Neutral Citation No. [2013] NIMaster 15

Ref: **2013NIMaster15**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **22/03/2013**

2011/038343

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

SANTANDER (UK) PLC

Plaintiff

and

1. MARTIN McATAMNEY
2. CAROL McATAMNEY

Defendants

and

2011/084655

BETWEEN:

SANTANDER (UK) PLC

Plaintiff

and

1. DAMIEN McCAFFREY
2. CATRIONA McCAFFREY

Defendants

and

2009/70158

BETWEEN:

ABBEY NATIONAL PLC

Plaintiff

and

1. DAVID WILLIAM CLINT
2. VICKY CLINT

Defendants

MASTER ELLISON

1. These are applications by summonses by the plaintiff lender for leave to enforce suspended orders for possession of dwellings arising out of default by borrower defendants in compliance with payment obligations under charges originally executed in favour of Abbey National plc but since registered in the plaintiff's ownership. The dwellings are the homes of the defendants and their titles are registered in Land Registry folios.

2. In the first and second intituled actions ("McAtamney" and "McCaffrey" respectively) I gave detailed directions for supplemental affidavit evidence for the plaintiff so that the other parties and the court would have as full as possible an explanation of the reasons for the plaintiff's insistence on hearings when there are proposals to discharge the arrears of instalments requiring to be paid during the proposed "reasonable period" for addressing the default and not just arrears of monthly instalments but additional sums stated at hearings to be necessary to cover interest calculated on the instalments in arrears over the proposed repayment period in each case. It is not in issue that, where arrears of interest in instalments exist, the plaintiff is contractually entitled to capitalise and add to the overall indebtedness that unpaid interest. Indeed as I understand it, that is the practice of the great majority of lending institutions which appear before me and (bar one, a sub-prime lender which relented when the practice was challenged in a particular case) the plaintiff is the only mortgagee of which I am aware that insists on hearings on the practice I have mentioned. Moreover, such insistence by the plaintiff's representatives on

hearings only appears to have arisen so far as I can recall or ascertain relatively recently, albeit the plaintiff claims that its practice of separating out on mortgage account statements such additional interest as it accrues on a monthly basis alongside the arrears figure to which it is added has been ongoing for a number of years, indeed since its commencement of business in Northern Ireland. Tellingly, there is no evidence that the plaintiff's predecessor in title and the original lender in each case, Abbey National plc, originated the practice or engaged in it.

3. At the hearing of submissions Mr David Dunlop of Counsel appeared for the plaintiff instructed by R G Sinclair & Co Solicitors, Mr McCaughey of Counsel appeared for the second defendant in McCaffrey and Miss Galvin of Housing Rights Service assisted the defendants in McAtamney and in Clint.

4. In all of these (and a significant number of other) cases the plaintiff's practice is objected to on the basis that it causes untoward prejudice to defendants of limited means in trying to put a proposal under section 36 of the Administration of Justice Act 1970 ("the 1970 Act") and section 8 of the Administration of Justice Act 1973 ("the 1973 Act") to remedy mortgage payment default within a reasonable time. In essence, it is submitted in the present cases that if, as appears from the mortgage contract, the plaintiff is able to charge additional interest on arrears on a monthly basis, that should be done by simply adding the arrears to the overall indebtedness whereupon the plaintiff can revise the level of the normal contractual instalments in consequence of the increase in the total capital indebtedness. For the plaintiff, Mr Dunlop argues that this objection is misconceived as the overall effect of the plaintiff's practice is no more expensive to the borrower than the standard practice of other lenders. Moreover, Mr Dunlop claims that the plaintiff, by isolating and showing the additional interest sums on a regular basis on its mortgage account statements, is actually being more transparent than other lenders are about the addition of interest on arrears (other lenders including the arrears of monthly instalments, including arrears of the interest component of the instalments, in the overall indebtedness on which interest is charged).

5. However that may be, I have been reading grounding affidavits and submissions for the plaintiff and its predecessor banks for many years and I have no recollection that a grounding affidavit, in setting out the requisite state of account between the parties or otherwise, or any solicitor or counsel for the lender at any hearing until recently ever so much as mentioned its practice of adding as arrears in repossession proceedings the accrued or projected future accrual of the interest which it charges on the arrears of instalments. It is therefore only now clear to me that the plaintiff adds the isolated figure for

interest on arrears (referred to by the plaintiff and its Counsel by the unexplained acronym "OVI") when computing the figure stated as the amount of the arrears for the purposes of Order 88 rule 5(3) of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules") the relevant provisions of which read as follows:-

> "(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class of case otherwise directs, the state of the account between the mortgagor and mortgage with particulars of –
>
> (a) the amount of the advance;
>
> (b) the amount of the periodic repayments and payments of interest required to be made;
>
> (b)(b) the rate of interest payable –
>
> (i) at the commencement of the mortgage;
>
> (ii) at the commencement of the proceedings; and
>
> (iii) at the date of the affidavit.
>
> (c) the amount of any interest or instalments in arrears at the date of issue of the originating summons and at the date of the affidavit; and
>
> (d) the amount remaining due under the mortgage."

6. Thus the evidence required by the Rules, which are subordinate legislation, includes the amount of a monthly instalment (specifying the interest component) as at the date of swearing the grounding affidavit and the amount of the arrears of "interest or instalments". Before the plaintiff's practice came to my notice I invariably assumed the averment in the affidavit and the announcement at hearing as to current arrears to relate to arrears of the contractual monthly instalments comprised of interest on the capital balance or of principal and interest thereon. This understanding (which turns out to have been something of a longstanding misunderstanding) was grounded on assumptions that the lender shared my own interpretation of section 36 of the 1970 Act as amended by section 8 of the 1973 Act.

7. Section 36 was enacted to allow homeowners in trouble with their mortgages but who could if allowed a reasonable time to do so address the relevant default,

be afforded time by the court by way of adjournment of the proceedings or a stay or suspension on terms as to payment of an order for possession. However case-law in England and Wales soon established that, by reason of provisions in mortgage contracts requiring repayment of the entire mortgage debt in the event of default, further legislation would be necessary. The objective of that further legislation was to redefine the sums secured by the mortgage which would require to be "likely" to be paid within a reasonable time as including either the entire mortgage debt (which section 36 had successfully countenanced) or, where an instalment mortgage was involved, only the contractual instalments on account of the principal and interest thereon which the borrower (not the lender, not the court) would have expected to be required to pay had the mortgage contract contained no provision for earlier payment in the event of default. Section 8 of the 1973 Act was enacted accordingly and reads as follows (so far as relevant):-

> "(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 the purposes of section 36 of the Administration of Justice Act 1970 (under which a court has power to delay giving a mortgagee possession of the mortgaged property so as to allow the mortgagor a reasonable time to pay any sums due under the mortgage) 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. …"
>
> (Emphasis added).

8. The Court of Appeal of England and Wales in Habib Limited v Tailor [1982] 3 All ER 561 held that the provisions of section 8 did not confer power to suspend an order for possession on terms as to payment of interest due on a secured overdrawn current (or other "running") account (but did, contrary to a common misunderstanding of that decision, hold that section 36 would allow the court to defer possession if the entire indebtedness on such an account was likely to be paid in a reasonable time). In that case Lord Justice Oliver quoted section 8 of the 1973 Act and summarised its intent concisely as follows:-

> "So, without seeking to construe the section at this stage, one can see that the intent of it was, in the case of instalment mortgages, to enable the court to defer possession if it was satisfied that there was a reasonable prospect of the mortgagor paying off, within a reasonable period, not the whole of the principal sum, but the outstanding instalments."
>
> (Emphasis added.)

9. The borrower, if he is to establish his case for being allowed a reasonable time to pay only part of the indebtedness in accordance with section 8 of the 1973 Act, has to establish that he is likely within such a time to be able to pay , on account of the principal and interest thereon due, only "such amounts as (he) would have expected to be required to pay" (ie the current arrears of instalments on the hypothesis that no acceleration clause applied in the event of default) and such further sums "that he would have expected to be required to pay" (prospectively, over the reasonable period he is permitted by the Court and on the same hypothesis). Out of an abundance of caution I point out that in the event of any doubt about the meaning of section 8 – or for that matter, Order 88 rule 5 of the Rules - section 3(1) of the Human Rights Act 1998 ("the 1998 Act") would apply. It reads as follows:-

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention (ECHR) rights."

10. However, the question "what would the borrower have expected to be required to pay on the hypothesis that there is no acceleration clause?" appears to me to be dealt with unambiguously by a reading of the relevant mortgage conditions

in each of the present cases. Those conditions envisage that the "monthly payment" be a figure calculated to discharge either all the monies owing (in the case of a capital and interest repayment mortgage) over the full remainder of the mortgage term or all the interest payable on principal (in the case of an interest only mortgage, which interest on the principal would include interest on fees, on any legal costs and on any compounded interest thereby converted to principal) during the remaining term.

11. I refer to the Standard Mortgage Conditions 2006 (edition) of the plaintiff's relevant predecessor bank, Abbey National plc, with whom as I have stated all the defendants in the present cases took out their mortgages. Though those conditions apply to the mortgage transactions in McAtamney and McCaffrey and not identically to the transaction in Clint, the standard conditions in Clint appear to me to be essentially the same in meaning and perceived intent. The scope and effect of the relevant standard conditions in each case do not appear to have been altered by anything in the mortgage offers or charge deeds. I begin by citing the condition relied on by the plaintiff's Counsel and permitting the charging of interest on arrears, namely condition 12.1(d):-

> "**General provisions about interest**
>
> 12.1 We will charge interest each day on the capital owing as the end of that day. The following terms explain how we work out the capital:
>
> (a) any money we lend you will increase the capital from the date when we release the money to you (or the date when the money is transferred if we pay it by electronic transfer);
>
> (b) any fees which we incur will increase the capital if they are not paid when due,
>
> (c) any money we receive for the credit of your mortgage account will be used (after paying off any interest which is due for payment) to reduce the capital with immediate effect, except that, where the money is paid by cheque, it may not be used to reduce the capital unless the cheque has cleared;
>
> (d) the interest we charge on capital each day during an interest period will be added to the capital on the first

day of the following interest period (unless it has been paid off in the meantime)."

(Emphasis added).

12. This provision (like the equivalent condition in Clint) does not state how or when the borrower is required to pay the additional interest on the unpaid capitalised interest. The relevant footnote does however say in terms that the effect is to compound the interest in arrears as it "will be added to capital". "Capital" is defined in condition 3.7 as follows:-

> "3.7 '**Capital**' means any money on which we can charge you interest under Condition 12.1."
>
> (Emphasis supplied)

"Capital" is further defined in footnote 6 to that condition as:-

> "The amount on which we charge you interest each day. Condition 12.1 explains how we work out the capital owing on your mortgage account".

13. Under "**Payment obligations / The payments you must make**" (emphasis supplied) condition 8 includes the following:-

> "8.1 You agree to pay us the **monthly payment** at monthly intervals until you have repaid all the **money you owe us**.
>
> ...
>
> 8.7 We will work out the **monthly payment** so as to provide that:
>
> (a) you pay interest only on any **capital** which is covered by an interest-only scheme; and
>
> (b) any capital which is not covered by an **interest-only scheme** is repaid with interest by the end of the **repayment period**."
>
> (Emphasis supplied.)

14. Under "**Monthly payment**" the following provision for altering the monthly instalment reads as follows (at condition 13, so far as relevant):-

"13.1 We may change the **monthly payment** at any time by giving you notice. The change will come into effect on the date stated in the notice, which will not be earlier than the date when we give the notice.

13.2 We may change the **monthly payment** for any of the following reasons:

...

(g) if you have paid us less or more than is necessary to ensure that **the money you owe us** is repaid within the **repayment period**. ..."

(Emphasis supplied.)

15. In turn, and in my view putting the matter beyond any doubt, "**money you owe us**" is defined in condition 3.20 to mean:

> "3.20 "**money you owe us"** means all the money you owe us under Part 1 of these conditions [which Part includes all of the conditions I quote in this judgment] and the offer, including any unpaid interest or fees".
>
> (Emphasis by emboldenment supplied; that by underlining added.)

16. Therefore it is to be assumed, particularly given the *contra proferentem* principle that a document in standard form such as these mortgage conditions is to be interpreted, where there is doubt (which for my part I do not at all have) as to meaning, against the drafting party, that capitalised arrears of interest should simply be added to the overall mortgage debt and interest thereon charged and reflected in the monthly instalments accordingly in the way other lenders do and in strict accordance with the relevant requirements of the mortgage conditions as to the "monthly payment" and otherwise, payment of the capitalised interest being required along with the rest of the mortgage debt either at the end of the predicated mortgage term or – subject to section 8 of the 1973 Act - sooner under an accelerated payment clause (such as that in standard condition 23.3 in McCaffrey and McAtamney) in the event of default. For reasons I shall shortly explain, that is the only interpretation compatible with the principle, first promulgated by lenders such as Santander's predecessor and other banks and building societies in this jurisdiction through the Mortgage Code of the Council of Mortgage Lenders (and now incorporated in all relevant OFT guidance, the Court's Pre-Action Protocol for proceedings for possession

based on residential mortgages, and – in another form of words meaning the same thing – in the Financial Services Authority MCOB regulations pursuant to the Financial Services and Markets Act 2000 covering regulated mortgage contracts) that "possession is a matter of last resort". It is also the only interpretation compatible with section 8 of the 1973 Act and the duty of the Court as a public body under section 6 of the 1998 Act to respect the home under Article 8 ECHR. In Kay v United Kingdom [2010] ECHR 37341/06 the European Court of Human Rights held as follows in respect of that Article in its application to proceedings for possession of a person's home:-

> "As the Court emphasised in *McCann* ... , the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end."

17. The plaintiff's insistence on its current method of computing monthly instalments (in, as it appears to me, most but not all of its cases) and its hitherto (or until recently) undisclosed inclusion of discretely computed sums for "arrears of interest on arrears" as part of the "arrears" in the averments required by Order 88 rule 5(3) of the Rules and announcements of arrears totals at hearings, is also at odds with the defendant's right to a fair trial under Article 6 ECHR (and generally) of the issues arising when he seeks time to pay under section 8 in order to remain in his home. Notwithstanding mortgage account statements copies of which were exhibited in McCaffrey and McAtamney showing the monthly OVI figure alongside that of the monthly instalment, I have not to my recollection come across a case yet where a defendant borrower or his or her advisers appeared to be aware before hearing of the plaintiff's insistence on payment (ie where such a defendant was in a position to "expect" as envisaged by section 8 to have to make the payment) not only of the current arrears of contractual instalments but also sums for interest upon arrears which accrued in the past and which are calculated by the plaintiff to be due to arise in the future. The averments in the present cases in affidavits of the plaintiff's solicitors are quite inadequate in endeavouring both to justify this practice and to clarify a somewhat arcane arithmetic calculation with which defendants, their advisers and the Court have insuperable difficulties in individual cases. It is far from a transparent and plain approach to the consequences of mortgage default and I note with concern that in one of the affidavits the plaintiff by its solicitor

appeared to be disowning the principle that possession should be a matter of last resort for lending institutions, particularly as, he claimed, it is not a requirement of the MCOB regulations of the Financial Services (now Conduct) Authority. That Authority's regulations in "Mortgage and Home Finance: Conduct of Business" (MCOB) at 13.3.2E provide as follows (so far as relevant):-

> "A firm should ensure that its written policy and procedures include:
>
> …
>
> (f) repossessing the property only where all other reasonable attempts to resolve the position have failed."

In other words, possession is a matter of last resort, whether under a regulated or an unregulated mortgage contract.

18. I quote the following letter dated 27 February 2013 from Ms Galvin of Housing Rights Service to the plaintiff's solicitors in Clint:-

> "Dear Sirs,
>
> Our Clients: David & Vicki Clint
> You're Client: Santander (UK) Plc
> Property at: 43 Demesne Crescent, Ballywalter, BT22 2NE
>
> I refer to the above and to previous correspondence. As you will be aware this matter is listed for hearing on 5th April 2013 at 4.15 pm.
>
> At a Chancery hearing on 7th September 2011, the Master suspended a Possession Order on the terms that our clients pay their contractual monthly instalment plus £50 per month towards arrears. Our clients felt that this was their best realistic proposal and felt it was sustainable in the long term. Mr Goodfellow of your offices objected to the suspension of the Order on the basis of the poor payment history and non-compliance with agreements in the past, he felt the arrears would not be cleared within a reasonable time and that the property was in negative equity. No reference was made to interest being levied on the arrears and added to the arrears balance on a monthly basis and, therefore, the proposal made did not reflect interest levied on arrears. Our client was of the

belief that the £50 per month payment towards arrears would reduce their arrears balance.

Your instructed solicitor made an application for leave to enforce the Suspended Possession Order and Housing Rights Service agreed to assist Mr & Mrs Client at their hearing on 13th November 2012. We secured an adjournment to advise the clients comprehensively.

At the hearing on 14th December 2012 we made an application to reaffirm the terms of the previous Order so that our clients would make payments of contractual monthly instalment plus a sum of £50 per month towards arrears. It was at this hearing that we were informed that there was interest of £38.34 being levied on the arrears balance monthly.

Our clients were shocked at this development as they stated that it was the first time they were advised that interest on the arrears would have to be paid monthly in addition to the contractual monthly instalment plus a sum off arrears. They state that they were not advised of this at the time they entered into the Suspended Possession Order or at any time since.

The fact that interest is levied on and appears to be added to the arrears balance makes it impossible to calculate proposals to address arrears within the remaining term of the mortgage. A proposal to deal with arrears and associated interest based on the figures announced at court will not reflect the diminishing arrears balance, assuming regular payment towards arrears, nor will it reflect the diminishing interest on arrears. It is impossible for us to make accurate proposals to address arrears and interest levied on arrears as we do not have the software available to your client.

I would appreciate copies of all notifications sent to my clients advising them of the additional monthly payments required to cover interest on arrears.

I refer to the Mortgage (sic) Code of Business and in particular Section 13.3.3: The requirement in MCOB 13.3.1 R(2) for a written policy and procedures is intended to ensure that a firm has addressed the need for internal systems to deal fairly with any customer in financial difficulties. MCOB 13.3.1 R(2) does

not oblige a firm to provide customers with a copy of the written policy and procedures. Nor, however, does it prevent a firm from providing customers with either these documents or a more customer-orientated version. Please forward a copy of the written policy and procedures.

In relation to MCOB 13.3.2 E(1)(a), customers:

(1) should be given a reasonable period of time to consider any proposals for payment that are put to them; in addition, and depending on the individual circumstances, a firm may wish to do one or more of the following with the agreement of the customer:

(a) extend the term of the regulated mortgage contract; or

(b) change the type of the regulated mortgage contract; or

(c) defer payment of interest due on the regulated mortgage contract or mortgage shortfall debt; or

(d) treat the payment shortfall as if it was part of the original amount borrowed;

(2) should be given adequate information to understand the implications of any proposed arrangement; one approach may be to provide information on the new terms in line with the requirements for annual statements (see MCOB 7.5.3 R).

Please outline your client's policy in relation to (1)(c) above.

I look forward to your reply by return in advance of the next hearing.

Yours faithfully

Marie Gavlin
Housing Adviser (Debt)."
(Emphasis in second paragraph supplied; that in later paragraphs added.)

18. I record that (as I recall, before I read Ms Galvin's excellent letter) I directed that the plaintiff file and serve an affidavit within a stated time exhibiting a copy of the relevant "written policy and procedures" referred to in MCOB 13.3.2E and Ms Galvin's letter. That direction was not complied with at all. Rather, I

received on the day before hearing an envelope addressed to me asserting some kind of confidentiality and containing two photocopy documents under cover of a letter from the plaintiff's solicitors explaining that the enclosures could be read by me but not by the parties or their advisers as they were "commercially sensitive". I have not read the two documents concerned; indeed they now appear to be misplaced and I have no intention of initiating a search for them. I explained to plaintiff's Counsel at hearing my objection to reading them when the plaintiff had manifestly refused to comply with, appeal or even invite me to revisit a clear direction of the Court to which no responsible lending institution with a proper level of transparency in dealing with its borrowers could object.

19. In my experience the plaintiff's practice about arrears significantly aggravates the distress of defaulting borrowers with bewilderment, confusion, frustration and insecurity. Moreover there is a perception, eloquently expressed in Ms Galvin's letter, that existing suspended orders for possession now no longer mean what they were understood to mean by defendants, their advisers and the Court.

20. The nub of the problem is that the plaintiff, in arrears situations, fails to add the arrears to the overall mortgage debt. There is nothing before me to suggest that this practice produces an arithmetical total (of plaintiff's stated "monthly payment" plus accumulated and, most problematically, projected interest on arrears) higher than the amount of a monthly instalment as normally formulated by mainstream lenders (who simply add arrears of interest to the overall debt, and charge a consequently increased amount of interest on the overall debt by including it in the normal monthly instalments). However the plaintiff, in its statements of account (particularly those included in or exhibited to grounding affidavits in most proceedings, which do not so much as mention its idiosyncratic charging practice) miscomputes and significantly understates the "monthly payment" under the mortgage contract in a manner at odds with the terms of that contract. This unfairly engenders unrealistic expectations among many defaulting borrowers as to their capacity to repay arrears. Then at hearing, where a proposal is put by or for the defendant which may not, in the perception of the plaintiff or its solicitor, address the arrears of the "monthly payment" either at all (meaning, normally, within the mortgage term) or within a reasonable period, the defendant's hopes and expectations in reliance on the understated figure for the monthly instalment are understandably confounded when the plaintiff's solicitor explains that "interest on arrears" has to be paid in addition to the monthly instalment and that the defendant's proposal is accordingly insufficient to address the default. A like confounding of hopes and

expectations will doubtless also have arisen in negotiations of which the Court is unaware in other cases, leading to some borrowers simply disengaging in confused dismay without seeking advice or attending the hearing.

21. The resultant confusion is not helped by the fact that the plaintiff, in its solicitors' affidavits grounding possession applications, has failed with some consistency and over a disturbing length of time to comply with Chancery Division Practice Direction 2003 No 9: Mortgage Actions and Applications for leave to enforce suspended orders by exhibiting copies of the offers of advance. These are key parts of the mortgage contract. Indeed the plaintiff's standard mortgage conditions state that in the event of any conflict between the terms of the offer of advance and either those of the mortgage deed or the general conditions, it is the offer of advance that must prevail. Moreover the same plaintiff fails far too often (as evidenced, for example, in McCaffrey) to exhibit to the relevant grounding affidavit the correct edition of the standard mortgage conditions of the plaintiff or, where appropriate, one of its predecessor lending institutions. The chances that the defendant borrower and his advisers, and indeed the Court, are in a position to read all relevant terms of the mortgage contract in individual cases are diminished accordingly. These shortcomings are significant given the importance of the precise terms of the mortgage contract to proceedings for possession of a person's home. (It has been the plaintiff's solicitors' practice to exhibit, in lieu of the offer of advance, a somewhat minimal sheet with several short lines of print which tells the reader nothing at all about the terms of the mortgage contract. It is plainly unfortunate that, because of pressures of business, I have not been alive until recently to the full extent of such inadequacies.)

22. The plaintiff's claim to possession and its rights to its possessions under Article 1 of the First Protocol of the Convention are clearly outweighed in these cases (for the time being at least) by the language of the mortgage conditions, the relevant domestic legislation including section 36 of the Administration of Justice Act 1970, section 8 of the Administration of Justice Act 1973, sections 3 and 6 of the Human Rights Act 1998 and the rights of defendants to their possessions under the same Article and their rights to a fair trial and respect for their homes under Articles 6 and 8 respectively of the Convention.

23. The Orders I will make will be to direct further affidavits containing revised particulars of the respective states of account as set out in Order 88 rule 5(3) based on correct computations of the monthly instalments in accordance with the standard practice of lenders, the plaintiff's own standard mortgage

conditions and the findings in this judgment and adjourn the plaintiff's applications for leave to enforce accordingly. (Alternatively, if the plaintiff elects to retain its existing practice, there must be affidavits containing revised statements of account which leave interest on arrears out of the figures altogether as, for reasons stated earlier, unless that interest is computed in the same manner as it is by other lenders, there is no contractual basis upon which, for the purposes of the application of section 8, which stipulates that in determining a "reasonable period" any requirement "for earlier payment" can be ignored, interest on arrears per se should be treated as part of the arrears when the Court is considering its statutory discretion.) The Orders will disallow so much of the plaintiff's costs of and incidental to the applications for leave to enforce as arise by reason of its erroneous computations. The Order in McCaffrey will also require the plaintiff to pay so much of the defendants' costs of the application as arise by reason of those errors. In McAtamney there will be a variation (as agreed between the parties, the only live issue being as to costs) of the terms of the original suspended order for possession. In McCaffrey and Clint proceedings will be adjourned to allow for the filing and serving of the plaintiff's further affidavits and enough time for the defendants to consider them and, if necessary, file and serve affidavits themselves.

24. I add the important caveat that in all other cases in which suspended orders for possession have already been made upon the basis of the plaintiff's present practice about interest on arrears, my view is that the plaintiff would be estopped (unless as in the present cases the leave of the Court is obtained by Order) from unilaterally increasing the contractual monthly instalment in the manner I have found to be in compliance with the mortgage contract as the overall effect of increasing the underlying monthly instalment in such cases would be to enlarge significantly and unfairly the defendant's overall monthly financial commitment beyond what had been envisaged by the parties and the Court when the suspended order (or if, appropriate, the most recent variation order) was made.

25. In all cases where applications by this plaintiff for leave to enforce or to vary suspended possession orders where interest on arrears has been demanded otherwise than in properly formulated contractual monthly instalments, affidavit evidence of the following will be necessary as at the date of swearing:-

    (a) a statement that interest on arrears has been added to arrears figures otherwise than by adding capitalised interest to the overall debt and re-formulating the contractual monthly payment accordingly;

(b) the duration of the remaining mortgage term;

(c) the rates of interest charged at the date of the suspended (or last variation) order and at the date of swearing;

(d) the state of account between the parties (as described in Order 88 rule 5(3) but omitting the rates of interest as therein specified and the arrears as at the issue of the originating summons) on the explicit basis of the plaintiff's present practice as to interest on arrears; but including also a statement disclosing how much of the stated "arrears" figure comprises accrued interest on arrears and statements of the total and monthly projected additions of interest on arrears of instalments if payment of such arrears had to be spread over the full remainder of the mortgage term;

(e) a like statement of account, but explicitly based on correct compliance with the relevant standard conditions and therefore omitting reference to interest on arrears and adding a statement confirming that this is so;

(f) the terms of payment in the suspended order (or the most recent variation thereof);

(g) particulars of payments which should have been and those which actually have been received since that order;

(h) the amount of the shortfall in payments under that order.

26. I am not minded to make any further orders for possession on the basis of the plaintiff's present practice in the absence of clear and informed agreement or other compelling reason (if such there may be). Accordingly many of the plaintiff's grounding affidavits under Order 88 rule 5 will require to be supplemented by corrective affidavit evidence after the appropriate re-formulation of the contractual monthly payment upon notice to the defendants and such periods of adjournment as may be necessary to allow the defendants to come to terms with the revised figures and formulate any proposals or affidavit evidence of their own. It is not envisaged that supplemental grounding affidavits for originating summonses need condescend to the detailed comparisons of particulars which I have specified above for applications in which existing orders may have to be varied, but the supplemental affidavits

must state that the previous figures in the original grounding affidavit have now been superseded (stating the date of change) by reason of a duly notified increase in the contractual monthly instalment, the arrears now being added to the overall mortgage balance on which interest is charged, but that the plaintiff will no longer be claiming, in respect of interest on arrears, a separate and additional monthly amount over and above normal contractual monthly instalments. In other respects the supplemental grounding affidavits would have to set out the state of account between the parties as required by Order 88 rule 5(3) of the Rules.

27. The time within which any notice of appeal must be filed in the present cases is the period of 28 days from email transmission of this written judgment.