THE COURT OF APPEAL

Court of Appeal Record Number: 2023/267

High Court Record Number: 2022/113 SP

Whelan J.
Pilkington J.
O'Moore J.

Neutral Citation Number [2024] IECA 245

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENT

- AND –

TIMOTHY CAREY AND FINOLA COLGAN CAREY

APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 16th day of October 2024

1. This is an appeal against orders of Mulcahy J. made in the High Court on 21 July 2023 and thereafter perfected on 18 September 2023. The said orders firstly declared valid a lien arising by virtue of an equitable deposit by the first appellant with the bank in 2008 of the land certificate to the lands comprised in Folio 2639 of the Register County Westmeath, which the bank registered as a lien on Part 3 of the Folio on 4 November 2008 pursuant to s.73(3) of the Registration of Deeds and Title Act 2006 ("the ROTDA 2006"). The court declared that sum of €597,435.44 together with €396 in respect of costs ("the

judgment debt"), being the sum due on foot of a judgment obtained by the Bank against both appellants on 12 September 2016 ("the 2016 judgment") in proceedings 2013/4066S together with interest at the rate of 2% per annum from 12 September 2016 until payment, stood well charged on the first respondent's interest in the said lands. Secondly, the Court declared that the judgment debt sum stood well charged on the appellants' respective interest in the lands comprised in Folios 2639, 16939F and 2997 of the Register County Westmeath. It was further ordered that in default of payment of the judgment debt the said lands and premises be sold and the respective proceeds be distributed in accordance with the priority of the burdens affecting same. The Bank was granted an order for costs against the appellants jointly and severally to be adjudicated in default of agreement. A stay was granted in the event of an appeal.

2. The Bank instituted separate proceedings (2022/114SP) against the appellants in respect of the same indebtedness seeking orders for possession over a dwelling house and lands comprising two further folios 7693F and 2513 of the Register County Westmeath over which the Bank held register mortgages/charges. The said claim (2022/114SP) was heard and determined by the High Court at the same time as the within proceedings and both were the subject of a single written judgment of the High Court delivered on 7 July 2023. The appellants also appeal the said decision by Appeal 2023/268.

Background

3. The appellants are litigants in person. The second named appellant (the wife) conducted the appeal and advanced the arguments on behalf of both appellants. In written submissions and oral argument the wife outlined that the Bank restructured five separate loans of the appellants and offered what is characterised as a restructure facility which was *"calculated to be in the sum of €532,500 at the date of the facility letter dated August 5th 2010. The principle sums contained in this facility consisted of three farm loans in the*

respective sums of €200,000 each advanced by way of facility letters from the plaintiff dated 1st March 2007… 12th November 2007… together with overdraft and other smaller facilities …"

4. The restructured facility was governed by the terms specified in a facility letter dated 5 August 2010 ("the facility letter") and the appellants duly signed same letter assenting to its terms on 2 September 2010. The appellants contend that net effect of the loan facility agreement was to consolidate into one loan the various indebtedness of the appellants to the Bank. Under its terms the date identified for the overall repayment of the sum outstanding was 31 October 2010. It is clear from the said terms that the purpose of the facility was to restructure five existing facilities. In regard to the securities held, those recited included, *inter alia*, a *"Registered lien over the property at Toorlisnamore (Folio No: 2639 Co. Westmeath) comprising 16 acres registered in the name of Mr Timothy Carey."* The appellants contend that this lien is invalid and unenforceable for non-compliance with s73(3)(c) of the ROTDA 2006.

5. The purpose of the facility letter is clearly stated on the first page: *"to assist with the restructure of existing facilities"*. Five specific account numbers of extant loans are identified. The "*Form of Acceptance*" of the facility letter was duly signed by both appellants on 2 September 2010. It is not in dispute that the appellants did not discharge their liabilities by 31 October 2010. From and after 31 October 2010 no step was taken by the appellants to discharge same, although it appears some *without prejudice* negotiations took place between the parties. Such negotiations are not material to this appeal.

6. On 9 October 2013, almost three years after default, a formal demand was served on both appellants. On 4 December 2013, proceedings issued by way of summary summons Record Number 2013/4066S ("the summary proceedings") whereby the Bank sought the sum of €541,396.28 together with the interest on the principal sum and €215 in respect of

costs. It is not now in dispute that the said proceedings were served on the appellants on 7 January 2014. No step was taken by either of them to enter an appearance to the summary summons as required by the Rules of the Superior Courts. The proceedings lay in abeyance for some years. On 10 August 2015 a notice of intention to proceed was filed by the Bank in the Central Office.

7. An affidavit of debt was sworn on behalf of the Bank by Brendan Murphy on 9 August 2016. Of note in particular is para. 9 of the said affidavit wherein he deposed *"I say the Plaintiff hereby waives its claim to further interest from the 9th day of August 2016."* The appellants contend that the said averment precludes the Bank from seeking court interest in respect of the sum claimed by the Bank. This argument was unsuccessfully advanced before the High Court in both proceedings 113/2022 and 114/2022 and constitutes a ground of appeal in both appeals. On 13 August 2015 a notice of intention to proceed was served on each of the appellants by the Bank's solicitors. Thereafter on 25 August 2015, an inhibition was registered on Folio 2639, County Westmeath by Claire Carey. It appears that on 25 September 2015, the said folio was also the subject of a caution registered in favour of one Bernadette Colgan.

8. On 12 September 2016, over two and a half years after service of the summary proceedings, the Bank entered judgment in default of appearance in the Central Office for the sum of €597,435.44 together with €396 in respect of costs. The Bank registered the 2016 judgment as a judgment mortgage on Part 3 of all five of the appellants folios on 1 March 2017. It is noteworthy that no formal step was ever taken by the appellants or either of them to have the said judgment mortgages set aside on any legal basis thereafter.

9. Meanwhile, on 25 October 2016, the appellants issued a notice of motion in the High Court seeking to set aside the summary judgment pursuant to O.13, r.11 RSC (now O.13 r.13 RSC). On 29 May 2017, the notice of motion came on for hearing before Barr J. in

the High Court wherein he found in favour of the appellants, set aside the default judgment and extended time for the entry of an appearance. The Bank appealed to the Court of Appeal and same it was heard on 9 April 2018. Judgment was delivered on 23 April 2018.

Judgment of the Court of Appeal

10. The judgment of this Court ([2018] IECA 119) noted that it was not disputed that a copy of the summary summons had been served on the appellants on 7 January 2014. They had not entered an appearance. Extensive negotiations had been pursued between the parties in which the appellants had been represented by a financial advisor. In argument, Mrs. Colgan Carey asserted, *inter alia*, that they had not entered any appearance because they were aware that the summary summons served on them was not a true copy of the original summons. Further, *inter alia,* that the affidavit of debt filed by the Bank failed to comply with O.13, r.18. It was contended that under the 2010 facility letter they had entered into a three-month contract with the Bank from August 2010 and at the expiry of that period they no longer had any contractual obligations to the Bank. It was otherwise argued that they had reached some form of compromise with the Bank or alternatively that they were still engaged in ongoing negotiations with the Bank at the point when the 2016 judgment was entered against them. Irvine J., in giving the judgment of the court, noted:

> *"Whilst the Careys denied they signed the loan offer of the 5th August 2010 it is clear that when Mr. Brendan Murphy, on behalf of the bank, produced the signed copy of that agreement as an exhibit they did not seek to challenge that evidence. Indeed, they would appear to have embraced that agreement in so far as on this appeal Mrs. Colgan Carey argues that the loan offer they accepted from the bank on the 5th August 2010 was one confined to a three month period."*

The judgment observed that the submission of the Careys in question had no legal validity. The judgment goes through each of the arguments advanced by the appellants in support of

a contention that the decision of Barr J. was correct and that the judgment entered on 12 September 2016 ought to be set aside to enable them to enter an appearance and proceed to defend the Bank's claim.

11. At para. 37, The judgment noted:

> *"While the Careys contend that in some way the bank ought to have advised the court as to precisely what loans were being re-structured in the letter of loan offer of the 5th August 2010, that letter speaks for itself and there was no need for the bank to detail what was clear on the face of the document. Further, the fact that the claim is for a sum of money due on foot of loans that were re-structured, could never afford the Careys any ground of defence to such a claim."*

The order of Barr J. was set aside and the 2016 default judgment was reinstated.

12. It was open to the appellants had they disputed any aspect of the 2018 judgment, [2018] IECA 119, or the order of the Court which was perfected on 14 May 2018, to make a direct application to the Court of Appeal to review its own judgment to correct any error, omission, or oversight. The judgment was delivered on 23 April 2018 and in the first instance such an application could have been made pending perfection of the order. Had they otherwise wished to appeal to the Supreme Court it was open to them to seek leave to do so. No such step was taken by them.

13. On 8 April 2019, and again on 20 April 2019, almost a year following delivery of the judgment of the Court of Appeal [2018] IECA 119, the appellants wrote to solicitors for the Bank alleging overcharging of interest and revoking any offers of settlement.

14. By letter of 23 May 2019 the Bank asserted that the 2016 judgment was not capable of dispute and further that it was considering steps such as obtaining well charging orders/possession orders to progress the matter.

15. On 17 July 2019, over five years after the summary proceedings were instituted and almost three years after summary judgment was obtained, a year after the Court of Appeal had reinstated the said summary judgment as valid and operative the appellants procured a report from Candor asserting that the bank had overcharged interest on one loan.

The Court of Appeal motion

16. On 26 July 2019, the second named appellant purported to issue a notice of motion in the Court of Appeal office in the concluded appeal proceedings 2017/276. This step was taken over fifteen months after delivery of that court's judgment overturning the decision of Barr J. and reinstating the 2016 default judgment. It sought an order *"striking out/setting aside the judgment in default of appearance"*, an order "*striking out/setting aside the judgment mortgage registered by the Bank"* against the property of the appellants on 2 March 2017, and certain other reliefs including damages. The motion doesn't directly assert error, mistake or omission in the Court of Appeal judgment. The 2016 Order could not be set aside however without the 2018 Court of Appeal order reinstating same first being set aside.

17. In an affidavit supporting this motion the second-named appellant alleges that the restructured loan agreement of August 2010 was "*unreasonable*" and that the borrowers found it impossible to comply with it "*given the financial state of Ireland at the time*". She accuses the Bank of *"being guilty of mala fides"* and asserts that an auctioneer was attempting to dispose of part of their lands in order to satisfy the loan *"without the knowledge or the authority of the borrowers".* She alleges that the summary summons was not served properly. This is entirely at variance with the position adopted in the Court of Appeal where there was no dispute, but that summons was served on the appellants in the month of January 2014. She also relied on the Candor report which is said to prove that

the Bank was guilty of charging the wrong rate of interest. This affidavit was not served on the Bank at the relevant time.

18. Subsequently on 29 July 2019 the Court of Appeal office communicated with Ms Colgan Carey stating:

> *"I have reviewed the file in this appeal today and unfortunately the motion should not have been accepted as the Court of Appeal does have jurisdiction to deal with the reliefs sought. I am therefore returning the motion to you by post. You may apply for a refund on the stamp fees paid and this email will suffice as evidence that the motion and affidavit were not accepted."*

19. The appellants asserted in the High Court an entitlement to rely on the words *"The Court of Appeal does have jurisdiction to deal with the reliefs sought",* but a reasonable perusal of the email makes clear that the motion was being returned to Ms. Colgan Carey by post. She was told she was entitled to a refund of the stamp fees paid and it was confirmed to her that the motion and affidavit were not accepted by the Court of Appeal Office. It was explicitly stated that *"unfortunately the motion should not have been accepted."*

20. On receipt of the email Ms. Colgan Carey could have been under no illusion but that the motion she sought to launch in the Court of Appeal had been rejected. Thereafter there was no motion extant or in any list and no step was taken by her to assert otherwise throughout the balance of 2019, 2020, 2021 or indeed 2022 certainly up until well after institution of High Court Special Summons 2022/113 and 2022/114 dated 28 June 2022.

21. The appellants did not seek to rely unduly on the 2019 Motion in the course of the appeal. It cannot be contended that any issue concerning alleged overpayment of interest was being pursued by the appellants before the High Court or Court of Appeal from July

2019 onward. However, the substance of the Notice of Appeal in effect invokes the Greendale jurisdiction to revisit the 2018 Court of Appeal judgment and Order.

22. Although the appellants sought to rely on the wife's engagement with the Financial Services and Property Ombudsman (FSPO), however, communications show that as of 30 March 2022 the appellants were well aware that the FSPO had no jurisdiction to entertain the complaints based on the time limitations, the fact that the products had expired over six years prior to the complaint being made and that certain aspects were not appropriate for determination by the FSPO in the first instance.

The Special Summons

23. Special summons 2022/113SP issued on 28 June 2022, cited to be in the matter of an application pursuant to s.117 of the Land and Conveyancing Law Reform Act 2009 (the 2009 Act). The reliefs sought included a declaration that by virtue of the deposit of the land certificate with the Bank by the husband, which said equitable deposit was registered as a lien on Folio 2639 County Westmeath pursuant to s.73(3) of the ROTDA 2006, the sum of €597,435.44 together with costs as due on 12 September 2016 plus interest stood well charged on the husband's interest in the said folio. An order for the sale of the lands and premises were sought together with such other order for the enforcement of the lien as the court deemed appropriate. In addition, well charging orders, orders for sale and declarations were sought by way of enforcement by virtue of the judgment mortgage registered in Land Registry on 1 March 2017 as a judgment mortgage over respectively the lands in Folios 2639, 16939F and 2997, all County Westmeath.

24. The High Court in its judgment [2023] IEHC 388 (para.4) noted that the defendants had raised a number of arguments by way of defence *"but their principal objection is that the sum in respect of which the plaintiff obtained judgment is based on an incorrect calculation of interest".* The court also noted their contention that the Bank had waived its

claim to further interest from and after 9 Augst 2016. It noted that the equitable lien in the Bank's favour over Folio 2639 had been registered on 4 November 2008 pursuant to s.73(3) of the ROTDA 2006. The judge noted the appellants' argument that the amount in the default judgment was said to be incorrect, subsequent registration of the judgment mortgage on 1 March 2017 was rendered invalid.

25. The court noted that the Bank's claim that it held a lien over Folio 2639 alone by virtue of registration of an equitable deposit of the land certificate as a lien pursuant to s.73(3) ROTDA 2006 that in respect of all three folios, a judgment mortgage in favour of the Bank had been registered on Part 3 of the each which in the case of Folio 2639 offered a separate and distinct basis on which the well charging order and order for sale was being sought. In respect of Folios 16939F and Folio 2997 the Bank relied on registration of the judgment mortgage on 1 March 2017 as the legal basis for its claim to well charging orders and orders for sale. The court noted that it was not disputed that the sums due on foot of the judgment had not been discharged and that the appellants relied on the Candor report of July 2019 to support their contention that there had been overcharging of interest by the Bank and that in consequence the judgment mortgage registered over each folio had been registered *"in respect of an "unsafe and false judgment sum""* (para. 51).

26. The appellants in substance were contending that the High Court should review the decision of this Court, [2018] IECA 119. The court noted that they had sought to rely on the decision of this Court in *Launceston Property Finance DAC v. Wright* [2020] IECA 146 (*Launceston)* which had reviewed the authorities and summarised the nature of the jurisdiction of this court to review or set aside a prior judgment and observed that in essence that the jurisdiction was *"wholly exceptional"*, requires the applicant to discharge a very heavy onus, cannot be invoked on the basis of discovery of new evidence and is not

to be invoked for the purposes of revisiting the merits of the decision. The court noted that the borrowers asserted they met the high threshold for reopening of the 2018 judgment.

27. The court also noted the arguments that the affidavit of debt sworn on behalf of the Bank on 5 August 2016 had effectively waived the right to interest from and after that date. Mulcahy J. rejected the contention they had met the "*heavy onus"* for reopening a judgment noting that it was not permissible for the High Court to disregard an order of the Court of Appeal simply on the basis that a party argues that said court had been been led into error (para. 58). The court observed that it was a matter exclusively for the Court of Appeal as to whether "*the wholly exceptional jurisdiction*" to review its final judgment [2018] IECA 119 should be invoked. The court noted that no such application had ever been made to the Court of Appeal despite the fact that the borrowers had the benefit of the accountant's report since July 2019 - almost four years previously. The judge noted that no other valid basis had been raised by the borrowers for the High Court to engage in what he construed as a collateral attack on the 2016 default judgment. *"As a result, it is not open to this Court to now review the Default Judgment reinstated by Order of the Court of Appeal on foot of a final judgment of that Court."* (Para. 59). The court noted that the appellants had not claimed that there had been any repayments of the judgment sum which the Bank had established to be due and owing for the purposes of its application for a well charging orders and orders for possession.

28. To the appellants contention that the Bank had failed to comply with the requirements of s.73(3)(c) of the RODTA 2006, the High Court observed that it was not entitled to look behind the Register and registration of the lien by the Bank over the lands comprised in Folio 2639. Registration was held to be conclusive evidence that the Property Registration Authority had satisfied itself that the requirements of the RODTA 2006 had been met prior to registering the lien. The court was satisfied by reference to the loan

facility letter that the registered lien was intended to secure the debt referred in the loan facility the subject matter of the proceedings.

29. In regard to the appellants' contention that the Bank had waived its entitlement to claim court interest by reason of para 9 of the affidavit of debt of 5 August 2016, the judge concluded that this argument was not well founded:

> *"Although the affidavit of debt does not refer to the Plaintiff waiving "contractual" interest, as opposed to Courts Act 1981 interest, it is clear from the context that the Bank only intended to waive its entitlement to contractual interest. The affidavit of debt contains a calculation of contractual interest up to a particular date and then states that interest is waived from immediately after that date. It is clear, therefore, that this is a reference to contractual interest."* (para. 64)

30. Mulcahy J. considered the purpose of an affidavit of debt in the context of O.13, r. 20 of the Rules of the Superior Courts. It obliges a plaintiff to file an affidavit specifying "*the sum then actually due"* before judgment in default can be entered for a liquidated sum.

31. The judge noted that an express waiving of interest in an affidavit of debt was a necessary device to ensure that a plaintiff seeking judgment in default of appearance for a liquidated sum can rely on that affidavit as accurately setting out the sum due where interest might otherwise have accrued between the date of the swearing of the affidavit of debt and the date of entering final judgment in default (para. 65). The trial judge, having rejected all of the grounds of appeal advanced, concluded he was satisfied to declare the sum of €597,435.44 plus €396 well charged over the lands in Folio 2639 and make an order for sale in default and ancillary orders on foot of the registered lien and further to make the well charging orders as sought together with the orders for sale in default of

payment and other ancillary orders sought in respect of the judgment mortgage registered over all three folios.

The notice of appeal

32. The appellants' notice of appeal was filed on 16 October 2023. Key grounds are as follows: firstly, that the sum of €597,435.44 plus €396 costs is not the correct sum due and owing and is not well charged on the properties. An order for sale ought not to be granted in respect of same. Secondly, that the final sum claimed included an amount of interest "*which was waived pursuant to an affidavit sworn on behalf of the plaintiff dated 8 August 2016 in proceedings 2013/4066S*." Thirdly, that the Bank had not complied with the legislative requirements in registering the lien on Folio 2639 and in consequence thereof the sum claimed was "*false and unsafe*" was not well charged on the property.

Arguments advanced contending that the sum is not well charged on the property.

33. The appellants' submissions emphasise that the proceedings constituted *"a completely new set of proceedings instituted by the plaintiff in the matter of a consolidated loan facility provided by the plaintiff to the defendants which was proceeded with by way of special summons by the plaintiff in 2022."* It was asserted that the appellants had advanced independent verification that the sums claimed were "*false and unsafe*" and were "*invalid*". The appellants contended concerning the consolidated sum stated in the facility letter of 5 August 2010 to have been advanced to the appellants that *"the said sum now claimed on foot thereof has been proven beyond doubt to be false".*

34. Written legal submissions were advanced purporting to support those contentions. Reliance was placed on the Candor report of 17 July 2009 although the date of initial retainer of that firm of chartered accountants and auditors was not divulged. The appellants relied on the fact that they had engaged with the Financial Services Pension Ombudsman, however the submissions acknowledged that the complaint was out of time.

34. The arguments advanced then proceed in substance to reopen the decision of the Court of Appeal, [2018] IECA 119, contending that s.117 of the 2009 Act had not been complied with: *"the defendants submit that this presupposes that there was nothing irregular concerning the sum claimed and granted in the specific judgment particularly where the said judgment is a judgment in default of appearance."* It was contended that there were serious questions to be answered by it as to why figures contained in the affidavit of debt *"which has been proven to be false and unreliable"* had not been addressed by the Bank. The appellants place reliance on the decision in *Launceston.* It was asserted that the appellants were entitled to rely on the decision of this Court in *Promontoria v Greene* [2021] IECA 93 where this court reversed the High Court and permitted the filing of a further corrective affidavit. The appellants dispute the High Court judge's assessment that it was not open to him to overturn the decision of the Court of Appeal in judgment [2018] IECA 119.

35. The second ground contends that the Bank waived its entitlement to any further interest from 8 August 2018 by virtue of the terms of the affidavit of debt. They note that O.13, r. 20 is *"specific in the sum to be claimed by way of judgment by default as a sum then actually due".*

36. The third ground challenges the validity of registration of the lien on Folio 2639. They contend that s.73(3)(c) imposes strict obligations on the Bank in the matter of registration of a lien. Reliance was placed on its terms *"the application shall be on notice by the applicant to the registered owner of the land or charge and be accompanied by the certificate concerned."* It was contended by the appellants that to the best of their knowledge and belief they had not received notification of the said registration of the lien by the Bank and neither had s.73(3)(c) been complied with.

37. During the course of the appeal hearing the appellants sought in substance to reopen the 2018 decision of this court, and accordingly it appears to me to be necessary in the first instance to consider whether in fact the appellants have established any valid basis which would entitle them to require the court to revisit the judgment of 23 April 2018 under the so-called Greendale jurisprudence principles.

The potential jurisdiction of this Court to revisit its own judgment.

38. The relevant principles and their correct application when an application is made by a litigant that a court revisits its own previously delivered judgment were summarised in *Nash v. DPP* [2017] IESC 51. In that case O'Donnell J. (as he then was) observed that the jurisdiction is aptly described as a "*potential jurisdiction*". He further observed:

> *"It may be, however, that an error identified is not considered either central to the reasoning in the case, or capable of establishing such a fundamental departure from the administration of justice as would justify the application of the Greendale jurisdiction. Nevertheless, the error, if it be such, may be considered of some significance either because of its impact on an individual, the potential for confusion and worse in relation to separate matters, or perhaps, for the sake of simple accuracy. There is and can be no objection either in principle or in constitutional law to the correction of such matters which do not affect the decision of the court captured by Article 34.4.6."* (para. 14).

In the course of his judgment in *Nash*, O'Donnell J. observed:

> *"Exceptionally, an error may be capable of being so fundamental and central that it should lead to the setting aside of a judgment including perhaps resulting in the reversal of the decision itself."* (para. 6).

The judgment in *Nash* speaks to the exceptionality of the jurisdiction and the narrow ambit of circumstances which warrants such an intervention. Including on the basis that

"revisiting of old ground inevitably adds to the costs incurred and by the stress imposed on all the parties involved. It also requires the allocation of scarce time and resources which are therefore necessarily denied to litigants who have not yet had their case heard or considered on appeal."

39. O'Donnell J. emphasised the earlier decision of the Supreme Court in *Riordan v An Taoiseach* [2000] IESC 61 where at para. 4 Murray J. (as he then was) observed:

> *"If a party, solely because he or she disagreed with the judgment of the court of final appeal could by one means or another restart the proceedings to have issues tried all over again, and perhaps even again, it would undermine the functioning of the administration of justice and weaken the authority of the law, which are there for the benefit, not of the courts, but of citizens as a whole."*

O'Donnell J. explained at para. 9:

> *"The requirement of finality in litigation is not therefore the product of judicial decision or statute. It is encapsulated in the provisions of the Constitution which establishes this Court (referring to the Supreme Court) which it is bound to uphold. That imposes constraints upon the court when it is invited to alter or set aside its decision."*

40. He reviewed the history of the jurisdiction noting that it was originally identified in this jurisdiction in *Greendale Developments Ltd. (No. 3)* [2000] 2 IR 517 where Denham J. (as she then was) observed at p. 544:

> *"The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider*

whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights."

41. This Court in *Friends First v. Paul Smithwick* [2019] IECA 197 reviews the Greendale jurisprudence and particularly the modified manner in which its application to decisions of this Court has come to be applied. Of particular note is the decision of *Bailey v. The Commissioner of An Garda Síochána & Others* [2018] IECA 63 where Finlay Geoghegan J. observed at para. 31:

"… this Court should follow closely the approach taken by the Supreme Court in those judgments allowing for the different factual contexts and nature of the errors identified."

The judgment is attentive to the different constitutional position of the Court of Appeal from that of the Supreme Court and at para. 35 she observed that this means that:

"there is, notwithstanding Article 34.4.3 an exceptional jurisdiction to revisit a judgment of this Court which is otherwise entitled to finality where it is considered necessary to do so to comply with the constitutional imperative to administer justice. Whether that threshold is met will depend upon the relevant facts."

42. As was observed in *Friends First v. Smithwick* [2019] IECA 197 in reviewing the jurisprudence on the standard to be established by an applicant who seeks to revisit or reopen a concluded decision of this Court, a significant amount of guidance was provided by the Supreme Court as to the approach to be adopted. In the decision *The People at the suit of the DPP v. McKevitt* [2009] IESC 29, where Murray C.J. observed:

"There are two particularly important factors to be addressed when considering whether this Court has, in the circumstances of a particular case, jurisdiction to consider a re-opening of its decision., Firstly <u>the application must patently and</u>

substantively concern an issue of constitutional justice other than the merits of the decision as such. Secondly, the grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant." (emphasis added)

Murray C.J. emphasised *"Very exceptionally the Court has jurisdiction to review a decision in the special circumstances referred to in the case-law …"* He also observed:

"Insofar as this Court has potential jurisdiction, in the exceptional circumstances referred to in the case-law, to review one of its earlier decisions, an applicant must show cogent and substantive grounds which are objectively sufficient to enable the Court to enter upon an exercise, by way of a hearing of an application on the merits, of that wholly exceptional jurisdiction. (For example, a mere assertion of subjective bias on the part of the Court by a dissatisfied litigant could not be a ground upon which the Court could have jurisdiction to hear and determine an application)."

43. As is noted in the *Smithwick* decision, which analysis the jurisprudence up to 2019, Clarke J. had observed in *McInerney Homes Limited & Others* [2011] IEHC at 3.7:

"It seems to me that in order for the Court to exercise its jurisdiction to revisit a question after the delivery of either an oral or written judgment, its necessary that there be 'strong reasons' for so doing."

The aforementioned principles were further succinctly distilled in the *Launceston* decision referred to in the High Court. The summary of the Greendale jurisdiction in para. 7 of the *Launceston* judgment was relied upon by the trial judge and succinctly encompasses the key factors derived from the jurisprudence. The decision of Murray J. in *Decobake, in liquidation* [2022] IECA 31 (at para. 4), offers a succinct yet compendious exposition on the application of the Greendale principles. He noted that *"…the Greendale jurisdiction:*

(i) is by definition wholly exceptional in nature, available only in 'special and unusual circumstances' (Re Greendale Developments Ltd. (No. 3) [2000] 2 IR) 514, at p. 527 to 528 per Hamilton C.J., is subject to a burden on an applicant which is 'heavy' (id. per Denham J. at p. 1043) and is operative only where the breach is 'clear' (id. per Denham J. at p.438);

arises only where it is established that a failure to set aside the decision will result in a breach of the constitutional rights of the applicant and to that end must constitute something extraneous going to the very root of the fair and constitutional administration of justice (LP v. MP [2002] 1 IR 219 per Murray J. (as he then was) at p. 229 and 230);

is <u>not</u> available only because the decision is alleged to have been wrong on the merits (People (DPP) v. McKevitt [2009] IESC 29 per Murray C.J. at para. 20) and thus cannot be used to reargue an issue already determined (Murphy v. Gilligan per Dunne J. at para. 138);

(ii). has been related in each authority in which it has been addressed to an established breach of 'constitutional justice' (Re Greendale Developments Ltd. (No.3) at p. 544, Attorney General (SPUC (Ireland)) Ltd. v. Open Door Counselling [1994] 2 IR 333 per Denham J. at p. 352, LP v. MP at p. 229) and will thus only usually be in play where the violation of constitutional rights arises from a breach of fair procedures that cannot be remedied other than by a set aside order. For this reason, the jurisdiction arises only where there was established 'a substantive issue concerning a denial of justice in the proceedings' (DPP v. McKevitt [2009] IESC 29 at para. 20 per Murray C.J.) or 'a clear breach of the principles of natural justice, to which the applicant

has not acquiesced' (Bates v. Minister for Agriculture, Fisheries & Food [2019] IESC 35 at para. 112 per MacMenamin J.), and;

(iii) will never be available where the basis for the application arises from the applicant's own fault (Re Greendale Developments Ltd (No. 3) per Denham J. at p. 544).

44. A useful analysis of the jurisprudence is also to be found in the decision of the Supreme Court in *Walsh v. The Minister for Justice and Equality & Ors.* [2019] IESC 15 & [2019] IESC 54 where the Supreme Court gave consideration to the circumstances where the exceptional jurisdiction to set aside a prior judgment or orders might be exercised. It emphasised that important guidance was to be found in its decision in *DPP v. McKevitt* [2009] IESC 29.

45. The Supreme Court in *Walsh* observed at 2.5:

"… the contention that a judgment is wrong, even plainly wrong, whether by reference to law or fact, will not suffice. This, too, is consistent with the jurisprudence of other legal systems. In the United Kingdom in R. Bowe Street Magistrate, ex parte Pinochet (No.2) 2000 I AC 119 (Pinochet) at p.132, it was stated that, "it should be made clear that the House will not reopen an appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case, there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."

The Court observed at 2.6: *"It bears reemphasis that this is an exceptional jurisdiction where the test is, of necessity, difficult to satisfy."* At 2.7 it observed *"It will be*

particularly difficult to meet the test when what is relied on is not something extraneous to the decision, such as the composition of the court, but an alleged error of fact."

46. The Supreme Court cautioned that:

> *"A party may well reasonably believe that, if new arguments are made, or old arguments advanced more persuasively by new advocates, or if defects or weaknesses in reasoning or in the understanding of the factual position could be pointed out, the judges concerned might change their minds."* (para. 2.2)

47. By this appeal the appellants in substance seek to have the 2018 order of the Court of Appeal reversed, the High Court order of Barr J. reinstated and in effect the 2016 default judgment be set aside. The appellants point to no actual error either of fact or of law in the judgment of the 2018 Court of Appeal in light of the papers put before the court which would warrant such an intervention. Indeed, the 2018 judgment engages with and considers each of the grounds of appeal advanced by the appellants and rejects same for the reasons stated and in light of the authorities identified. It is significant that at no point in the 2018 appeal hearing did the appellants seek to impugn the 2016 default judgment on the grounds of erroneous calculation of interest or averments in the affidavit of debt.

48. The appellants were served with the proceedings on or about 7th January 2014. It was incumbent on the appellants at that time to identify all bases on which they sought to rely to have the 2016 judgment set aside. They had ample opportunity to make such inquires as they saw fit with regard to interest being charged on the various accounts referred to in the facility letter of August 2010 prior to the 2016 default judgment being obtained by the bank and thereafter in the course of the Motion brought by them in October 2016 to have the default judgment set aside. The allegation of interest overcharging was not advanced either before the High Court in 2017 or the Court of Appeal in 2018.

49. It appears certain communications regarding alleged overcharging of interest were engaged in with the Bank circa April 2019. This reflects a delay of over two years subsequent to the 2016 default judgment being obtained by the bank.

50. The report procured by the appellants is dated July 2019. It was obtained over five and a half years after the summary proceedings were first served on the appellants. Neither the existence of the report nor its contents establish a valid basis for the appellants to seek to revisit the judgment of this court reported at [2018] IECA 119.

51. There is no escaping the fact that the appellants had ample opportunity at the latest from January 2014 when the summary proceedings were served upon them to take steps to ascertain whether the sums due were in dispute or not. Not alone did they refrain from taking such steps they failed to enter an appearance in the Central Office of the High Court. No assertion of overcharging in relation to the calculation of interest was advanced either before the High Court on 29 May 2017 or on appeal before this Court in April 2018 by the appellants. Thus no basis whatsoever is identified to suggest that there was any error on the part of the Court of Appeal in its approach to the issues advanced by the appellants in the appeal or in its findings or conclusions in regard to same which culminated in the Bank's appeal being allowed, the order of the High Court made on 29 May 2017 being set aside and the 2016 default judgment being reinstated.

52. Following the perfection of that order on 14 May 2018, the appellants took no step to seek leave to appeal to the Supreme Court, a measure open to them had they considered that a material error on the part on the Court of Appeal had occurred such as would warrant the granting of leave on the basis of Article 34.5.4 of the Constitution.

53. In this regard the notice of motion which the second appellant sought to issue in July 2019 in the Court of Appeal Office does not on its face seek reliefs within the Greendale jurisdiction directed to the Court of Appeal judgment or its Order perfected on 14 May

2018. No specific relief to directly vary or alter any fact or statement in the Court of Appeal's judgment of 23 April 2018 is sought. The grounding affidavit sworn by the wife on 26 July 2019 does not address or engage the check list identified by the Court of Appeal in *Launceston* where an application is made to review a judgment of the Court of Appeal. The July 2019 notice of motion does not specifically seek an order that the Court of Appeal would exercise its jurisdiction to review or to set aside its judgment of 23 April 2018.

54. The Court of Appeal office quite correctly concluded that the motion ought not to have been accepted by the office. The motion was returned to the second named appellant by post advising her of her entitlement to apply for a refund on the stamp fees paid on the basis that the motion and affidavit were not accepted by the Court of Appeal. The appellants could have been under no illusion whatsoever from and after 29 July 2019 that there was no motion before the Court of Appeal in relation to the matter.

55. A consideration of the wife's affidavit demonstrates that no specific error that meets the Greendale threshold is asserted to have occurred on the part of the Court of Appeal in its judgment of 23 April 2018. The appellants seek to rely on what might be characterised as some new evidence in the form of the Candor report on the loan account. That report after such an inordinate delay could not in and of itself justify the reopening or the carrying out of a review of the Court of Appeal decision based on its judgment of 23 April 2018. It is important to emphasise that no challenge or complaint is made by the appellants to the facts as set out in the Court of Appeal judgment which clearly were based on the Notice of Appeal and the submissions and arguments of the parties.

56. I express no view on the validity, reliability or accuracy of the Candor report. Its requisitioning and the timing of same were matters entirely for the appellants. However, it is not open to the appellants to attempt to collaterally attack the judgment and orders of the Court of Appeal, based on the Candor report. Parties to litigation are entitled to finality

and it undermines the administration of justice if a disgruntled litigant who are entitled to serially have decisions reviewed based on retrospective rationalisation or the introduction of additional new material after such a significant effluxion of time. This would run entirely counter to the *dicta* of the Supreme Court on the proper application of the jurisprudence of the Supreme Court and this court to the principles governing an application to set aside a judgment and reverse a decision previously made. The approach of this Court to review applications is now set forth in the Court of Appeal practice direction CA 14 of 15 February 2023 – which did not apply in 2019 but did apply on 16 October 2023 when the Notices of Appeal were served. It makes clear that the application should concern a decision which involves a matter of general public importance. It notes the is desirability in the interest of finality and certainty that any review application to the court be initiated as soon as possible and within the general period of time allowed by the Rules of the Superior Courts for seeking leave to further appeal to the Supreme Court under Order 58, r.16(1) of the RSC or shortly thereafter. Insofar as the appellants appeal might be characterised in substance as encompassing an application to review or revisit the 2018 decision of this Court reported at [2018] IECA 119, it comes nowhere near satisfying the requirements of Practice Direction CA14. Further, the delays have been wholly inordinate and it is to be inferred in all the circumstances that but for the institution of the special summons proceedings 113/2022 and 114/2022 by the Bank it is unlikely that any step would have been taken by the appellants seeking to challenge any aspect of the 2018 Court of Appeal decision which reinstated the summary judgment obtained in default on 12 September 2016.

57. By analogy with *Henderson v Henderson*, (1843) 3 Hare 100, 67 ER 313 it is an abuse of process not to put forward one's entire case and identify all grounds of defence intended to be relied upon on an application to set aside a default judgment and then years

thereafter launch a fresh application seeking to reverse the Court of Appeal's decision based on a new point never advanced before. The *Henderson v Henderson* principle applies whether consideration is being given whether to permit the fresh ground of defence to be launched years after the initial process has concluded, final orders have been made and perfected. The issue was never put before this Court in April 2018. In effect by their submission the appellants seek to revisit the merits of the decision of the Court of Appeal in the substantive judgment delivered on 23 April 2018. This is impermissible in all the circumstances. The validity of the order obtained by the Bank in default on 12 September 2016 is not now open to being impugned in circumstances where its validity was fully the subject of comprehensive argument in the High Court resulting in the decision of Barr J. which in turn was reversed by the Court of Appeal. The parties to litigation are under an obligation to present the entirety of their case and all grounds of potential defence fall to be identified in a timely fashion particularly where an order for summary judgment is sought to be set aside with leave to enter an appearance and to defend the underlying claim. The Court makes its determinations on the basis that both sides have put forward the totality of their claim. As the Court of Appeal observed in *Launceston:*

> *"To proceed otherwise would lead to unending litigation, would squander the scarce public resources of the courts and deny successful parties the fruits of judgments issued in their favour. It is wholly inimical to the proper administration of justice."* (para. 11).

Accordingly, it is not now open to the appellants to contest the validity of the sum determined to be due and owing and as is encompassed within the order made in the summary proceedings 2013/4066S. To find otherwise would in the words of Murray J. in *Decobake;*

> "*... be inconsistent with core principles of finality and legal certainty, res judicata and the jurisdiction derived from the decision in Henderson v. Henderson. It would fail to respect the conditions attached by the courts to the setting aside of final orders expressed in Greendale Developments and cognate case law. Each of these features of the applicable law is fundamental*." (para. 46).

The above observations apply equally to the related appeal 114/2022.

Grounds of appeal -That the sum claimed is not well charged.

58. It claims that the sum of €597,435.44 plus €396 costs is not "*well charged on the properties*" but that assertion cannot now be entertained. All issues supporting a claim that the appellants were entitled set aside the 2016 default judgment and enter an appearance ought to have been put before the High Court and the Court of Appeal in 2017/2018. Though the appellants were throughout self-representing, this in and of itself cannot confer any procedural advantage on them as was made clear by Clarke J. (as he then was) in *ACC Bank Plc v. Kelly and Another* [2011] IEHC 7. Clarke J. cited the academic article written by Master Bell of the Queen's Bench and Matrimonial Divisions of Northern Ireland *"Judges, Fairness and litigants in person"* (2010) 1 *JSIS* 34 which observe, *inter alia*:

> *"The court should not confer upon a personal litigant a positive advantage over his represented opponent nor is it the position that the party with the greater expertise must be disadvantaged to the point at which they have the same expertise effectively as the other party. That would be a perversion of what is required, which is a fair and equal opportunity of each party to present its case."*

59. Simply put the appellants have not established any valid basis whereby this Court could entertain the proposition that the amount claimed and the sum specified in the judgment obtained in default on 12 September 2016 might now be impugned as being erroneous. The said judgment became final once reinstated on appeal by the Court of

Appeal as explicitly stated in the order perfected on 14 May 2018. The trial judge was entirely correct in reaching his conclusion that it was not permissible for him to embark on a review or to purport to revisit the judgment of the Court of Appeal or the terms of the said order. Further for all the reasons stated above the appellants came nowhere near discharging the heavy onus on them for the successful invocation of the exceptional jurisdiction to revisiting and reviewing a prior final decision of this Court.

Conclusiveness of the register

60. The three folios under consideration in the within proceedings comprise Folios 2639 and 2997 of the Register County Westmeath both in the sole name of the first named appellant and Folio 16939F County Westmeath which comprises 0.4780 hectares registered in the joint names of the appellants. A judgment mortgage in respect of the 2016 judgment was registered on Part 3 of each Folio on 1 March 2017.

61. The conclusiveness of the Register is provided by s.31(1) of the 1964 Act:

> *"31(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just*." (emphasis added).

62. *Deeney* in "*Registration of Deeds and Title in Ireland*", Bloomsbury Professional notes:

> *"The Registration of Title Act 1964 (ROTA 1964), s.31(1) provides that the register is conclusive as to the title of the owner of the land and of any right,*

privileges, appurtenance or burden appearing thereon. 'Conclusive' in this context means that the facts stated are to be regarded as true and that no other evidence is necessary or permitted to verify or contradict the statement. The title of such registered owner, in the absence of actual fraud, is conclusive even if the registered owner had notice of any deed, document or matter relating to the land. ROTA 1964, s 31(1) abrogates the equitable doctrine of notice (express or constructive) in relation to registered land and the non-application of the doctrine of notice in relation to registered land clearly establishes 'the integrity of the register." (6.01)

63. The appellants have not alleged fraud nor established any basis on which the High Court or this court could go behind the conclusiveness of the register in support of their contention that the judgment sum specified in the judgment mortgage registered is not well charged on their folios. This ground of appeal is not sustainable.

Ground 2 - alleged waiver of interest.

64. The assertion of the appellants is that the averment in para. 9 of the affidavits of debt sworn by Brendan Murphy on behalf of the Bank waived not alone further contractual interest arising on the debt from 9 August 2016 up to date of judgment but also waived statutory interest on the judgment sum pursuant to s.26 of The Debtors (Ireland) Act 1840 ("the 1840 Act") at the rate then in force pursuant to the Courts Act 1981 (as amended) ("the 1981 Act"). In the trial judge's reasoning at para. 65 of the judgment he considers the purpose of an affidavit of debt noting that O.13.r.20 of the RSC *"requires that before judgment by default can be entered for any liquidated demand… an affidavit must be filed specified the sum then actually due."* He notes that the express waiving of interest in an affidavit of debt is necessary to ensure that a plaintiff seeking judgment for liquidated sum in default of appearance can rely on that affidavit as accurately stating the sum due where

interest might otherwise have accrued *"between the date of swearing of the affidavit and the date of entering judgment."*

65. The judge was entitled to have regard to the context in which the affidavit was sworn and the practical exigencies that confronted the deponent as he sought to meet the requirements for judgment in default of appearance including in particular O.13, r.20. There is no basis for the appellants' contention that the Bank waived interest pursuant to s.26 of the 1840 Act or pursuant to the 1981 Act.

66. Section 22 of the 1981 conferred a discretion on courts to award of simple interest at a rate fixed from time to time pursuant to the 1840 Act. At the date of introduction of the 1981 Act the prevailing rate was 11% (SI 11/1981). The rate of interest was subsequently reduced to 8% in SI 138/2011 which was the applicable rate at the date judgment was entered in the office. The rate of interest was subsequently reduced to 2% by virtue of SI 624/2016 Courts Act (Interest on Judgment Debts) Order 2016. The latter Order came into operation on 1 January 2017 amending s.26 of the 1840 Act. The Bank has repeatedly acknowledged that the rate of interest it is seeking on the 2016 judgment is 2% notwithstanding that the Court rate of interest did not fall from 8% to 2% until 1 January 2017. I do not understand the Bank however to have sought to resile from that position. This ground of appeal has no merit.

Ground 3 - Validity of the registered lien over Folio 2639.

67. The appellants contend that the Bank failed to comply with the statutory requirements in relation to registering a lien over Folio 2639, Co. Westmeath and that in consequence the sum claimed is not well charged on same and an order for sale ought not to be granted to the Bank. The Bank purports to hold two securities over this Folio: the lien registered on 4 November 2008 and the judgment mortgage registered 1 March 2017 in respect of the judgment obtained on 12 September 2016. The lien was registered solely

over Folio 2639 pursuant to s.73(3) of the RODTA 2006. The husband had lodged the Land Certificate with the bank by way of security at step reflecting the longstanding practice in this jurisdiction at least from the late 17th century of creating equitable mortgages by deposit of title deeds or, in the case of registered land (post 1 January 1892), the deposit of the land certificate or a charge certificate in respect of same to secure an existing indebtedness or a specified sum advanced.

68. Historically, the creation of such security either for a debt antecedently due or a sum of money advanced at the time of deposit operated as an equitable mortgage by virtue of which the depositee acquired not only the right to retain the deeds (in the case of registered land the Land Certificate which issued pursuant to s 31 of the Local Registration of Title Act, 1891) until the debt was paid but also created an equitable interest in the land itself. The validity of such security was recognised by Lord Thurlow L.C. in *Russel v Russel* (1783) 1 Bro. C.C. 269. *Coote on Mortgages* 9th Edition (1927) Volume 1 p.86 observed: "*A mere delivery of the deeds will have this operation without any express agreement, whether in writing or oral, as to the conditions or purpose of the delivery, as the court would infer the intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties unless the contrary were shown: and the delivery would be sufficient part performance of such agreement to take the case out of…"* the Statute of Frauds (Irel.) , 1695 s.2. An equitable mortgage over the title deeds or Land Certificate (as the case may be) could be declared established once the court was satisfied from the evidence adduced as to the existence of a contractually binding agreement arising expressly or by implication whereby the debtor had granted security for an obligation which was clearly established. The deposit of the Land Certificate or title deeds was treated as a sufficient act of part performance to take the case out of the Statute of Frauds (Irel.), 1695. The equitable lien was contract based and, generally, given the requirement of

certainty, was not considered to extend to future advances unless it was established that such had been expressly agreed between the parties.

69. But here, the registration was effected pursuant to s73 (3) and gave rise to a conversion from an equitable mortgage by deposit to a registered lien by act and operation of law. I remain unconvinced that registration on 4 November 2008 expanded the potential ambit of the security agreed to by the parties beyond the level of indebtedness as it stood on 4 November 2008 in the absence of evidence to the contrary. I find the absence of any contemporaneous agreement from circa 4 November 2008 encompassing "*future advances*" to be significant, in light of authorities such as *Ex parte Kensington* (1813) 35 E.R. 249 and Lord Cairns in *Shaw v Foster* 1872 L.R. 5. H.L.321.

70. However, the Facility Letter states under the heading "*Security*", "*Any security held now or at any future tine shall be security for all the liabilities present and future howsoever arising, of the borrower to the bank".* This agreement was signed by both appellants. I notice that the 29 June 2022 Affidavit of Andrew Larkin paras 10-12 inclusive deal with this lien but does not assert that it was agreed or intended by the parties thereto to extend to future advances. Para.11 merely alludes to *a prior equitable deposit of the land certificate…"*

71. The practice in this jurisdiction is comprehensively analysed in the textbooks including Wylie on *Irish Land law 6th Ed. Bloomsbury Prof.* (2020), paras. 12.45 -12. 47 and Deeney, *Registration of Deeds and Title in Irish Land Law* (2014). In the case of registered land the facility for the creation of such equitable mortgages by deposit was greatly circumscribed following the coming into operation of s.73 of the RODTA 2006 which provided that the Property Registration Authority (PRA) (established under the RODTA 2006 and subsequently replaced by Tailte Eireann under ss. 28 and 29 of the Tailte Eireann Act 2022) that the PRA would cease to issue land certificates and charge

certificates which said provision became operative on 1 January 2007 by virtue of the RODTA 2006 (Commencement) (No.2) Order of 2006 S.I. 511/2006). As Deeney (opus cit.) explains:

> *"RODTA 2006, s 73 made provision for the conversion of any equitable mortgages which arose from the deposit of certificates into registrable liens during the 'phasing out' three-year period. Section 73(3)(b) provided that, during the period specified in s 73(2), ie from 1 January 2007 to 31 December 2009, the holder of a lien created by deposit of a land certificate or certificate of charge could apply for registration of the lien in such manner as the Authority determined. The application was made on notice to the registered owner of the land or charge and had to be accompanied by the relevant certificate. The lien was deemed, for the purposes of ROTA 1964, s 69, to be a burden which could be registered as affecting registered land… The registration of tens of thousands of such liens as burdens was effected during the 'phasing out' period."*

72. A mortgage created by equitable deposit of the land certificate of registered land was not registerable as a burden within s69 of the Registration of Title Act, 1964 prior to the coming into force of the RODTA 2006. The position was reversed by s.73 of the RODTA 2006. The legislative intent of s.73 of the RODTA 2006 was that the recognition of existing equitable deposits would continue in accordance with the laws that previously stood. This is explored by Wylie at para. 13.115. Simply put, the equitable mortgage by deposit was to be converted to a registered lien.

73. Pursuant to s.73(2) of the RODTA 2006, land certificates ceased to have any force or effect upon the expiration of three years after the commencement of the said provision. From 31 December 2009 it ceased to be possible to create an equitable mortgage by deposit of a land certificate over registered land. This position was acknowledged by

Clarke C.J. in *Promontoria (Oyster) DAC v. Hannon* [2019] IESC 49. For the Bank to protect and equitable mortgage created by the husband depositing the land certificate it was necessary that a lien be registered in part 3 of Folio 2639 prior to 31 December 2009. The lien would be deemed by registration to be a burden pursuant to s.69 of the ROTA 1964. The lien was so registered on 4 November 2008.

74. By virtue of s.73(3) of the RODTA 2006, the holder of an equitable mortgage by deposit over registered land was entitled to apply to the PRA for its registration as a lien during the "phasing out" period, 1 Jan 2007 – 31 December 2009. Registration results in the lien being deemed to be a burden for the purposes of s.69 of the ROTA 1964 and thus capable of affecting the registered land in question. The subsection must be construed in a purposeful fashion. Even a cursory perusal of section 73 makes clear that the intention is to ensure that the registered owner of the folio in question is aware that a lien is being created and registered over the subject folio. The first appellant does not deny that he lodged the Land Certificate to Folio 2639 with the bank in 2008 by way of equitable mortgage. Registration as a lien took place on 4 November 2008. Both events occurred during the "*phasing out*" period before creation of such mortgages was abolished on 31 December 2009. The appellants must be taken to know the law and readily understand that the bank would take the final procedural step of registering the equitable mortgage which the first appellant has never denied creating by deposit of the land certificate with the bank to maintain its security which was otherwise. The tenor of s73(3)(c) of the RODTA 2006 suggests that it was primarily directed towards the protection of registered owners from the registration of liens without their knowledge in circumstances where the holder of the Land Certificate was not entitled to do so. The equitable mortgage over Folio 2639, Co. Westmeath was thereby converted into a registered lien.

75. The appellants knew from August/September 2010 that in the consolidation and restructuring of the five separate existing facilities in respect of which they had liabilities with the Bank, the securities acknowledged to be held by the bank included, *inter alia*, "*registered lien over the property at Toorlisnamore (Folio No: 2639 Co. Westmeath) comprising 16 acres registered in the name of Mr Timothy Carey*." Both appellants signed the form of acceptance of same on 2 September 2010. I conclude, on balance that execution by them of the Facility Agreement amounted to an acknowledgement by them and acceptance that the valid and operative securities held by Bank for the €532,500 "*by way of loan*" extended to and included, *inter alia*, the registered lien. Further, it offers proof that at the latest as and from August/September 2010 the appellants were fully aware of the existence of the lien as a registered burden on Part 3 of Folio 2639 in respect of their indebtedness to the Bank. It is noteworthy that neither in 2010 nor the ensuing years to 2022 did they ever seek to impugn the validity of the lien.

76. The appellants are now precluded as a matter of law from seeking to impugn the validity of the registered lien over Folio 2639 in any manner which offends s 31(1) of the ROTA 1964. They accepted the validity of the lien along with all the other terms in the facility terms when they duly signed the acceptance on 2 September 2010. The register is conclusive as to the validity of its registration. It is not open to them now to purport to rely on technical aspects of the Registration of Deeds and Title Act 2006 in seeking to override the import of s 31(1) to impugn the validity of the lien. The first named appellant does not deny that he deposited the land certificate in respect of Folio 2639 with the Bank as security in respect of the appellants indebtedness in 2008. Fraud is not alleged.

77. Section 105(5) of the ROTA 1964 (which substantially replicates s.81(5) of the 1891 Act) provides:

> *(5) Subject to any registered rights, the deposit of a land certificate or certificate of charge shall, for the purpose of creating a lien on the land or charge to which the certificate relates, have the same effect as a deposit of the title deeds of unregistered land or of a charge thereon.*

A comprehensive analysis of same was carried out by Collins J. in *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93.

78. The Facility Letter in substance appears to have contemplated that the lands in folio 2639 would form part of the security for the loan in question only by way of extension of the existing lien. Ordinarily s.62 of the ROTA 1964 would govern the position and it would be incumbent on the Bank to create and register a valid charge over the Folio on notice to and with the concurrence of the registered owner. Such did not occur. Instead, the Careys explicitly assented in the lien of 4 November 2008 extending to cover the loan sum.

79. Given that the lien registered on 4 November 2008 derived from an equitable deposit of the Land Certificate rather than an instrument of mortgage or charge, it was necessary for the Bank to apply to the High Court for a well charging order together with an order for sale in accordance with the Rules of the Superior Courts and the courts inherent jurisdiction. That is precisely what they did.

80. Collins J. in *Greene* comprehensively analysis the beneficial impact of s.73 of the ROTDA 2006 in particular at circa paras. 38, 39 and 40. The appellants seek to go behind the registration of the lien created by the deposit of the land certificate of the Bank. However, that approach cannot now be entertained. Section 31 of the ROTA 1964 applies to this lien. The Register is to be deemed "conclusive evidence" that the title of the registered owner of the lands in Folio 2639 – namely the first named appellant Mr. Carey is subject to this lien.

81. The Bank is entitled to rely upon the validity of Part 3 of Folio 2639 which is effective to establish conclusively that it is the holder of the lien registered on 4 November 2008 at entry No. 4, Part 3 of the Folio. By virtue of s.31 of the ROTA 1964 the registered lien appearing on Part 3 of the Folio expressly said to have been registered in accordance with s.73(3) of the ROTDA 2006 has been conclusively shown by the Bank to be have been so registered and arguments advanced by the appellants seeking to impugn its validity on the basis the Bank did not execute the facility letter of 5 August 2010 are *nihil ad rem.* Separately, as outlined above, the Bank has registered the judgment mortgage as a burden at entry No.5 on Part 3 of Folio 2639.

82. I am satisfied that there was clear evidence before the High Court not alone that the monies the subject matter of the 2016 judgment were due and owing by the appellants but also that same had been secured, *inter alia*, by the judgment mortgage registered over Folios 2639, 16939F and 2997, Co. Westmeath and additionally, in the case of Folio 2639 and in light of all the evidence, particularly execution by both appellants of the Facility Agreement on 2 September 2010, the registered lien.

83. The appellants have not established any stateable basis whereby the judgment and orders of this Court made 23 April 2018 and the orders perfected on 14 May 2018 could validly be reviewed or revisited or otherwise altered or varied as to its findings, determinations or conclusions. This appeal falls to be dismissed on all grounds.

Costs

84. My provisional view as to the costs of this appeal are as follows: the within proceedings were brought by way of special summons as were the allied proceedings High Court Record No. 2022/SP114. As regards the conduct of both sets of proceedings, they were dealt with together, the parties were the same. The High Court delivered a single judgment on 7 July 2023 [2023] IEHC 388. They derive from the same set of facts in all

material respects concern the same indebtedness and seek the realisation of the securities of the Bank for the purposes of satisfying the indebtedness in question.

85. In regard to the appeal, the appellants served a single notice of appeal in respect of both sets of proceedings. The judgment mortgage sought to be impugned was registered against all of the folios on or about 1 March 2017 and concerns the same or overlaps with the indebtedness as did the lien and charges the subject of Appeal 2023/268. It is evident from the tenor of the facility letter of 5 August 2010 that, as the appellants contend, the Bank effectively restructured all subsisting facilities and the appellants agreed to that course of action. The appellants contend that the loans were *"consolidated*". Having due regard to the provisions of s.169 of the Legal Services Regulation Act 2015 (as amended) it appears proportionate and reasonable in all the circumstances that the respondents who have been successful in this appeal be entitled to one set of costs only in regard to both appeals. This constitutes my provisional view.

86. Should the parties or either of them contend for a different order as to costs in respect of this appeal it is open to the to either party to make written legal submissions within fourteen days of electronic delivery of this judgment. The said submission should be furnished to the other party to this appeal and lodged in the Court of Appeal and be no longer than 2000 words. Thereafter, any response to the said submissions should be furnished within a further two weeks. The court will thereafter consider the same and make its determination in regard to the issue of costs.

87. Pilkington and O'Moore JJ. have confirmed their concurrence with the above judgment.