJ said (at paragraph 33) that:

> 'Of course I accept as a general proposition that a lender must have an eye to the market when it sets its rates of interest.'

He also went on to say at paragraph 46:

> 'I would hold that there were terms to be implied in both agreements that the rates of interest would not be set dishonestly, for an improper purpose, capriciously or arbitrarily. I have no doubt that such an implied term is necessary to give effect to the reasonable expectation of the parties.'

[34] I have no doubt that a similar term should be implied into Clause J in order to give effect to the reasonable expectations of both parties. The rates of interest should not be set dishonestly, for an improper purpose, capriciously or arbitrarily when varied by the plaintiff."

(Emphasis added.)

Thus the exercise of a like unilateral discretion in a mortgage contract such as that relied on in this case by the plaintiff must not be unreasonable (in the Wednesbury sense), dishonest, for an improper purpose, capricious or arbitrary, but the

relevant discretion in the present cases is not in my opinion inherently unfair. That said, in the present case the bar may be said to be somewhat raised because there is an express term to the effect that the discretion shall be exercised "reasonably".

I am satisfied that the plaintiff has acted in a manner that has been so unreasonable that no lender acting reasonably would have so acted and is therefore in breach of the mortgage contract. However on one view the capitalization *per se* might not have been unreasonable given that in my 21 years of specializing in mortgage possession applications I do not recall any in which capitalisation of arrears as normally understood (ie resulting in the wiping out of the current arrears) was alleged by a borrower to be unfair or unreasonable – even where the capitalisation had been automatic and without prior consultation with the borrower or might otherwise be categorized by the FCA (most correctly in my view) as being "poor" and potentially prejudicial in particular cases. In the present cases, however, the plaintiff has gone further and acted unconscionably (as I shall shortly particularise) by its remarkable insistence that for all practical purposes *the payment* of the arrears *had not* been spread over the remaining lifetime of the mortgage. Accordingly it is necessary to address the resultant prejudice by insisting that the plaintiff be held strictly to its election to consolidate the arrears. Indeed irrespective of whether the plaintiff was in breach of the mortgage contract because of the *actual* intention with which or manner in which it consolidated the arrears, I am satisfied on the material before me in these cases that this is a situation in which equity should treat as done that which ought to have been done (or perhaps, impute an intention to fulfill an obligation), ie it is necessary to *deem* the plaintiff to have *elected* to consolidate arrears in a manner consistent with the mortgage contract and established principles and practice and thereby to have also *waived by election the right to demand immediate payment of the arrears that had been consolidated*. I refer to the relevant principles as to waiver by election (which unlike promissory estoppel is always final, not suspensory, in effect) in Motor Oil (Hellas) Corinth Refineries v Shipping Corporation of India [1990] 1 Lloyds Law Reports 391.

Moreover I would caution that, given the multi-faceted and long term nature of residential mortgage contracts and the principles of unjust enrichment and substantial performance, I believe a breach of contract by the plaintiff arising from unilateral consolidation would not entitle a borrower in default who claims to have been prejudiced by the breach to repudiate or resile from his own obligations under the mortgage: see Hoenig v Isaacs [1952] 2 All ER 176.

[22] Curiously, the plaintiff relies on Mortgage Conduct of Business at paragraph 13.3.4.A which states as follows:-

> "1. A firm must consider whether, given the individual circumstances of the customer, it is appropriate to do one or more of the following in relation to the regulated mortgage contract or home purchase plan with the agreement of the customer:
>
> (a) Extend its term;
> (b) Change its type; or
> (c) Defer payment of interest due on the regulated mortgage contract or of sums due under the home purchase plan (including, in either case, on any sale shortfall); or
> (d) Treat the payment shortfall as if it was part of the original amount provided *(but a firm must not automatically capitalise a payment shortfall);* or
> *(e)* Make use of any Government forbearance initiatives in which the firm chooses to participate."
>
> (Emphasis added)

It seems to me that the words I have italicised appear not to support but to proscribe exactly the kind of unilateral or automatic capitalisation or consolidation of arrears effected by the plaintiff in these cases. Moreover such consolidation, though not a forbearance tool itself, would appear to reduce the chances that the plaintiff would seriously consider opting for any of the forbearance steps in subparagraphs (a), (b), (c) or (e).

[23] The plaintiff, in the second affidavit of Ms Stead, dated 2 May 2014, in Laverty continues in the same vein as earlier deponents to deny that unilateral consolidation is "capitalisation". She states as follows:-

> "The Financial Services Authority (now the FCA) issued guidance on Forbearance and Impairment Provisions ("the FCA guidance") in October 2011 which specifically deal with the process of capitalisation. Capitalisation or a capitalisation event is defined within that guidance as:
>
> > 'Where a customer has made repayments that are less than is due under the contractual terms of the mortgage, but where this difference has not been retained as an arrears figure, (sic) the mortgage is considered to have been subject to a capitalisation event. In these instances the interest repayable over the life of the mortgage and/or the future repayment amount and/or the terms of the mortgage will have been affected'."
>
> (Emphasis added.)

It appears to me that this FCA definition is far more consistent with the standard practice of lenders as I understand it: namely, to keep the shortfall sum "retained as an arrears value" (the actual FCA document using the word "value" as opposed to "figure") separate from the amount upon which the ongoing monthly instalments are computed: unless, that is, capitalisation occurs, whereupon the shortfall is *no longer "retained as an arrears value"*. The FCA is obviously referring to consensual capitalisation. However it has already made clear in the extract I read earlier from MCOB that lenders "must not automatically capitalise a payment shortfall", ie they must either retain that shortfall as an arrears value or absorb the shortfall into the remainder of the indebtedness by way of capitalisation or consolidation. To do

both, by consolidating the arrears while retaining and relying on them as an arrears balance, immediately generates (as we shall see) a mist of incomprehension, confusion and self-contradiction.

[24] The plaintiff's insistence that the meaning of "capitalisation" or "consolidation" (which, though bearing different dictionary definitions, are exactly the same thing in the context of this judgment) is restricted to that category of forbearance in which the borrower and lender agree (normally after a period of six successive payments of the contractual monthly instalments) that the outstanding arrears should be merged in future monthly instalments, is highly subjective. Consolidation is an objective fact: the arrears are either consolidated by being absorbed into increased contractual monthly instalments or they are not. Indeed in her own affidavit evidence Ms Stead refers to an "automatic consolidation" (in accordance with the lender's previous practice) of Mr Laverty's arrears in March 2009 and there is no sign in the exhibited explanatory letter of 19 March 2009 that this was preceded by agreement with the borrowers. Indeed, the letter opens with:-

> "I am writing to advise that we have consolidated your arrears of £2,803.93"

It goes on (unlike the letter and leaflet about the consolidation triggered by "migration" in 2013) to warn of potential prejudice this step may cause in that:-

> "… any existing life assurance you may have, and any insurance for accident, sickness, and unemployment may not fully cover your mortgage commitments. We therefore recommend that you check you have sufficient cover."

On the plaintiff's evidence a very similar letter was issued to Mr and Mrs Laverty upon the consolidation evidently made in error in August 2012.

[25] In National & Provincial Building Society v Lynd [1996] NI 47 Mr Justice Girvan departed from a key principle in the judgment of the Court of Appeal of England and Wales in Cheltenham & Gloucester Building Society v Norgan [1996] 1 AER 449 by ruling that in Northern Ireland the court's approach to its jurisdiction to defer possession under the 1970 Act, section 36 and the 1973 Act, section 8, should be based on the "best realistic proposal" of the borrower as opposed to an *ad hoc* presumption of what constitutes a "reasonable period" for the payment of arrears such as taking as the starting point the entire residue of the mortgage term. In doing so he quoted from a Council of Mortgage Lenders statement headed "Alleviating Arrears Problems" in which the CML discussed capitalisation. He went on to say:-

> "I do not consider, with respect, that it is a logical progression to move from the CML's statement to conclude that except in unusual cases arrears of interest should be treated as a capitalised sum payable over the length of the term of the mortgage. Moreover as the CML statement points out the deferral of arrears or the capitalisation of arrears is unlikely to be a solution where there is a permanent reduction in income."
>
> (Emphasis added.)

Mr Justice (now Lord Justice) Girvan's use of "capitalisation" is entirely consistent with my understanding.

[26] The very restricted meaning imputed to capitalisation or consolidation by the plaintiff is *demonstrably* incorrect by reason of the following section (beginning with a paragraph I have already mentioned) from the Glossary annex to the FCA's Guidance Consultation: Forbearance and Impairment Provisions – mortgages:-

"Capitalisation or capitalisation event

Where a customer has made repayments that are less than is due under the contractual terms of the mortgage, but where this difference has not been retained as an arrears value, the mortgage is considered to have been subject to a capitalisation event. In these instances the interest repayable over the life of the mortgage and/or the future repayment amount and/or the term of the mortgage will have been affected.

It is recognised that a firm may capitalise small amounts of arrears where there is no resulting impact on interest payable, repayment amount or term of the mortgage, which have arisen from timing issues and interest rate rounding during rate change months etc. Where the long-term interest payable impact is less than £50 or less than £1 on the contractual monthly repayment amount and less than one month on the term, the capitalisation is deemed as immaterial and ignored for reporting and treatment purposes. Under this clause, where cumulative immaterial capitalisations become material, a capitalisation event is deemed to have occurred.

(a) Standard capitalisation: a single capitalisation event to capitalise a pre-existing contract shortfall.

(b) Repayment capitalisation: defined as any process which allows for a lower than contractual repayment to be made without this contract shortfall accruing as arrears (e.g. the account is temporarily transferred to IO, provided with a payment holiday or other payment arrangement where arrears are not accruing)."

(Emphasis added.)

[27] This puts beyond question that for regulatory and other purposes capitalisation or consolidation is an objective event. The second paragraph in dealing with very small (or "immaterial") amounts of arrears is most telling: within sensible limits as indicated in the passage, the FCA expressly approves capitalisation of arrears "where there is no resulting impact on interest payable,

repayment of the amount or terms of the mortgage". Accordingly a de minimis capitalisation is acceptable and can be effected unilaterally without the consent of the borrower or any assessment of affordability. It follows that what would definitely not be acceptable is capitalisation in the same manner but in respect of sums that are anything but minimal as conducted by the plaintiff in the present cases.

[28] In its Technical Note: mortgage arrears and hardship, the Financial Ombudsman Service includes the following under "HANDLING OF ARREARS":-

> "In general terms, mortgage lenders must treat customers in arrears fairly. What is fair will normally depend on the individual circumstances of the case.
>
> Lenders will normally be expected to:
>
> - handle matters sympathetically;
> - make reasonable efforts to reach agreement with the consumer about how the arrears should be paid;
> - make sure any proposed repayment plan is realistic;
> - liaise with any third party acting on the consumer's behalf - for example, a Citizens Advice Bureau;
> - provide the consumer with an explanation, if they do not accept the consumer's own repayment proposals; *and*
> - seek possession of the property only as a last resort.
>
> Steps that a lender might take as part of treating the consumer fairly might include, for example:

- adding the arrears to the mortgage balance (sometimes called *capitalisation*);
- extending the term of the mortgage;
- accepting interest-only repayments for a period of time;
- accepting part-repayments for a period of time; *and*
- allowing a 'payment holiday' to tide the consumer over a short-term problem."

(Emphasis added.)

"Capitalisation" is indeed simply "adding the arrears to the mortgage balance". The plaintiff's interpretation seems perversely purposive. (It suggests a football team which defines "goal" as something that can only be scored by itself.)

[29] The plaintiff's deponent Ms Stead, endeavouring to justify the practice, herself betrays the problem. At paragraph 48 of her second affidavit she states as follows:-

> "The FCA guidance sets out poor and good practice on the use of capitalisation by lenders. An example of poor practice is to use capitalisation in circumstances where the customer had not demonstrated sustained ability to meet future repayment. It is for this reason that the plaintiff's policy is to only consider offering capitalisation where a customer can meet a minimum of 6 consecutive CMI payments. An example of this practice can be found in or around January 2009 in the case of Bank of Scotland v Laverty."
>
> (Emphasis added).

It therefore appears to be the plaintiff's practice, not only to offer consensual capitalisation as indicated above but also unilaterally "to use capitalisation in

circumstances where the customer has not demonstrated sustained ability to meet future repayment" – those being exactly the sort of circumstances which the FCA presumably envisaged when they ruled that a firm "must not automatically capitalise" a payment shortfall.

[30] I quote from the same FSA Guidance Consultation:-

> "**Good and poor practice in the overall provision of forbearance to customers**
>
> [18] The primary aim of providing a forbearance facility to a customer should be to enable the complete recovery of the mortgage through the full repayment of arrears. In this case the long-term impact on both the firm and the customer is minimised. Where the circumstances of the customer mean this primary aim cannot be achieved, the secondary aim would be to recover the customer into a *sustainable terms* position on their mortgage.
>
> [19] This guidance should be considered in the light of relevant existing Handbook material such as Principle 6, Chapter 13 of MCOB and the good and poor practice in Mortgage arrears and repossessions handling published in 2009.
>
> Firms should be mindful of these obligations and treat customers in arrears fairly. In relation to mortgage accounts in arrears:-
>
> - The determination of a reasonable repayment period will depend upon the individual circumstances. In appropriate cases this will mean that repayments are arranged over the remaining term (reference to MCOB 13.3.4A R (1))
> - Firms should not agree to capitalise a payment shortfall except where no other option is realistically available to assist the customer (reference to MCOB 13.3.4A R (1)(d))."

[31] I quote also paragraphs 20 and 21 of the same Guidance Consultation:-

"**Good and poor practice where a capitalisation event takes place**

[20] *Capitalisation* has continued to be one of the core forbearance tools used by firms. There are two methods of capitalisation observed taking place in firms:-

- Standard capitalisation (defined as a singular capitalisation event) and
- Repayment capitalisation (defined as the non-accrual of arrears when short payments are received).

These are defined in more detail in Annex 1.

[21] This section provides additional good and poor practice where *capitalisation* is taking place.

Good practice

Capitalisation is provided selectively to those cases where the recovery of historical arrears or monies due under the contract is not possible and *capitalisation* is the only option realistically available to assist the customer.

Capitalisation is provided where the customer has demonstrated a sustained ability, intent and track record to repay, and regulatory requirements are observed.

The firm has formally sought confirmation that the customer understands and accepts the *capitalisation* event.

For larger value *capitalisation* events or re-defaulters, the firm applies more stringent intent and track record criteria, to recognise the increased risks and the increased long-term impact on the customer.

For standard *capitalisation* the revised monthly repayments are assessed as affordable now and sustainable over the term of the mortgage:

- the mortgage is paid on a capital and interest (C&I) basis and the revised repayments will fully repay the mortgage over the remaining term of the mortgage; or
- the mortgage is paid on an interest only (IO) basis and the repayment vehicle will fully repay the mortgage; or
- part of the mortgage is transferred on to C&I and each part satisfies the conditions above.

…

The firm recognises that customers who have previously been given a *capitalisation* but then miss a repayment have higher loss risks than other accounts going into early arrears, so the firm prioritises them within the debt management process. *The aim is to achieve early direct contact with the customer to reassess their circumstances and minimise the compounded impact of further financial stress or capitalisation events*.

Poor practice

The firm fails to establish whether a capitalisation event is in the best long-term interests of the borrower and whether there are other options realistically available to the customer.

Standard *capitalisation* or repayment *capitalisation* events take place in cases where:

- The customer has not demonstrated sustained ability, intent or track record to meet future repayments;
- The customer has not met the qualifying criteria for *capitalisation*;
- The firm has not provided the customer with clear, timely and adequate information to understand the implications or the proposed changes in their terms;

- The firm has not given sufficient time to the customer to understand these changes, the *capitalisation* event, and the impact it will have currently and ultimately on their repayments and interest payable;
- The firm has not formally sought confirmation that the customer understands and accepts the *capitalisation* event;
- The customer has an effective repayment arrangement in place, and is paying more than the contractual monthly repayment which will fully repay the outstanding arrears within a reasonable timeframe; and
- The customer has been provided with misleading and biased information to encourage *capitalisation* which may not always be in the customer's best interests.

..."

(Emphasis added.)

Accordingly the plaintiff's capitalisation practice appears to be extremely poor standard capitalisation by the criteria of the Financial Conduct Authority.

Bank of Scotland -v- Zinda/The Court's Discretion

[32] The effect of capitalisation or consolidation of arrears was considered by the Court of Appeal of England and Wales in an important case involving the plaintiff, namely Bank of Scotland Plc v Zinda [2011] EWCA Civ 706 in which Lord Justice Munby in a unanimous judgment of the Court which he said was on a subject of "great practical significance" stated in accordance with the longstanding perception of the position that:-

> "The one point on which Mr Zinda is correct, as the bank conceded, is that the effect of the consolidation was to clear the arrears …"

His Lordship stressed, however, that:-

> "The mere fact that the arrears may have been discharged in their entirety – as they were by reason of the consolidation in March 2008 – is not enough if there is nonetheless a failure to comply with the second limb of the condition."
>
> ("The second limb of the condition" was a reference to the requirement in the suspended possession order to maintain payment of the ongoing 'current' monthly instalments.)

Therefore the plaintiff's extremely "poor standard capitalisation" (though not consensual as in Zinda) also extinguished the arrears as they were immediately before consolidation.

[33] The underlying rationale of that ruling in Zinda (which confirmed a long established principle and perception) appears to be that the mortgagee has taken a step which bars it from relying on the extinguished arrears, in the sense that they can no longer be included in and relied on as being arrears giving rise to a claim for possession. Once arrears have become part of the contractual monthly instalment their payment is from that point on required not as a matter of *addressing* but rather as a matter of *avoiding* a breach of the mortgage contract. The only thing borrowers have to do to address the "arrears" is comply with the requirement to pay the new contractual monthly instalments. They should not have to face a risk of losing their home as long as they do so. If, as stressed by the English Court of Appeal in Zinda, arrears of the post-consolidation monthly instalments accrue, those arrears can be relied on in a claim for possession. However, in the present cases the evidence about arrears is as I have indicated wholly unsatisfactory and, among other things, fails to distinguish between the pre-consolidation arrears which no longer exist and the post-consolidation arrears of the revised increased monthly instalments.

[34] This clearly has implications for the exercise by the court of its jurisdiction to defer possession under section 36 of the 1970 Act as revised by section 8 of the 1973 Act. Parties to a mortgage contract cannot contract out of the operation of these provisions and the discretion conferred by this legislation. I refer to the following extract from the judgment of Mr Justice Girvan (as he then was) in Northern Bank Ltd v Jeffers [1996] NI 497 (in which Mr Shaw as Counsel for the plaintiff contended, unsuccessfully, that by a compromise consent order the parties had contracted out of any reliance on that statutory jurisdiction):-

> "Mr Shaw on behalf of the bank accepted the proposition that a mortgagee in respect of a dwellinghouse cannot by the contractual terms incorporated within the mortgage preclude a mortgagor from the seeking to rely on section 36 of the 1970 Act. I consider that that concession was rightly made. Section 36 represents a statutory qualification to the contractual rights of mortgagees and in my view lays down a rule of public policy, thus outside the principal quilibet potest renuntiare juri pro se introducto (see Equitable Life Assurance Society of the United States v Reid [1914] AC587)."
>
> (Emphasis added.)

It follows that a mortgagee may not take steps or adopt a policy that restricts, distorts or prevents the proper exercise of that important statutory discretion.

[35] Setting aside for this purpose the point that consolidated arrears no longer exist as arrears, if the contractual monthly instalments contain undisclosed contributions towards the arrears, should a defendant borrower put a proposal for payment of a particular sum over and above that monthly instalment it would be impossible for the parties or the court to know the period over which that proposal would address the arrears. Before the court's jurisdiction to defer possession under the 1970 Act, section 36, as amended by the 1973 Act, section 8, can be exercised it must be satisfied that the borrower is "likely to be able within a reasonable period

to pay" either the arrears of monthly instalments or the entire mortgage debt. I quote from paragraphs 22-23 of Lord Justice Munby's judgment in Zinda:-

> "20. … So far as is material, section 36 is in the following terms:
>
> '(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.
>
> (2) The court –
>
> (a) may adjourn the proceedings, or
>
> (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may –
>
> (i) stay or suspend execution of the judgment or order, or
>
> (ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.
>
> (3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.
>
> (4) The court may from time to time vary or revoke any condition imposed by virtue of this section.

21. The effect of the words "pay any sums due under the mortgage" in subsection (1), was that in order to satisfy the requirements for obtaining statutory relief the mortgagor had to be able to show that he was likely to be able to pay within the reasonable period referred to not only the arrears of instalments but also the principal sum due under the mortgage. *Halifax Building Society v Clark* [1973] Ch 307.

22. Following that decision there was further legislative intervention with the enactment of section 8 of the Administration of Justice Act 1973. So far as is material, section 8 is in the following terms:

> (1) Where by a mortgage of land which consists of or includes a dwelling house, or by any agreement between the mortgagee under such a mortgage and the mortgagor, the mortgagor is entitled or is to be permitted to pay the principal sum secured by instalments or otherwise to defer payment of it in whole or in part, but provision is also made for earlier payment in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise, then for purposes of section 36 of the Administration of Justice Act 1970 … a court may treat as due under the mortgage on account of the principal sum secured and of interest on it only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment.
>
> (2) A court shall not exercise by virtue of subsection (1) above the powers conferred by section 36 of the Administration of Justice Act 1970 unless it appears to the court not only that the mortgagor is likely to be able within a reasonable period to pay any amounts regarded (in accordance with subsection (1) above) as due on account of the principal sum secured, together with the interest on those amounts, but also that he is likely to be able by the end of that period to pay any further amounts that he would have expected to be required to pay by then on account of that sum and of interest on it if there had been no such provision as is referred to in subsection (1) above for earlier payment".

23. Now as Mr Grant correctly submitted, the effect of these provisions is two-fold. First, there is the jurisdictional gateway

> created by the requirement on the mortgagor to demonstrate that he is (section 36(1)) 'likely to be able within a reasonable period to pay' both (section 8(1)) the 'amounts [he] would have expected to be required to pay if there had been no … provision for earlier payment' – in other words, the arrears of the instalments due to date – and (section 8(2)) the 'further amounts that he would have expected to be required to pay by then' – in other words, the future instalments accruing during the reasonable period. The power of suspension exercisable by the court under section 36 is *conditional* on its appearing to the court that in the event of the exercise of the power the mortgagor is likely to be able to pay the sums in question within a reasonable period. Absent such proof, the court has no jurisdiction to stay or suspend the order for possession: *Royal Trust Co of Canada v Markham* [1975] 1 WLR 1416, 1422B, 1423B, 1424E."

[36] In this jurisdiction, as explained in some detail in my own judgment in Swift Advances Plc v Heaney [2013] NI Master 18, in special circumstances such as in that case (in which there was no affordability for a financial proposal but possession was refused to a second chargee facing a nil equity situation and who therefore could not sell and as a second mortgagee had no power to let) the court appears, in addition to the discretion as described above pursuant to the 1970 and 1973 Acts, to have a complementary or residual statutory discretion to defer possession. This arises by virtue of (a) Schedule 7 Part 1 paragraph 5 to the Land Registration Act (Northern Ireland) 1970 ("LRA") which in respect of charges on registered land (now constituting almost all securities in Northern Ireland) confers a discretion on the court whether to order possession and imposes an overriding duty on the court not to make an order for possession unless satisfied that it is "proper" to do so, and (b) the court's obligation under section 3 of the Human Rights Act 1998 to read and give effect to legislation so far as possible in a manner compatible with ECHR rights of the parties. I emphasise however that in respect of the discretion conferred by the Administration of Justice Acts 1970 and

1973, the above passage from Zinda undeniably represents the law as I understand it in this jurisdiction also. Accordingly, the use of the additional degree of discretion accorded by LRA, Schedule 7, has in practice been reserved for the most part for special situations where it is not possible for the defendant to put a satisfactory or any financial proposal but it would nonetheless be unconscionable or outwith the court's duties under sections 3 and 6 of the Human Rights Act 1998 to allow repossession to proceed, or at least to proceed in the near future. (Foremost in my recollection are two cases which I heard on successive days where it seemed plain that the trauma of eviction would not only have exacerbated an already critical or extremely immobilizing illness, but would also have parted the sufferers of those illnesses from their closely related carers. In the first case the defendant, whose own health was increasingly parlous, was the mother and carer of a young man with cerebral palsy so severe that Northern Ireland Housing Executive was building a house specifically tailored to his needs; in the second the deceased defendant's widow had end-stage Alzheimer's disease and the carer was her daughter who had herself [and in part at least because of her mother's illness] suffered the trauma of recent eviction from her former home. In these most exceptional circumstances I considered Articles 2 and 3 in addition to Article 8 of the European Convention on Human Rights to have been engaged.)

[37] Part of the problem in the present cases and a part of the solution to it is addressed in Zinda. In Zinda the borrower was held to be in breach of the terms of a suspended possession order which required him to pay the arrears of instalments in addition to the "current monthly instalments". It was ruled that because of the specific wording of that order and the court's power under section 8(3) of the 1973 Act to impose a condition as to payment which (it was held) could bite at any time (not just during the "reasonable period" for payment of arrears) and after the arrears had been paid or consolidated, the buildup of fresh arrears of the "current"

post-consolidation instalments meant the order for possession had again become enforceable. However the Court of Appeal appears to approve (or at least, not demur from) the District Judge's statement at first instance that, had the suspended order included a statement to the effect that if the arrears were paid the order for possession should be discharged - described by Munby LJ as a provision for 'proleptic discharge' - the outcome might have been quite different; ie the order for possession itself, and not just the arrears, may have been extinguished on consolidation. The Court of Appeal treated this essentially as a question of the correct interpretation of the specific order for possession.

[38] At first blush a provision for the proleptic discharge of a mortgagee's order for possession might sit uncomfortably with a number of authorities holding that a legal mortgagee's right to possession, which under the common law (as it stood before its qualification by contract and statute) would have arisen as soon as "the ink was dry on the mortgage", crystallised on the occurrence of the relevant contractual default and thus an order for possession remains enforceable after the arrears are cleared if they should build up again: see Greyhound Guaranty Limited v Caulfield [1981] CLY 1808 and Bradford & Bingley Building Society v Harris (unreported, 6 November 2003, Leeds County Court) as approved by the Court of Appeal of England and Wales in Halifax plc v Taffs [1999] CLY 4385. However in this jurisdiction by reason of Schedule 7 LRA which I have already mentioned the registered owners of charges such as the plaintiff do not have the traditional common law entitlement to possession. They do have a right to possession (or perhaps more accurately, to claim possession) under the mortgage contract for the purpose of exercising the statutory powers of a mortgagee in possession and to apply to the court for an order for possession for that purpose but that is not the same thing as a legal mortgagee's common law entitlement to

possession given the statutory discretion and duty conferred on the court by Schedule 7 LRA that I have mentioned. I refer to my judgment in Heaney:-

> "26. … Over a decade before the Human Rights Act 1998 was enacted, Professor Wallace wrote this in his article Mortgagees and Possession (1986) NILQ Vol. 37 at 336:-
>
> > 'Unlike a legal mortgagee of unregistered land, the owner of a charge on registered land does not have a common law right to possession of the land charged nor does he acquire the status of a legal owner. The Land Registration Act (NI) 1970 provides that upon registration of this charge he has –
>
> the rights and powers of a mortgagee by deed within the meaning of the Conveyancing Acts, including the power to sell the estate which is subject to the charge….
>
> Although this provision is somewhat ambiguous, it is submitted that it does not completely equate the position of the registered owner of a charge with that of a legal mortgagee but only gives him the powers which are conferred on a mortgagee by deed by the Conveyancing Acts. Thus, for example, in the absence of stipulations to the contrary in his deed of charge, the chargee can take advantage of the powers to appoint a receiver and to sell conferred by section 19(1) of the Conveyancing Act of 1881. If, however, he wishes to obtain possession, he must make application to the court under Schedule 7, Part I, paragraph 5(2) of the 1970 Act. It provides –
>
> The registered owner of a charge may apply to the court for possession of the registered

land, the subject of the charge, or any part of that land, and –

(a) On such application, the court may, subject to sub-paragraph (3), order possession of the land, or that part thereof, to be delivered to him; and

(b) Upon so obtaining possession of the land or, as the case may be, that part thereof, he shall be deemed to be a mortgagee in possession.

Paragraph 5(3) then states –

The power conferred on the court by sub-paragraph (2) shall not be exercised –

(a) Except when payment of the principal sum of money secured by the deed of charge has become due and the court thinks it is proper to exercise the power;

or

(b) Unless the court is satisfied that, although payment of the principal sum has not become due, there are urgent and special reasons for exercising the power.

Thus, under paragraph 5(2)(a) the court has a discretion rather than a duty to make an order for possession and paragraph 5(3)(b) makes it clear that only in the most exceptional circumstances will a chargee be given possession when the chargor has not been guilty of any default. The court's power to refuse possession under paragraph 5(2) and its duty to do so under paragraph 5(3) are clearly potentially more favourable to chargors than the jurisdiction conferred in respect of mortgages of dwelling houses by the Administration of Justice Acts of 1970 and 1973. Therefore

> although the relevant provisions of the latter Acts apply also to charges on registered dwelling houses, it would seem that that application serves only to indicate particular circumstances in which it would not be "proper", within the meaning of paragraph 5(3)(*a*) of Schedule 7, Part I of the Land Registration Act, to make an order for possession.'
>
> (Emphasis added).

27. I agree with Professor Wallace. The plaintiff has a registered charge to which Schedule 7 applies. The plaintiff does not have a 'contractual and legal entitlement' to possession. Moreover, by reason of section 3(1) [of the Human Rights Act], Schedule 7 must now be considered, read and given effect in accordance with such Convention rights as apply in a particular case."

Accordingly I am satisfied that it may be appropriate to include in many future suspended orders for possession (if and as appropriate to the particular circumstances) a provision that upon discharge of the arrears (ie by payment or consolidation) the effects of the order shall cease. I am fortified in this by the fact I have recently dealt with a case in which this plaintiff saw fit to grant a substantial mortgage advance to a couple of limited means aged 64 and 61 respectively for a term of 24 years. This means that if there were to be a typically worded suspended order for possession without a provision for proleptic discharge, then even if the arrears were cleared in the near future the conditional order for possession might remain in being in this jurisdiction into the 89th year of the first defendant and the 86th year of the second defendant! Mortgage default, which is often monetary and for the most part the result of illness, unemployment or other genuine misfortune, should not have to haunt people down the years.

[39] Royal Trust Co of Canada -v- Markham [1975] 1 WLR 1416 is authority for the following well established principle:-

> "An adjournment, suspension or postponement under section 36 must be for a defined or ascertainable period".

This principle was expressly affirmed by two successive Chancery Judges in this jurisdiction, namely Mr Justice Campbell (as he then was) in Alliance & Leicester Building Society v Carlile (unreported, delivered 8 September 1995) and Mr Justice Girvan (as he then was) in National & Provincial Building Society v Lynd. When I put to Mr Shaw that I could neither define nor ascertain the period over which compliance with any suspended order for possession would discharge the mortgage arrears his response was (and I quote): "It doesn't matter" because there were borrowers who "came forward" and engaged with the lender and made payments and it was the lender's unwavering policy to ensure that those borrowers had every chance to avoid repossession. Therefore in many cases, even where a suspended possession order was in place, if the borrowers were paying sums which met or exceeded the contractual monthly instalments the lender might not seek possession unless (as I understand it) the borrowers ceased to engage or to make any decent effort to resolve the situation by payment proposals or continued payments. (The onus he emphasised, was on a borrower who felt confused by the plaintiff's information about his account and requirement to pay, or who would have difficulties paying both the consolidated monthly instalments and the additional sum required by the S.P.O, to approach the plaintiff for help.) The nub of what he is saying was that his client and indeed all the banks constituting the Lloyds Banking Group were so imbued with a culture of responsibility toward their borrowers – or at least those who were "coming forward" and making a worthy effort – that this responsibility was a key feature in all that they do with respect to mortgages. I indicated that I could not subscribe to that sentiment, and something to the effect that the scale alone of the plaintiff's operations meant that it

could not ensure that high standards of efficiency and concern for the welfare of customers necessarily prevailed in all its parts, policies and performance.

[40] My concerns in that context were not mitigated by another recent case in which the plaintiff was involved: Roberts v Bank of Scotland Plc [2013] EWCA Civ 882. In that case the claimant had exceeded her overdraft and credit card account limits by sums described by the Court of Appeal of England and Wales as "modest". With a view to resolving those matters, the bank contacted the claimant by no less than 547 calls or attempted phone calls, most of them made in a 6 month period and against her express wishes. The court recorded that the claimant was greatly distressed by the bombardment which amounted to harassment not merely according to the relevant civil law principles but also those of criminal harassment. The bank's appeal against an award of £7,500 damages was rejected. All three of the judges - very exceptionally in judgments by senior judges in civil matters - gave individual concurring judgments saying they had been shocked by this plaintiff's conduct. (In my experience, the most pejorative expression used in civil matters tends to be "unconscionable" and "shock", "shocked" or "shocking" tend to be avoided.) To my certain knowledge erroneous mortgage lending practices, particularly those generating an increased risk of repossession of homes, also inflict a great deal of distress on individual borrowers and others in their households.

[41] Moreover this lender's concern for the rights of its borrowers seems somewhat qualified by the fact that it consistently fails to comply with a Practice Direction (Practice Direction 2003 No 9) requiring grounding affidavits by mortgagees seeking possession to exhibit a copy of what may fairly be described as a key component of the mortgage contract, namely the offer of advance, side letter or equivalent document. I refer to Fisher & Lightwoods Law of Mortgage (13th Ed. 2010) at paragraph 621:-

> "Section 8 of the 1973 Act applies to instalment mortgages and all other mortgages where the payment of the whole or part of the principal is deferred (including an endowment mortgage), but provision is also made for earlier repayment on default of the mortgagor or demand by the mortgagee. All the terms of the mortgage document and any agreement between the mortgagee and the mortgagor must be considered to see if the mortgagor is entitled or is to be permitted to defer payment."
>
> (Emphasis added.)

A copy of the offer of advance was not exhibited to any of the affidavits grounding the application for possession in these three cases (although it was purportedly exhibited to one such affidavit). Nor was it produced at any hearing. The court's ability to consider all terms of the mortgage contract is thereby seriously qualified. Again, the plaintiff's unexplained failure to "retain" copies of its offers of advance may prejudice borrowers and the court. I refer to my comments about this practice in Santander (UK) Plc v McAtamney & Ors [2013] NI Master 15.

[42] Confidence in the plaintiff's sense of responsibility toward its customers (in particular, those who "come forward") is not helped either by the uncontradicted affidavit evidence of Ms Rea as to her own endeavours to obtain an explanation from the plaintiff's Collections Centre of the reasons for the "migration" increase in her monthly mortgage instalment from £809.92 to £846.24 allegedly notified to her in March 2013. She asserts that she had not been notified of that change until receipt of a letter from K Stafford of the Collection Centre dated 1 May 2013 to which she was replying when she claimed in her letter of 12 May that the failure to notify her had resulted in £51.02 "arrears being added to my account". Ms Rea received no reply and wrote again on 12 November 2013 with a reminder and a request for further particulars and explanation. The plaintiff's Customer Services

Department eventually replied by letter dated 3 December 2013 from a Ms Lucy Maller expressing sincere apologies for the delay and explaining:-

> "As the Collections Department is telephony based, they do not respond to written correspondence. However, I appreciate you weren't aware of this procedure."

In that reply Ms Maller provides the following attempt at explaining the plaintiff's capitalisation-non-capitalisation practice, which attempt, like the practice itself, appears to me to be fundamentally self-contradictory and confusing:-

> "With regard to the queries noted in your letter dated 12th November 2013, the interest applied upon the arrears is the same rate of interest which is applied to your mortgage, so in your case, we are (sic) applied a rate of 3.99% upon your arrears. Also just to clarify your arrears are a separate amount however is (sic) still classed as part of your mortgage. The arrears won't be added to your mortgage unless you qualify for capitalization. This means you would have to make six consecutive contractual monthly payments and also met (sic) certain criteria for the arrears to be added to the mortgage balance. Other than that you can pay the contractual monthly payment and also an additional amount to repay the outstanding arrears."
>
> (Emphasis added.)

I add only that a compensatory payment of £50.00 was enclosed for the "distress and inconveniences caused" and that the statement that the "arrears won't be added to your mortgage unless you qualify for capitalisation" is misleading nonsense as, of course, the arrears had already been "added to" Ms Rea's mortgage.

[43] The plaintiff claims to have sent Ms Rea (and her late partner Mr Donnelly who had died in 2012 – a sad event of which Ms Rea states that she informed the

bank long before this letter) its standard notification letter dated March 2013 which reads as follows:-

"**We changed the way we manage your mortgage**

Dear Miss Rea & Mr Donnelly

We told you previously that we'd be changing the way we manage your Halifax mortgage. We're pleased to say that this is now complete.

As part of our ongoing review of the products and services we provide, we've moved your account to a different mortgage system. This means you'll now have much more information available about your mortgage account and you will see this in your annual statements.

You'll also notice other changes to the way we manage your mortgage account which are described in this letter and the enclosed booklet.

Please take time to read this important information carefully and keep it for future reference.

What's changed?

Account number: You now have a new mortgage account number. This replaces your previous roll number:

10367469150200

Please use your new account number whenever you contact us about your mortgage.

Your mortgage account

Your mortgage may be made up of a number of parts. These parts may include different repayment methods, interest rates and terms. We put each of these different parts into separate 'sub-accounts'.

You can now see the different sub-accounts which make up your overall mortgage account in the table below and will be shown on your annual statements going forward.

Sub Account	Balance at 8.3.2013	Repayment Method	Remaining Term	Product Type	Current interest	Monthly mortgage

Number					rate	repayment
1	£ 2,162.35	Repayment	30 ys 1 mth	Variable	3.990%	£ 10.32
2	£ 8,154.97	Repayment	30 ys 1 mth	Variable	3.990%	£ 38.85
3	£129,297.92	Repayment	30 ys 1 mth	Fixed	6.290%	£796.39
98	£ 245.00	Repayment	30 ys 1 mth	Fixed	0.000%	£ 0.68
Total	£139,842.24					£846.24

Sub-account 1 may include any costs or charges which have been added to your mortgage. For example arrangement fees, valuation fees or building and contents insurance.

Mortgage account fee

When you took out your mortgage, a part of it equivalent to the Mortgage account fee, was set up to be charged interest at 0% fixed for the life of your mortgage – this was irrespective of whether you paid the fee up front or added it to your loan. This amount is now shown in sub-account 98 and continues to be charged 0% interest, fixed for the life of your mortgage.

We've not charged you this fee again but we need to show it separately as you're still entitled to this interest free amount. For an explanation of how this worked, together with any future impacts, please see page 10 of the enclosed booklet.

Your monthly payment

As part of the move to the different system, we've recalculated your monthly payment. You may have seen payment recalculations before, as they usually happen when there is an interest rate change, or when there is a change on your account, for example, if you borrow more money.

The recalculation takes into account transactions on your account up to and including 8th March 2013, along with any lump sum repayments or regular overpayments that you may have made and will ensure your mortgage account remains on track.

Your total monthly repayment is £846.24

Your new contractual Monthly Mortgage Payment from April will be £846.24. This is an increase of £36.32.

Your total monthly payment is due each month starting from 28th April.

The change in your mortgage payment includes your sub-account 98 now being repaid over the term of your mortgage. There may also be a number of other reasons why your monthly payment has changed including if you've made over or underpayments since your payment was last recalculated. Please see page 6 of the enclosed booklet for further information."

(Emphasis added.)

[44] In her affidavit of 24 April 2013 Ms Rea denied having received this letter and pointed out that the correspondence address used was the site number as opposed to her postal address and the postcode used was incorrect. She also pointed out that on 23 January 2013 she received a telephone call from the plaintiff in which they advised that because of regular payments to the accounts she qualified for "formal capitalisation" and that the original monthly instalment after that event would be £669, which is all of £1.80 higher than her current monthly instalment. She did not accept the offer of formal capitalisation. She also stated in that affidavit that she had been making regular payments since January 2013 and continued to do so. She remained at a loss to understand the reason for the change to her monthly instalments effected by the unilateral consolidation.

[45] It is unsurprising that borrowers in receipt of such documentation, including the accompanying and somewhat glib booklet "Your Mortgage", are confused. The above letter of March 2013 under "Your monthly payment" states that "the recalculation … will ensure your mortgage account remains on track". The impression is conveyed by these documents that all is satisfactory. There is

nothing to suggest that the capitalisation is without prejudice to the lender's right to rely on the (erstwhile) arrears in seeking possession. Indeed the word "arrears" is avoided altogether in favour of "underpayment" which appears in context to mean underpayment which has been agreed to by the bank.

[46] There are significant problems about previous and prospective orders for possession suspended on the assumption that no arrears payment was included in the contractual monthly instalments. If the order for possession is made on the implicit assumption that the monthly instalment will not be increased by subsequent consolidation, a requirement for a borrower of limited means to pay a fixed monthly sum toward arrears on top of the contractual monthly instalment would clearly be jeopardised by an unexpected significant increase in the amount of the monthly instalment. Mr Shaw emphasised that there were a number of factors which could cause the monthly instalment to increase, including the borrower's liability for the costs and expenses of the plaintiff, administration charges and of course variations in the rate of interest applied to the account. Indeed those are matters which a defendant borrower may reasonably be expected to have to address after he or she enters into a standard residential mortgage contract. However, the unilateral addition of an imposed figure in the monthly instalment representing a contribution to eliminating arrears over the residue of the mortgage term is not a matter which a borrower can reasonably "expect to be required to pay" as part of the normal contractual monthly instalment or as envisaged under the relevant provisions of section 8 of the 1973 Act or indeed in the explanatory Form 10A Notice issued to defendant borrowers under Order 88 rule 4A of the Rules of the Court of Judicature (NI) 1980 ("the Rules") the PreAction Protocol as to arrears on residential mortgages and any other court promulgated documentation about mortgage default. The plaintiff's unilateral consolidation practice embarrasses borrowers, their advisers and the court in a number of

respects when it comes it comes to formulating, considering or maintaining proposals to address arrears within a reasonable time.

[47] Suspended orders for possession have been made by the court in the belief that the amount of the proposal for monthly payments over and above the monthly instalment would be all that would be paid in respect of the arrears. As I have indicated, it is now established law in this jurisdiction by reason of the decision of Mr Justice Girvan (as he then was) in Lynd that a borrower has to put a "best realistic proposal" before the court and that "a reasonable period" for the payment of arrears must be determined after consideration of all relevant circumstances. "Likelihood" (that the arrears can be cleared within a reasonable time) is a question of fact to be determined by the court in a particular case: Cheltenham & Gloucester Building Society v Grant [1994] 26 HLR703 CA. There would be no circumstance more relevant to the matter than the fact that the arrears will be discharged in full without the need for any additional payment if the borrower simply complies with the contractual obligation to pay the normal contractual monthly instalment as it falls due. Moreover it appears that from the following extracts from a letter dated 3 June 2014 from the plaintiff's solicitors TLT to Housing Rights Service that the plaintiff may be unable or unwilling to quantify the arrears component in monthly instalments if called upon to do so:-

> "You will note from the contents of the sworn evidence in this case that our client does not maintain a separate arrears account and a contractual monthly instalment is calculated on the total debt outstanding at the time of the review. There is accordingly no simple and straightforward way for our client to provide a breakdown of the portion of the monthly instalment attributable to payment of arrears without a manually intensive account reconstruction on a case by case basis which would result in considerable expense and delay.
>
> Our client appreciates that it is critical that customers understand what arrears have occurred and what proposal they need to make in addition to their

> contractual monthly instalment to invoke the discretion available under the Administration of Justice Acts. Our client would question what additional benefit is delivered to a customer for providing the amount of a CMI attributable to their arrears given that it will be very costly and time consuming to do so. We believe that the other agreed proposed changes would provide adequate information in this regard without the need to undertake this additional calculation, mindful of the need to balance proportionality against transparency for customers."
>
> (Emphasis added.)

General

[48] My conclusions in these cases are rather similar to those in my judgment in Santander (UK) Plc v McAtamney & Ors [2013] NI Master 15. As in that case, the averments in the present cases in affidavits on behalf of the plaintiff are quite inadequate in endeavouring both to "justify this practice and to clarify a somewhat arcane arithmetical calculation with which defendants, their advisers and the court have insuperable difficulties". Again, as in McAtamney, it is far from a "transparent and plain approach to the consequences of mortgage default" and is at odds not only with the rights of borrowers to respect for their homes under Article 8 but also their rights to a fair trial of the "time to pay" issue under Article 6 of the European Convention of Human Rights. The practice is also contrary to the now long established and very widely accepted principle that possession should be a matter of last resort. Moreover I do not accept the plaintiff's argument that the "onus to come forward" applies only to defaulting borrowers. It is implicit (and sometimes explicit) in most of the F.C.A. and O.F.T. guidance about fair treatment of borrowers in arrears situations, and in the Pre-Action Protocol on mortgage arrears, that the lender itself takes reasonable steps to make contact with the borrower with a view to ensuring that before it decides to seek possession it is clear that all "reasonable attempts to resolve the situation" have failed.

[49] It appears that the plaintiff's practice of unilateral consolidation of arrears is much more longstanding and common than I had initially anticipated. It is impossible to know how many suspended possession orders already made have been rendered incapable of compliance because of unilateral consolidation. It is also impossible to know how many borrowers who would have engaged with the plaintiff or with their own legal advisers or Housing Rights Service or the court if they had only to deal with the initial basic (or even the consolidated) monthly instalments have failed to so engage with advisers, the plaintiff or the court, because of significant increases in monthly instalments combined with the plaintiff's reliance on the consolidated arrears as subsisting arrears. It is also impossible to know how many defaulting borrowers were faithfully or unsuccessfully trying to pay an amount each month in addition to the monthly instalment not knowing that they need not do so, that all they had to do is to keep paying the consolidated monthly instalments. It is also, sadly, impossible to know how many borrowers have as a result of the plaintiff's practice been plunged into depression or the exacerbation or initiation of other stress related illness and so forth, ie, the hidden, but all too real, human cost.

[50] The provisions of the mortgage contract upon which the plaintiff relies in these matters include discretion to capitalise because of underpayments, but that discretion is, as it were, dressed up as a duty by reason of the insertion of the word "needs". There is no "need" to unilaterally capitalise arrears of instalments. Above all there is no "need" to unilaterally capitalise arrears and at the same time maintain an artificial and anomalous, and indeed in a very real sense vexatious, double-billing by way of an "arrears balance". The plaintiff is in effect holding a borrower *in terrorem* by threatening or bringing possession proceedings on account of an erroneous and significant fictional arrears balance.

[51] Assuming the affidavit evidence for the plaintiff is correct in stating that the plaintiff will not insist on clearance of the

"separate" arrears balance at the end of the mortgage term if the consolidated monthly instalments discharge the mortgage balance by that time, the plaintiff may be said nonetheless to be deriving or trying to derive a significant financial benefit from the practice as there will be many cases in which borrowers who are claimed to be in arrears notwithstanding consolidation so prioritise the matter of addressing the arrears balance that the plaintiff receives something of a windfall of "overpayments" in amounts of arrears which do not exist and which, if they did exist, were being paid anyway by reason of the unascertainable amount included for them in the contractual monthly instalments. The plaintiff is, as it were, having its cake and eating it. There may not be any fraud involved, but I would certainly not regard this as fair accounting. The plaintiff's stance is one of extremely selective subjectivity. It has somehow turned a tool of forbearance into its opposite. In the process it appears to have been denying what seems to be obvious, distorting language and using incorrect evidence.

SUMMARY

[52] The plaintiff's practice of restructuring mortgage accounts so that arrears of monthly instalments are included in increased monthly instalments so that they will be paid over the remainder of the mortgage term constitutes capitalisation or consolidation of such arrears. This is so whether or not the plaintiff does this with the consent of the borrower and whether or not it is done as an act of forbearance.

[53] The relevant mortgage conditions conferring on the plaintiff a unilateral discretion to restructure the mortgage and increase the monthly instalments are not unfair terms within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999. However, it is clear, by reason of the findings of Mr Justice Horner in Swift 1st Limited v McCourt, citing Paragon Finance Plc -v- Nash, that there is an implied term in such unilateral discretions that they must not be exercised unreasonably (in the "Wednesbury" meaning of that word). Moreover, the express conditions relied on by the plaintiff include the requirement

that the discretion will be exercised "reasonably".

[54] Where, as in the present cases, the plaintiff consolidates arrears unilaterally, without any attempt to secure the borrower's agreement and without any assessment of affordability, that is extremely "poor" capitalisation according to the definition and criteria of the Financial Conduct Authority.

[55] Where, as in the present cases, the plaintiff goes further and also insists as a separate exercise on relying on the consolidated arrears to ground proceedings for possession it is acting inconsistently with primary and secondary legislation (the 1970 Act, s36, the 1973 Act s8 and, in this jurisdiction, Order 88 rule 5(3) of the Rules. Parties cannot in a mortgage agreement contract out of the possible exercise of the court's statutory discretion to defer possession under section 36 as revised by section 8: Northern Bank Limited v Jeffers, per Mr Justice Girvan.

[56] It follows that in its unilateral consolidation the plaintiff is also in breach of the established principle that arrears of instalments are "wiped-out" to the extent that they have been consolidated: a principle at the heart of a decision described as one of "great practical significance" in the recent judgment of the Court of Appeal of England and Wales in Bank of Scotland Plc v Zinda. As I understand the underlying rationale for that principle and its application to the present cases, it is essentially straightforward. The mortgagee has chosen to revise the mortgage contract to spread the payment of arrears over the remaining lifetime of the mortgage, meaning the mortgagors are required and permitted to pay them over that time as part of the contractual monthly instalments. The plaintiff has therefore waived its expectation and right to demand earlier payment of the capitalised arrears, which must be eliminated from the computation of subsisting arrears. To that significant extent the mortgagee is barred by its own actions from resiling from the contractual position which it has elected to take, whether or not the mortgagor agreed to the consolidation. The plaintiff has waived by election its right to rely in

court proceedings upon the arrears which it has extinguished. The effect of waiver by election is somewhat different from promissory estoppel (the effect of which may be merely suspensory) and it is final, ie irrevocable: Motor Oil (Hellas) Corinth Refineries -v- Shipping Corporation of India {1990] 1 Lloyds Law Reports 391.

[57] The plaintiff's reliance on extinguished arrears may fairly be described as double-billing. Unilateral consolidation with double-billing creates very real problems for borrowers, their advisers and the court. To the extent at least of the double-billing, it is unconscionable.

[58] First, the practice unfairly and confusingly distorts perceptions of affordability. Borrowers in default are faced with a monthly instalment increased to address a sum representing the arrears over the rest of the mortgage term and a demand (and indeed threat of repossession) for the immediate payment of the erstwhile arrears. This is, to say the least, confusing and must be a disincentive for many borrowers to make best realistic proposals to the lender or the court to address the arrears – particularly in light of an undisclosed "arrears element" in the monthly instalments. It also distorts the true arrears figures in the minds of those approached for advice and the court.

[59] Secondly, the practice means that if there is a proposal for an order for possession suspended or an adjournment on terms as to payment of a monthly sum towards the arrears as well as the ongoing monthly instalments, the court will not be able to define or ascertain the period within which that proposal, if maintained, will clear the arrears. The "reasonable period" within which under s8 of the 1973 Act the borrower must be likely to be able to address the arrears must be a "defined or ascertainable" one: Royal Trust Co of Canada –v- Markham as affirmed by successive Chancery Judges in this jurisdiction in Alliance & Leicester Building Society -v- Carlile and National & Provincial Building Society -v- Lynd. The court cannot accurately define or ascertain the period where an undisclosed amount of

the consolidated contractual monthly instalment relates to part of the arrears relied on by the plaintiff.

[60] Thirdly, that undisclosed "arrears element" in post-consolidation instalments must lead to a nonsensical and troubling situation of "double-counting" when the plaintiff adds arrears of post-consolidation monthly instalments to those of pre-consolidation instalments (even accepting as correct the plaintiff's incorrect submission that the earlier arrears were not extinguished by the consolidation). To some extent, the arithmetic must mean that the plaintiff is overstating, by duplication or double-counting, the total "arrears".

[61] Fourthly, the plaintiff's failure to explain its unilateral consolidation and double-billing in previous proceedings means that many suspended orders for possession (and indeed many other resolutions agreed between the parties) were made on erroneous assumptions as to: (a) the correct amount of arrears (since pre-consolidation "arrears" no longer existed); (b) how and when the arrears would be addressed in the future (as the undisclosed "arrears" element in consolidated monthly instalments would accelerate payment of the true arrears) and, as I have mentioned, the court's ability to ascertain the true repayment period was significantly impaired, and (c) the future computation by the plaintiff of the contractual monthly instalments requiring to be paid in addition to the arrears.

[62] Fifthly, the misassumptions I have mentioned persuade me that when this plaintiff brings an application for leave to enforce a suspended order for possession it may face an uphill struggle unless by its grounding affidavit it: (a) confirms that any future "material" consolidation of arrears in the case will be in a strict compliance with the requirements of "good capitalisation" as defined by the Financial Conduct Authority (thereby requiring among other things the informed

agreement of the "customer"); (b) discloses with particulars all past consolidations (save permitted "immaterial" capitalisations of minimal amounts) and all past double-billing events; (c) states the current state of account between the parties as to monthly instalments, arrears and so forth as prescribed (for affidavits grounding claims for possession) in Order 88 rule 5(3) of the Rules, (d) states the true arrears when the relevant suspended order and where appropriate any order varying its terms were made; (e) clarifies the particular circumstances in which it would be just to permit enforcement of the original order for possession (as varied by any subsequent order which had been made) notwithstanding the misassumptions I have mentioned; and (f) confirms in terms that the plaintiff in its figures is not relying on any pre-consolidation arrears.

[63] For like reasons I believe future applications by this lender for possession should also include the particulars of the state of account and of any consolidation and the express confirmations I have just specified for applications for leave to enforce. It would be open to the court on making any suspended order for possession to include a provision that in the event that the arrears are discharged by payment or consolidation the effects of the order shall cease: Zinda.

ORDERS TO BE MADE

[64] In Rea and McGready I shall adjourn and give directions for further affidavit evidence from the plaintiff's officers along the lines I have mentioned in the last couple of paragraphs (Rea being an application for an order for possession, McGready being an application by the defendants for a stay of enforcement in which the defendants are also seeking a suspension of the order for possession upon terms as to payment).

[65] Laverty is a different matter. There is no affordability for the making of any proposal to address the arrears however computed. There is an interest only mortgage for a term due to expire next year and without any apparent repayment vehicle for the capital sum secured. As the end of the term draws closer the

apparently slim prospect of Mr Laverty addressing his mortgage default diminishes further. Notwithstanding the grave deficiencies in the plaintiff's evidence about the arrears on his account I am satisfied that the plaintiff has a compelling case for an order giving it leave to enforce the suspended possession order in its favour. There will however be liberty for either party to apply for an account as to the correct amount of the arrears of instalments and/or that required to redeem. In the event that the defendant wishes to bring a summons for such relief in the context of a very marked improvement in his circumstances which (subject to the outcome of the account) might enable him to address his mortgage arrears or debt in a reasonable time it would be open to him to apply in the same summons for a stay of enforcement pending the outcome of the taking of the account.

[66] So much of the plaintiff's costs of and incidental to all three of the applications as have been increased by reason of its erroneous affidavit evidence about capitalisation and arrears of instalments will be disallowed. In Rea and McGready the plaintiff will be ordered to pay so much of the costs of the defendants in the present applications as have been increased by reason of the plaintiff's erroneous affidavit evidence about arrears, such costs to be taxed in default of agreement.