THE COURT OF APPEAL
CIVIL

UNAPPROVED
NO REDACTION NEEDED
Court of Appeal Record No: 2023/169
and Court of Appeal Record No: 2023/170
Neutral Citation Number [2024] IECA 54

Whelan J.
Faherty J.
Haughton J.

BETWEEN/

EVERYDAY FINANCE DAC

RESPONDENT

-AND-

RAYMOND BRADLEY, TERENCE DOYLE AND SINEAD BYRNE PRACTISING UNDER THE STYLE AND TITLE OF MALCOMSON LAW SOLICITORS

FIRST, SECOND AND THIRD DEFENDANTS

-AND-

PHILIP MORRISSEY

APPELLANT

- AND -

ALL PERSONS CONCERNED

FIFTH DEFENDANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 8th day of March 2024

1. These are two appeals by the fourth named defendant (Mr. Philip Morrissey) against the judgments and orders of Mr. Justice Barniville, President of the High Court (the President), delivered on 14 April 2023 and 12 May 2023 respectively.

2. In respect of the judgment of the 14 April 2023, the subject matter of the first appeal, the court, having considered a notice of motion filed by Allied Irish Banks Plc (AIB) on 6 February 2020, granted, *inter alia,* an Order pursuant to O.17, r. 4 of the Rules of the Superior Courts, as amended, substituting Everyday Finance DAC (Everyday) for AIB as plaintiff in the proceedings, such that with effect from the date of the Order the proceedings be carried on between Everyday as plaintiff in substitution for AIB which should no longer be a party to the proceedings. Further the court granted Everyday liberty to deliver an amended plenary summons and amended statement of claim. The High Court held that the appellant, Mr. Morrissey, was not entitled to withdraw his consent to specific consent orders identified at Schedule 3 as "Consent Orders" in a Settlement Agreement dated 31 January 2020 (the Settlement Agreement) and assented to by a Consent Letter, both of which were signed by him on 31 January 2020. The court further granted declarations more particularly set out and considered hereafter.

3. The second appeal is from the subsequent refusal of the President on 12 May 2023 to review or set aside his substantive judgment of the 14th April 2023. The appeals will be considered in sequence.

The Substantive Orders

4. The President in a comprehensive judgment noted that in accordance with the terms of the Settlement Agreement Mr. Morrissey had consented to the making of each of the individual orders specified in Schedule 3 to the said Agreement. He proceeded to grant the following declarations:

i. That the facility letter of 3 May 2011 constituted an equitable mortgage by the fourth named defendant Philip Morrissey in favour of Everyday of the lands and properties contained in folios CW2075F, CW6086F and CW14107F County Carlow (the "Clonmelsh Property") but excluding the family home outlined in red on Map A appended to the Order of the Court (the "Equitable Mortgage").

ii. That the sum of €24,970,000 (together with costs and interest) or such other sum as may be found to be due and owing on inquiry, stands well charged against the interest of the appellant, Philip Morrissey, in the Clonmelsh Property (but excluding the family home and retained lands outlined in Red on Map B appended to the Order), pursuant to judgment mortgages registered against the Clonmelsh Property Folios on foot of summary judgment obtained with his consent against the appellant in the High Court on 17 December 2015 and,

iii. That the sum of €24,970,000 (together with interest) being the amount secured by a guarantee of 5 June 2008 given by the appellant for the debts of the Company Dan Morrissey Ireland Limited (DMIL) (or such other sum as may be found to be due and owing on inquiry) stands well charged against the interest of the appellant in the Clonmelsh Property (but excluding the family home) pursuant to the equitable mortgage.

5. The President further directed that Mr. Philip Morrissey execute such documents as may be required to give effect to the declarations and orders aforesaid. The court ordered that Stephen Tennant (the "Court Appointed Receiver") of Grant Thornton be appointed as receiver to receive the interest of the appellant in the Clonmelsh Property (but excluding the Family Home and Retained Lands) as those terms were defined in the Settlement. It was

further ordered that the Court Appointed Receiver should have additional powers in respect of the Clonmelsh Properties (excluding the family home and retained lands), including to take possession of the same, to receive the rents and profits therefrom and to sell same or any of them free of all encumbrances.

Background

6. The appellant was a shareholder and director in the company Dan Morrissey (IRL) Limited ("DMIL"). On 5 June 2008, at a time when DMIL had substantial borrowings from AIB, the appellant furnished a personal guarantee to AIB in respect of the said borrowings of DMIL. Subsequently, pursuant to a Facilities Agreement with AIB dated 20 August 2009 as thereafter amended from time to time by a series of amending and restating letters of 3 May 2011, 16 November 2011, 26 September 2012 and 12 February 2013 (collectively "the Facilities Agreement"), Mr. Morrissey agreed to provide security over certain specified properties and folios mainly situate at Clonmelsh, County Carlow ("the Clonmelsh Property"), which excluded his family home. Pursuant to the Facilities Agreement AIB agreed to provide certain loan facilities to DMIL. The said Facilities Agreement was supported by Mr. Morrissey's personal guarantee aforesaid of 5 June 2008. Pursuant to the guarantee of 5 June 2008 Mr. Morrissey agreed to guarantee DMIL's liabilities to AIB up to the sum of €24,970,000 together with interest thereon.

7. It is noteworthy that the Restatement Facility/Facilities Agreement was signed by Mr. Morrissey as director of DMIL and also in his personal capacity as guarantor. A firm of solicitors Malcomson Law acted for the appellant in respect of the creation of the Restatement Facility/Facilities Agreement including in respect of the mapping of Clonmelsh House which was excluded from same in connection with the agreement by Mr. Morrissey to charge the balance of the Clonmelsh property excluding his family home for the benefit of AIB in respect of the indebtedness of DMIL.

8. On 17 June 2014 a formal demand by AIB was served on DMIL in respect of its indebtedness said as of the said date to being the sum of €26, 972,693.34. On 18 June 2014 a like demand was served by AIB on Mr. Morrissey in respect of the sum €24,970,000 due on foot of the guarantee aforementioned.

9. On 18 June 2014 AIB also appointed Paul McCann and Stephen Tennant (the Receivers) as receivers over the assets of DMIL.

10. On 3 November 2015 AIB issued summary proceedings against Mr. Morrissey Record No. 2015/2044S seeking summary judgment in the sum of €24,970,000, together with interest and costs. On 17 December 2015 the said summons was listed in the High Court for judgment against Mr. Morrissey. It appears that early that morning, prior to the court sitting, Mr. Morrissey executed a charge in favour of Malcomson Law, the solicitors on record for him at the time. The charge was said to be in respect of fees allegedly due and owing by him to the said firm in the sum of €969,963 plus interest at 2.5% per annum payable six monthly from 1 January 2016 with deferral in respect of payment of the principal monies to the 1 November 2016 provided the interest was paid. It appears not to be in doubt that Malcomson Law took this step for the purpose of obtaining priority over AIB in respect of Mr. Morrissey's indebtedness to the latter under his personal guarantee.

11. At all events, on the 17 December 2015 Mr. Morrissey also attended at the High Court and was legally represented by Malcomson Law when AIB obtained summary judgment on consent against him in the sum of €24,970,000 together with costs as in the said order provided.

12. On 7 January 2016 AIB registered the judgment obtained on 17 December 2015 as judgment mortgages against all of Mr. Morrissey's interest in certain folios referred to in short as the Clonmelsh Property. Searches effected at the time of the registration showed the said folios to be unencumbered. Indeed, this accorded with the terms of the Statement

of Affairs prepared by Mr. Morrissey on 21 August 2014. On 19 January 2016 Malcomson Law lodged their charge for registration on said folios. Ultimately registration was completed in or about the month of March 2016. There is a dispute between Everyday and Malcolmson Law as to the validity and/or priority of the Malcolmson Law Charge as against Everyday's judgment mortgages but that aspect of the proceedings was remitted by the President to plenary hearing.

13. Mr. Morrissey subsequently parted ways with his solicitors Malcolmson Law and retained a different firm. He engaged in a process of mediation on 9th December 2019 with AIB/Everyday and other concerned parties including the receivers and Plazamont a company which had been granted licences by the receivers of DMIL to quarry on lands owned by the appellant and over which he had previously granted a 99 year Quarry Lease to DMIL at a nominal rent. Thereafter the parties negotiated the terms of a comprehensive Settlement Agreement made between Mr. Morrissey of the first part, Everyday of the second part, AIB of the third part, DMIL (in receivership) of the fourth part, the Receivers of the fifth part and Plazamont Limited of the sixth part and the appellant provided a Letter of Consent to specific Orders which was signed by the appellant on 31 January 2020.

14. By notice of motion issued on 6 February 2020 to give effect to the terms of the Settlement Agreement, AIB sought, *inter alia*, a declaration that Mr. Morrissey's agreement to furnish security over the Clonmelsh Property (excluding his family home) as specified in the Facilities Agreement constituted an equitable mortgage in favour of AIB (and now in the events that have transpired in favour of Everyday). Its full terms are considered below.

The Judgment

15. The judgment of the President was delivered on 14 April 2023, [2023] IEHC 179. Parts of the judgment are directed towards a consideration and assessment of various objections advanced to the various reliefs sought by AIB/Everyday including the application

for substitution of Everyday in lieu of AIB pursuant to O.17, r. 4 RSC. A key relief sought was a declaration that the Facility Letter of 3 May 2011 constituted an equitable mortgage by Mr. Morrissey in favour of AIB over the Clonmelsh property (excluding his family home) and consequential orders directing the registration of the contended for equitable mortgage as a burden on each of the relevant folios over which the Clonmelsh property is registered in Counties Carlow and Wicklow. Subtending those issues the court had to consider whether it could grant the declaration sought in respect of the contended for equitable mortgage at the interlocutory stage in the proceedings and if so, whether it ought properly to do so in the exercise of its discretion or in the alternative should more appropriately leave over any consideration of the issue until the trial of the action as against the Malcomson Law defendants which was remitted to plenary hearing.

16. A core issue for determination by the High Court, insofar as Mr. Morrissey is concerned, was whether, having duly signed the Settlement Agreement on 31 January 2020 and given his express consent by the Consent Letter he also signed on 31 January 2020 to the orders AIB/Everyday sought in the notice of motion of 6 February 2020, Mr. Morrissey on the facts presented by him should be permitted now to resile from the said Agreement and to withdraw the consents previously given to the making of the orders.

17. The judgment of the President is meticulous in its analysis of facts and sequencing of events and considers the respective involvement of the various parties to the litigation along with other litigation instituted and being pursued by Mr. Morrissey. The involvement of parties such as Plazamont Limited to whom the Receivers had granted a license to operate part of the quarry formerly operated by DMIL under a 99 year lease from the appellant at Clonmelsh County Carlow and the role of the Receivers of DMIL insofar as relevant were fully explored, as was the role and conduct of Mr. Morrissey's former solicitors Malcomson Law. As the learned President made clear, nothing in his judgment affects in any way issues

as to the validity, priority or effectiveness of the alleged Malcomson Law charge which will be determined at a plenary hearing.

18. In the context of this appeal, the crucial issue considered and determined by the High Court was whether Mr. Morrissey was entitled to withdraw the consents previously given to the making of the orders specified in the Notice of Motion brought by AIB/Everyday.

19. In Part 7 of the judgment Barniville P. notes that following a mediation process which took place on 9 December, 2019, the Settlement Agreement was executed by, *inter alia*, Mr. Morrissey. Mr. Morrissey accepts he signed the Settlement Agreement. Under same he agreed to consent to the making of certain orders. The judgment noted; *"Those are the orders now sought in the notice of motion and in schedules 1 and 2 thereto".* It noted:

> *"Mr. Morrissey agreed to provide and did provide the Consent Letter in which he consented to the making of the orders set out in schedule 3 of the Settlement Agreement (which were also then set out in schedules 1 and 2 of the notice of motion). He confirmed that he had obtained independent legal advice prior to signing the Consent Letter and also agreed that the letter was governed by Irish law."* (para. 132)

20. The court then turned in particular to clause 3.1 of the 2020 Settlement Agreement noting (para. 133) that same *"...contains certain conditions precedent..."* That clause provided that the agreement was *"'conditional upon and shall not take effect until the date upon which all of' the following four matters were completed. Those four matters were:*

(a) All parties had to have executed the Settlement Agreement;

(b) Mr. Morrissey had to grant certain 'additional security';

(c) Mr. Morrissey had to provide the Consent Letter to AIB and Everyday; and

(d) The High Court had to have made the consent orders as against Mr. Morrissey.

134. The conditions precedent in (a) and (c) have been satisfied. The condition precedent in (b) has not been satisfied in that Mr. Morrissey has not granted the 'additional security' which he agreed to grant under the Settlement Agreement. The condition precedent at (d) has not yet been satisfied in that the court has not yet made the consent orders as against Mr. Morrissey as (i) the Malcomson Law Defendants have contested many of the orders sought in the AIB/Everyday application and it was necessary to have a contested hearing, to decide the disputed issues and to deliver this judgment and, (ii) Mr. Morrissey has belatedly sought to withdraw his consent to the orders sought in that application, and that issue also had to be considered by the court."

21. Mr. Morrissey was represented by a different firm of solicitors, certainly from December 2019. The President noted that by virtue of clause 3.1 of the Settlement Agreement the *"effective date"* as defined as the date on which all of the conditions precedent are completed, observing at para. 135:

"Clause 4 contains express obligations requiring Mr. Morrissey to cooperate. Those obligations are expressly stated to be 'with effect from the Effective Date'. They include an irrevocable agreement by Mr. Morrissey to consent to the consent orders (clause 4.2(a)). In attempting to withdraw his consent, Mr. Morrissey has argued that the conditions precedent have not been complied with as he had not yet provided the 'additional security' referred to in clause 3.1(b) and the court has not yet made the consent orders referred to in clause 3.1(d)."

"136. On the same day as the Settlement Agreement was executed and the Consent Letter signed by Mr. Morrissey, 31st January, 2020, counsel for Mr. Morrissey informed the court of the settlement and of Mr. Morrissey's consent to the orders to be sought under the Settlement Agreement. The AIB/Everyday application was

issued on 6th February, 2020. The matter was again before the court on the return date of that application, 10th February, 2020. Mr. Morrissey's consent to the orders being sought on that application was again confirmed to the court on 10th February, 2020. There is no dispute about any of that."

22. The court noted some delays in the hearing of the AIB/Everyday motion with various listings in the first half of 2020. *"It was first indicated to the court that there was an issue on Mr. Morrissey's side on 19th June, 2020."* (para. 137) Mr. Morrissey's solicitors brought applications to come off record in respect of this motion and two other sets of proceedings ostensibly compromised pursuant to the Settlement Agreement and relevant to the receivership of DMIL which he had instituted High Court Record No. 2017/2361P (the "Quarry Proceedings") and High Court Record No. 2019/294COS (the "Directions Proceedings"). The judgment noted that in the course of his solicitors' application to come off record, Mr. Morrissey submitted a statement of his own to the court which did not explicitly withdraw the Consent Letter he had signed or his agreement to the terms of the Settlement Agreement, but did state that he requested the court *"..not to ratify consent orders pending the outcome [of his] cases."*

23. After his solicitors had been permitted to come off record in June 2020, Mr. Morrissey proceeded on 6 July 2020 to write to the solicitors for AIB and Everyday purporting to *"withdraw from the Proposed Settlement Agreement".* As the High Court judgment noted at para. 139, he asserted in that letter that the Agreement was *"predicated on information unavailable to [him] but within the knowledge of the plaintiffs thereby prejudicing [him] in [his] capability of conscientiously executing same"*.

24. Having considered the written submissions filed on behalf of the Mr. Morrissey, the President observed at para. 140:

> *"There is nothing in Mr. Morrissey's submissions which addresses his entitlement to withdraw the Consent Letter and the consent to the orders sought on the AIB/Everyday application communicated to the court by his counsel on, at least, two occasions on 31st January, 2020, and 10th February, 2020."*

The President observed at para. 140 that *"…the essential point which Mr. Morrissey appeared to be making in the course of his various submissions to the court on the hearing of the application was that the Settlement Agreement remained conditional in that two of the conditions precedent had not been satisfied…"* It is noteworthy that the first unsatisfied condition is 3.1(b) which had required Mr. Morrissey to grant additional security as defined in the settlement. The second unsatisfied condition concerned performance of clause 3.1(d) which required procuring from the High Court the consent orders as against Mr. Morrissey as agreed to under the Settlement Agreement and Consent Letter. This, of course, was itself the subject matter of the application by AIB/Everyday to the High Court on foot of the notice of motion which had issued on 6 February 2020, less than a week after execution by Mr. Morrissey of the Settlement Agreement and the Consent Letter.

25. The President observed at para. 140:

> *"Mr. Morrissey's position, therefore, appeared to be that he was not contractually obliged to consent to the orders until those conditions precedent were satisfied (including the court making the consent orders) and there was, therefore, nothing to prevent him from changing his position and opposing the orders sought in the AIB/Everyday application".*

He considered the arguments advanced on behalf of AIB/Everyday which had contended that the court ought to proceed to make the consent orders notwithstanding Mr. Morrissey's attempts to change his position. As the President noted, they had based that contention on the following factors; firstly that Mr. Morrissey had already provided formal consent to the

consent orders in the signed Consent Letter and, further, expressly to the High Court through his counsel and the said consent had been unequivocal, unconditional and clearly intended to bind and was said to be *"irrevocable".* It was argued that Mr. Morrissey had failed to offer any legal basis to justify withdrawing his agreement to the consent orders. Whereas he had asserted that same had been predicated on *"information"* not available to him at the time of the agreement but within the knowledge of AIB/Everyday, this was said not to afford a valid basis for his withdrawal from the Settlement Agreement or the Consent Letter. He had not identified any significant information not available to him at the time of execution of said documents on 31 January 2020. The settlement was executed following a mediation and extensive negotiations. It embodied agreements to resolve not alone the within proceedings but two other sets of proceedings involving the respondents and the receivers. Since the making of the consent orders was a condition of the Settlement Agreement, it was contended that Mr. Morrissey was obliged not to prevent fulfilment of clause 3.1(d).

26. The court noted various authorities relied upon by AIB/Everyday for the proposition that parties to a settlement conditional on a consent order being made by the court are under an implied obligation to seek such order from the court and are not entitled to withdraw consent prior to the order being made. He noted that the court had jurisdiction to make orders in the terms consented to even where one of the parties to the settlement purports to withdraw consent prior to the court having had the opportunity to make it.

27. Reliance was placed by AIB/Everyday on clause 21.1 of the Settlement Agreement which had provided *"Each party undertakes to perform, execute and deliver such further acts and documents as may be required in order to implement the transactions contemplated by this Agreement and/or to perfect this Agreement."* They had further sought to rely on the doctrine of estoppel contending that they had relied on his representations by applying to the High Court to make the consent orders.

28. Having comprehensively reviewed all the evidence and the arguments of various parties, the President concluded at para. 147:

> *"Having signed the Settlement Agreement and having given his consent in the Consent Letter to the orders referred to in the Settlement Agreement and sought in the AIB/Everyday application and having communicated that consent to the court through his counsel on at least two occasions, on 31st January, 2020, and 10th February, 2020, and having not resiled from that position over the course of the following several months until just before or during the hearing of the application, it would, in my view, be totally wrong and grossly unjust to permit Mr. Morrissey to withdraw his consent to those orders."*

The President further noted (para. 147) that;

> "*…Mr. Morrissey has not put forward any legal basis whatsoever for impugning the consent in the Consent Letter as communicated to the court, or in the Settlement Agreement itself, save to make the point that it is conditional upon certain matters, two of which have already happened, one of which is the subject of this application (i.e. the court making the consent orders referred to in the notice of motion) and another which is completely within his control (i.e. the provision of the additional security which he agreed to give in the Settlement Agreement)."*

29. The President was satisfied that the approach being adopted by Mr. Morrissey was

> *"… itself a breach of, at least, one of the express provisions of the Settlement Agreement which has been disclosed to the other parties and referred to in submissions, namely, clause 21.1, and, in any event, is a breach of an implied term of the agreement to cooperate to enable performance of the agreement or, alternatively not to prevent fulfilment of the conditions in the agreement, including*

the requirement for the provision by Mr. Morrissey of additional security." (para. 148)

30. He set out in detail the legal basis for his conclusions aforesaid, agreeing substantially with the various submissions advanced by AIB/Everyday and rejecting submissions advanced by Mr. Morrissey (and Malcomson Law). The President found it unnecessary to consider arguments based on the doctrine of estoppel by representation. Having concluded that it was not open to Mr. Morrissey to withdraw his consent for the detailed reasons set forth in the judgment, the President made an order pursuant to O.17 r. 4 RSC substituting Everyday for AIB and proceeded to make the various orders (detailed above) sought in the notice of motion to which Mr. Morrissey had consented in the Letter of Consent signed by him on 31 January 2020 and by the Settlement Agreement of the same date.

The Appeal 23/169

31. Both Notices of Appeal 23/169 and 23/170 are identical. They are prolix in nature, raising a myriad of issues, many not raised at all during the High Court hearing. In his notice of appeal 23/169 of 6 July 2023 Mr. Morrissey identifies 63 separate grounds and seeks an order *"striking out the Judgment and Order of Judge Barniville".*

32. The orders made by the President and appealed against include the order pursuant to O.17, r.4 of the RSC that Everyday be substituted for AIB as plaintiff (ground 60). He appeals the determination that he was not entitled to withdraw his consent to the various consent orders referred to in Schedule 3 of the Settlement Agreement of 31 January 2020 and in the Consent Letter signed by him on the said date. He contests the declaration granted that the Facility Letter of 3 May 2011 constituted an equitable mortgage by him in favour of AIB/Everyday over the Clonmelsh property (but excluding the family home outlined in Map A appended to the High Court's order) and the consequential declaration that the sum of €24,970,000 stood well charged against his interest in the Clonmelsh property (outlined in

red on Map B appended to the order). He appeals the appointment of a receiver to sell the Clonmelsh property (as defined in the Settlement Agreement).

33. Mr. Morrissey provided combined outlined submissions addressing his arguments on both appeals 2023/169 and 2023/170. The latter appeal is considered separately.

Mr. Morrissey's written submissions

34. In his written submissions Mr. Morrissey identifies the key issues as follows:

(1) *"Lack of legal representation/fair trial"* – said to arise on foot of grounds 1 – 20 inclusive and parts of grounds 53 - 63 of the notice of appeal.

(2) *"Equality of Arms"* said to encompass grounds 54 – 63 of the notice of appeal.

(3) Grounds 21 – 35 are directed towards what he contends to be *the "[t]rue purpose of proceedings"* and assert that the debts and liabilities due and owing to AIB/Everyday have been paid in full.

(4) Grounds 33 – 38 are said to address the contention that an equitable mortgage was not created over the relevant lands as determined by the President and that the requirements for making a well charging order had not been satisfied.

(5) Grounds 38-40 contend that the High Court *"had no authority to make an Order appointing Receivers"*.

(6) Grounds 41 – 46 contend that Mr. Morrissey was entitled to withdraw from the Settlement Agreement and Consent Letter of 31 January 2021.

The standard of review

35. This matter was dealt with as a motion on notice grounded on affidavits and replying affidavits and was heard on that basis by the High Court. The decision in *Ryanair Limited v. Billigfluege.de GmbH* [2015] IESC 11 makes clear that the principles in *Hay v. O'Grady* [1992] 1 IR 210 do not apply to findings of fact made after a hearing on affidavit without oral evidence. It is authority for the proposition that where findings of fact are made on the

basis of affidavit evidence the party bringing an appeal must discharge the burden of demonstrating that there was some error in the findings of the judge below. The principles in *Ryanair Limited v. Billigfluege.de GmbH* were further considered by Murray J. in *A.K. v. U.S.* [2022] IECA 65 where at para. 53 he observed that an appellate court:

> *"… is free to correct errors of fact as well as of law, and mistaken inference as well as erroneous application of principle. It is thus not necessary for the appellant to establish that a judge has erred in law or in principle, the appellate court is not concerned to establish that the decision of the trial judge was not one that was reasonably open to him or her, nor will the appellate court be necessarily constrained to affirm a finding which is supported by credible evidence (although obviously where a judge has so erred or there is no credible evidence to support the finding the appellate court will interfere). Instead, the appellate court affords limited deference to the decision of the trial court by beginning its analysis from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect."*

Where, however, an error of law is established, it remains open to the appellate court to reverse same.

Alleged lack of legal representation and of a fair trial grounds 1-20 and 53-63 (part)

36. These grounds of appeal in substance contend that the lack of legal representation experienced by Mr. Morrissey from when his second firm of solicitors were granted leave to come off record on 26 June 2020 resulted in an absence of *"equality of arms"* as between the parties. It is further contended at great length that the President ought to have been alive to the asserted fact that there was *"fundamental unfairness"* experienced by Mr. Morrissey.

He directs complaints primarily against the last firm of solicitors on record, levelling a series of assertions against them never contended for or alleged before the High Court at the hearing. These include that the firm had failed to "*follow instructions"*, that the President "*ought to have known"* that the consent letter he signed on 31 January 2020 was *"neither real or informed"* and that his solicitors had a various times acted *"in breach of his instructions".* It was complained that the President ought to have given greater weight to the fact that Mr. Morrissey *"was justifiably unhappy with his legal representation"* and *"hampered in presenting his case by the failure of his legal advisors to advise him properly"*. He accused his former solicitors of fraud and other misconduct. It was asserted that his right to a fair trial was negatived and vitiated by alleged misconduct of his legal advisors and, *inter alia,* the failure of AIB/other parties to the litigation to notify the High Court that the appellant was one of a number of guarantors in respect of the indebtedness of DMIL and that there had been *"secret settlements"* with other guarantors.

37. A variety of complaints are advanced disputing the validity of the *"Malcomson Law charge"*. However, the validity or otherwise of the said charge was remitted to plenary hearing and all issues concerning same including those asserted at grounds 14-16 and elsewhere throughout the lengthy notice of appeal can be ventilated by Mr. Morrissey at the substantive hearing. Since no determination was made in the judgment and Malcolmson Law are not a party to this appeal such issues are not properly before this Court.

38. It was contended that his consents insofar as given to the orders specified in the Schedules to the Settlement Agreement and Consent Letter he signed on 31 January 2020 were "*neither real nor informed*" and that the trial judge erred in determining otherwise. Grounds 1-20 inclusive fall to be considered alongside grounds 53 -62 inclusive which assert that his legal representation was *"purely pro forma only"* and that the President attached *"excessive weight"* to the fact that he had had legal representation at the time of execution

of same. He makes various assertions regarding the manner in which AIB/Everyday engage with and reach compromises with other guarantors in respect of the same indebtedness of DMIL, complaining that he was not privy to the terms of those settlements and asserting same had been *"concealed"* from him and the court. Mr. Morrissey asserts that the decision of AIB/Everyday not to disclose the compromises with other guarantors to him amounted to *"misconduct"* on their part, it being asserted that there was an obligation to notify the court of such settlements and their terms. It was contended that AIB/Everyday had engaged in *"abuse of process"* and that the application to the High Court was not a *bona fide* effort to recover monies due on foot of the personal guarantee. Grounds such as 54 *et seq.* assert that a judgment mortgage was *"wrongfully registered"* by his solicitor without his consent against his private property in respect of company debt. This appears to derive from the fact that on the morning of 17 December 2015, judgment was obtained against him by AIB in the sum of €24,970,000 and the said judgment was subsequently registered by way of judgment mortgages against his interest in sundry folios in counties Carlow and Wicklow.

Observations on these grounds of appeal 1-20 and 53-63 (inclusive)

39. In many respects the appellant seeks an adjudication by this Court on matters which the High Court was never invited to adjudicate upon or consider in the first instance including regarding his relationship with the two firms of solicitors who had previously acted for him particularly the latter firm having come off record on 26 June 2020.

40. Issues that may have arisen as between Mr. Morrissey and the said firms of solicitors are not relevant to any issue to be determined in this appeal. The latter firm is not a party to this litigation. Malcomson Law is not a party to this appeal. Issues concerning the validity and priority of the charge executed by Mr. Morrissey on the 17 December 2015 and Everyday's judgment mortgages fall to be determined at the substantive hearing.

41. At the hearing of this appeal, Mr. Morrissey sought to adduce voluminous evidence concerning emails and communications that passed between him and his solicitors. As is clear from authorities, including *Emerald Meats Ltd v Minister for Agriculture* [2012] IESC 48 at [36], *Student Transport Scheme Ltd v. Minister for Education & Skills* [2015] IECA 303 at [34] and Chapter 23 of the textbook *Delany & McGrath on Civil Procedure* (5th ed., Round Hall, 2024), an appeal is generally to be determined on the basis of the evidence before the High Court when it made the decision under appeal. This appeal cannot be used as a platform to launch various allegations against the solicitors who came on record on behalf of Mr. Morrissey in succession to Malcomson Law. The new firm acted for him in relation to the mediation process on 9 December 2019 and advised him pertaining to the Settlement Agreement executed by him on 31 January 2020 and the Letter of Consent which he also signed on that date. This Court can have no regard to the asserted grievances and disagreements which Mr. Morrissey now seeks, without special leave, to deploy to advance his contention that the orders of the High Court are erroneous and should be set aside.

42. Mr. Morrissey is perfectly entitled to present his case in the High Court and this appeal as a litigant in person but doing so cannot confer upon him any litigation advantage. A helpful analysis of the obligations of the court in the context of a litigant in person is to be found in the judgment in *ACC Bank Plc v. Kelly & Anor.* [2011] IEHC 7 where Clarke J. (as he then was) made clear that a litigant *"cannot expect to gain an advantage because he is a litigant in person"*. Clarke J. cited with approval an article written by Master Bell of the Queen's Bench and Matrimonial Divisions of Northern Ireland entitled "Judges, fairness and litigants in person" (2010) 1 JSIS 34 where Master Bell had observed that:

> *"The primary principle applied by Judges in cases involving self -represented litigants is the principle of fairness. Fairness is the touchstone which enables justice to be done to all parties. A judge in proceedings involving a self-represented litigant must balance*

the duty of fairness to that litigant with the rights of the other party and with the need for as speedy and efficient judicial determination as is feasible. Achieving this balance is one of the most difficult challenges a judge can face."

43. Clarke J. (at 2.4) noted Master Bell's observation that *"... 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 to each party to present its case."*

44. Many of the contentions advanced by the appellant buttressing these grounds of appeal such as that he had instructed counsel to withdraw from the Settlement Agreement process before it was concluded and that this had occurred *"as far back as December 2019"* are bare assertions not supported by any evidence. Others are flatly contradicted by the evidence which was before the High Court. It is very evident from the exhibits that the process of negotiation that had ensued after the mediation process concluded in December 2019 continued throughout the month of December and the entire month of January culminating in the execution of the Settlement Agreement and signing of the Consent Letter by Mr. Morrissey on 31 January 2020.

45. Thus not alone is it not now open to Mr. Morrissey to launch a wide ranging attack on his erstwhile legal representatives and contend that the trial judge had some form of supervisory function which ought to have led him to intuit that the solicitors who had come off record had failed to follow his instructions or that he was *"justifiably unhappy with his legal representation"*. The grounds being advanced alleging lack of equality of arms in substance contend that the President was (or ought to have been aware) that Mr. Morrissey was unaware of a possible defence based on asserted misconduct by his legal advisors. This proposition is both incoherent and unsustainable.

46. At critical junctures throughout the judgment, the President evaluated the evidence and reaches conclusions informed by the principle of fairness and his assessment of the inherent unfairness were Mr. Morrissey to be permitted to exploit the arguments being advanced by Malcomson Law to his advantage. This is readily illustrated throughout the judgment including at paras. 147, 149 and 161. Subtending Mr. Morrissey's grounds of appeal 54 -62 and many of the grounds 1-21 inclusive is the untenable proposition that the President should have resiled from his position as a wholly independent arbiter of the issues arising to be determined in the notice of motion and ought to have assumed some form of advisory function vis-à-vis Mr. Morrissey. This contention is entirely contrary to authority and to principle. Indeed, as Clarke J. observed at 2.7 in *ACC Bank Plc v. Kelly & Anor*:

> *"... whether a person represents themselves of choice or of necessity does not alter the overriding requirement that the conduct of the trial must be fair to both sides, and that the fact that a person is, for whatever reason, unrepresented cannot be allowed to operate as an unfairness to the represented party."*

These particular grounds of appeal all fall away as wholly unmeritorious and contrary to authority. In substance, Mr. Morrissey is contending that his lack of legal representation should in effect have conferred some procedural advantage upon him and imposed upon the court additional obligations requiring the President to deviate from a position of judicial neutrality and the maintenance of a balancing exercise ensuring fairness as between both sides and instead ought to have adopted a stance favourable to Mr. Morrissey. Such contentions are unmeritorious and were not arguments advanced to the President at any time or during the hearing.

47. By these grounds the appellant seeks to divert attention from the critical fact that he was comprehensively legally advised and represented by both solicitors and counsel throughout the mediation and the negotiations thereafter that led to the execution by him of

the Settlement Agreement and the Consent Letter on 31 January 2020. The contention that the President attached excessive weight to that factor is mistaken. It was a highly germane consideration. The uncontested evidence was that senior counsel for Mr. Morrissey twice communicated to the High Court on his behalf his consent to the proposed orders - on 31 January 2020 and on 10 February 2020. Following Covid-19 -related adjournments, the first indication of a change of heart on the part of Mr. Morrissey came over four months later on 19 June 2020 which promptly led to his solicitors coming off record.

Grounds 21-34 including the contention that the debtor liability guaranteed by Mr. Morrissey has been discharged in full

48. The appellant postulates that the real purpose of the application is to remove him from the company DMIL and "*facilitate its seizure*". His contentions appear to encompass a number of disparate strands including suggesting that the financial benefits derived from quarry licences by the 2014 appointed Receivers during the receivership are not being dealt with appropriately and were they appropriately applied they would offset all liability of the appellant on foot of his guarantee and the judgment granted in the High Court on 17 December 2015 and which remains unsatisfied. It is noteworthy that there have been a number of applications brought in the Commercial Court concerning the receivership and the issues surrounding the operation of the quarry under licence and the valuation to be ascribed to same. However, it is noteworthy that it is clearly stated in the Settlement Agreement executed by Mr. Morrissey including at clause 4.1 and 9.1 that same was intended to be in full and final settlement of a variety of issues and litigations including, *inter alia*, the Quarry Proceedings. Furthermore, by entering into and executing the Settlement Agreement of 31 January 2020 he unequivocally acknowledged his liability for the sums outstanding on foot of the judgment of 17 December 2015 in respect of the guarantee.

49. The Quarry Lease granted by Mr. Morrissey to DMIL was for the term of 99 years at a nominal rent. Attributing notional and inflated figures to rock, gravel and/or stone extracted by DMIL from the quarry during the currency of the lease up to the date of appointment of the Receivers in 2014, and purporting to set off same against the sum guaranteed, amounts to unsound retrospective rationalisation and lacks any legal basis nor can it be seriously contended that the trial judge ought to have engaged in such an exercise. Furthermore, insofar as Mr. Morrissey contends that the Receivers granted licenses or other rights in or over part of the quarry to third parties for insufficient or inadequate consideration such are not issues properly arising for consideration in the determination of this motion and as such are not sustainable in this appeal.

50. The contention agitated by him before the High Court that his debt had been *"massively overpaid"* was not supported by probative evidence and amounted to a variation on the previous theme. There was simply no evidence before the trial judge that could have satisfied him that there was a statable basis for a contention that Mr. Morrissey's liabilities to AIB/Everyday under the guarantee had been either discharged or overpaid. Furthermore, Mr. Morrissey had in effect compromised the Quarry Proceedings (2017/2361P) under the terms of the settlement agreement he executed. His arguments and contentions accordingly were little more than an incoherent, ineffectual effort to collaterally attack the Settlement Agreement, performance of which required the making of the orders sought in the notice of motion on 6 February 2020 and further that had copper fastened Mr. Morrissey's consent to the making of same.

51. Woven throughout the appellant's very lengthy grounds of appeal and in his written submissions are a variety of procedural arguments, most now launched for the first time, contending, in effect, that at the date AIB obtained summary judgment, on consent, against him in the High Court on 17 December 2015 in the sum of €24,970,000 that there had been

sundry failures on the part of AIB to comply with relevant Rules of the Superior Courts and jurisprudence. These include alleged non-compliance with the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 regarding the obligation to sufficiently particularise the sum due in the endorsement of claim of a summary summons and the decision of *Havbell DAC v. Harris & Anor.* [2020] IEHC 147 concerning the procedural steps to be taken when amendment of an endorsement of claim is sought, in the light of the *O'Malley* decision. Reliance is also placed on the principles set forth in *Promontoria (Aran) Ltd. v. Gerry Burns & Anne Burns* [2020] IECA 87 with particular reference to the inadmissibility of hearsay evidence in support of a summary judgment.

52. However, none of the said authorities - or the others similarly relied upon by Mr. Morrissey - is relevant or supports the contention being advanced and in respect of which reliance is placed on the said decisions. Mr. Morrissey cannot now, years later, seek to impugn the consent order of 17 December, 2015. This must necessarily be so for Mr. Morrissey with the benefit of independent legal advice, including the advises of solicitors and senior counsel, consented in the High Court to the orders by AIB in the summary judgment against him on 17 December 2015. No step was ever taken thereafter by him to set aside the said judgment on any procedural basis. Neither was the judgment the subject matter of any appeal. The judgment stands and is a final order made on consent. These grounds of appeal are a gratuitous collateral attack on the 17 December 2015 Orders and are impermissible.

53. There is force in the argument advanced by Everyday that by virtue of the Settlement Agreement executed by Mr. Morrissey on 31 January 2020 he expressly acknowledged at Clause 2.1(b) that as of the 31 January 2020 he was *"...liable to Everyday for any sums outstanding and due and owing on foot of the Guarantee and Judgment"*. The summary judgment is defined as *"The judgment obtained by AIB against PM on consent in the sum of*

€24,970,000 plus costs in the context of the judgment proceedings". The various technical and procedural points belatedly launched by Mr. Morrissey attempting to impugn the validity of the 17 December 2015 judgment are unsustainable, amounting to nothing more than impermissible attempts to collaterally attack the consent order itself. He is estopped by his own previous conduct from pursuing such a course of action in the context of this appeal. Grounds of appeal which seek either in whole or in part to impugn the validity of the summary judgment obtained with the consent of Mr. Morrissey are lacking in merit and are unsustainable.

54. Insofar as some grounds (such as Ground 60) and submissions on the part of Mr. Morrissey might be understood to impugn or contest the validity of the order made by the President substituting Everyday for AIB as plaintiff in the proceedings pursuant to O.17, r. 4 RSC to the intent that from the date of the making of the order on 12 May 2023 the within proceedings be carried out between Everyday as plaintiff in substitution for AIB, and that the latter should no longer be a party to the within proceedings, such grounds are wholly unmeritorious and unsustainable. In the High Court Mr. Morrissey had advanced arguments contending that it would in the circumstances be inappropriate to permit AIB to substitute Everyday in its place in the proceedings, it being argued that this could give rise to potential adverse consequences should his former solicitors, Malcomson Law, successfully defend the proceedings on the issues concerning validity and priority of their charge over that of Everyday.

55. The President's analysis of the jurisprudence (para. 51 *et seq.*) in regard to the making of substitution orders pursuant to the rules was entirely correct. Having regard, *inter alia*, to the provisions of the Supreme Court of Judicature Act (Ireland) 1877 and in particular s.28(6) thereof in light of the jurisprudence, including the decision in *Bank of Scotland plc v. McDermott* [2019] IECA 142, AIB/Everyday met the relevant test for a substitution order

pursuant to O.17(4) to the standard of the balance of probabilities. No valid reason was identified by Mr. Morrissey that warranted the further continuation of AIB as a party to the proceedings.

Grounds 43-49 - No concluded Settlement Agreement

56. Insofar as the appellant contends that he was entitled to withdraw from the Settlement Agreement or in effect that there never was a concluded agreement, as asserted, *inter alia*, at grounds 41 – 46 inclusive of his notice of appeal, same was not established.

57. I am satisfied that there was clear evidence before the trial judge which entitled him to reach his conclusions as set out at paras. 107 and 108 of the judgment where he noted:

> *"While it is the case that Mr. Morrissey did previously dispute the creation of an equitable mortgage and addressed this issue in his response to the claims advanced by AIB, he withdrew his objection and consented to the orders sought in the AIB/Everyday application, including the declaration in relation to the creation of the equitable mortgage, in the Settlement Agreement and in the Consent Letter. There was nothing to preclude Mr. Morrissey from doing so and his change of position in that respect cannot, in my view, confer any enforceable right on the Malcomson Law Defendants or otherwise preclude the court from making the declaration sought."*

58. The making of the Consent Orders sought in the Notice of Motion encompasses performance of the condition precedent identified at 3.1(d) of the Settlement Agreement and agreed to in the Consent Letter consenting to same. AIB/Everyday had put the matter before the High Court in performance of the Settlement Agreement. Mr. Morrissey sets up his own gratuitous obstruction to impede compliance with and performance of the conditions precedent and then relied on same as a basis for why the High Court should refuse to the orders in the first place. However, as the trial judge correctly noted at para. 140 of the judgment, by his execution of the Settlement Agreement Mr. Morrissey had already provided

formal consent to the making of the consent orders to comply with clause 3.1(d) aforesaid. The consent provided by virtue of the terms of the signed Consent Letter and twice confirmed to the High Court by his senior counsel binds him and he identified no legal basis which would justify the court in determining that the said Consent Letter to which he appended his signature as was confirmed to the court could now lawfully be revoked. The burden rested with Mr. Morrissey to identify a valid legal basis for same. He clearly failed to do so and no valid basis was identified in the context of the lengthy grounds of appeal to substantiate his assertion. The assertions in Mr. Morrissey's letter sent to Everyday/AIB on 6 July 2020 that in effect the Settlement was, in the language of the President, *"predicated on information which was not available to him at the time of the agreement but was within the knowledge of the plaintiffs"* is wholly unconvincing, lacks particularity and amounts at best to a bare assertion. The appellant has identified nothing which could constitute a legal basis to now resile from his binding obligations arising by virtue of the execution of the Settlement Agreement and the Consent Letter and freely undertaken with the benefit of independent legal advice. He has not established any valid legal basis which would entitle him resile from either.

59. Mr. Morrissey's manoeuvre of purporting to withdraw his consent many months after the duly executed Consent Letter was provided and the Settlement Agreement executed by him amounts in substance to an assertion that he is entitled unilaterally to rely on his own gratuitous breaches of the Agreement for the purposes of impeding the outstanding condition precedent at clause 3.1(d) being performed and satisfied. There is palpably no such entitlement. Neither is he entitled to rely on his own wilful failure and neglect to perform his obligations pursuant to Clause 3 (1) (b) as a basis to impugn the Settlement. Where parties have agreed a settlement of proceedings, and where, as here, a clear an unequivocal consent to the compromise has been given involving, *inter alia*, the compromise of the Quarry

Litigation and the Directions Litigation, it is not open when the other party to the compromise/settlement proceeds to seek the relevant agreed orders to give effect to the settlement for a party who previously consented to go back on his consent. That is in effect what Mr. Morrissey seeks to do for the purposes of impeding Everyday in enforcing of the judgment for €24,970,000 obtained against him by consent on 17 December 2015.

60. Mr. Morrissey has failed to identify any coherent basis for interfering with the findings and determination of the trial judge particularly at para. 141 of the judgment wherein he cites, *inter alia,* authorities including *Smallman v. Smallman* [1972] Fam 25 and *Foskett on Compromise* (8th ed., Sweet & Maxwell, 2015). The trial judge correctly concludes at para. 147 that it would be unfair to the respondents and not unfair to Mr. Morrissey for the court to so act as to prevent him from now attempting to withdraw his consent or for the court to reject his purported withdrawal of the consent he gave in the Settlement Agreement and Consent Letter in all the circumstances as established by the trial judge and detailed in his judgment. Underpinning the trial judge's finding in that regard was his conclusion arrived at after an exhaustive analysis of the sequence of events which culminated in the execution by Mr. Morrissey of the Settlement Agreement and his signing of the Consent Letter on 31 January 2020.

61. The trial judge was entirely correct in his analysis and conclusions and no valid basis has been identified for interfering with his reasoned conclusion that;

> *"Mr. Morrissey has not put forward any legal basis whatsoever for impugning the consent in the Consent Letter as communicated to the court, or in the Settlement Agreement itself, save to make the point that it is conditional upon certain matters, two of which have already happened, one of which is the subject of this application … and another which is completely within his control…"*

Accordingly, there is no basis to interfere with the trial judge's conclusion as stated at para. 148 of the judgment where he observes: *"I conclude that this approach is itself a breach of, at least, one of the express provisions of the Settlement Agreement which has been disclosed to the other parties and referred to in submissions, namely, clause 21.1."* He further (and, in my view, correctly) concluded that in any event Mr. Morrissey's conduct was in breach of the implied terms of the agreement binding him to cooperate to enable performance of the Settlement Agreement or alternatively an implied obligation which operated upon Mr. Morrissey not to prevent fulfilment of the conditions in the Settlement Agreement, as was his obligation to provide additional security as specified at clause 3.1(b) of the Settlement Agreement itself. Accordingly, none of these grounds of appeal are maintainable and no basis is identified for interfering with a determination of the President in regard to same.

Was an equitable mortgage created by virtue of the Facility Letter of 3 May 2011 and whether well charging orders should have been made (Grounds 33 – 39)

62. Mr. Morrissey does not in any way meaningfully gainsay the fact, relied upon by AIB/Everyday, that when he agreed to consent in the Settlement Agreement to the proposed orders and further consented to same by the Consent Letter he signed on 31 January, 2020, he assumed an obligation to give his consent to a formal declaration by the High Court that the Facility Letter of 3 May 2011 constituted an equitable mortgage by him in favour of AIB over the Clonmelsh property (but excluding his family home) and that further consequential order fell to be made directing the Property Registration Authority (now Tailte Éireann) to register the said equitable mortgage as a burden on each of the relevant Folios on which the Clonmelsh property is registered (save his family home). Mr. Morrissey identifies no credible basis to support his contention that the Facility Letter of 3 May 2011 did not operate in all the circumstances and in light of the material facts, to create an equitable mortgage over the subject properties. In particular, contrary to Mr. Morrissey's assertions it is clear

that he signed the Facility Letter on behalf of DMIL and also separately on his own behalf - which included his status as a guarantor of the debts due and owing by DMIL to AIB.

63. The President was entirely correct in his analysis of the circumstances. It is also material that in Appendix 1 to the Facility Letter of 3 May 2011 it is expressly provided that the obligations of DMIL to AIB in regard to the relevant loan facilities referred to in the Facility Letter were to be secured by certain specified means which were satisfactory to AIB which included, *inter alia*, item 12, as the President noted at para. 76 a *"legal charge over property at Clonmelsh, Co. Carlow from Philip Morrissey (see below)".* The family home of Mr. Morrissey was explicitly excluded under the terms of the said Facility Letter. The trial judge was entirely correct in his analysis and conclusions, for instance as stated at para. 88, that as a matter of law the agreement by Mr. Morrissey to provide the security referred to in the said May 2011 Facility Letter was sufficient to give rise to the creation of an equitable mortgage. There is long authority supporting such a conclusion such as *ACC Bank v Malocco* [2000] 3 I.R. 191 and despite lengthy argument, Mr. Morrissey identified no contrary basis that would warrant interfering with the conclusions of the trial judge.

64. With regard to Everyday's entitlement to a well charging order, Mr. Morrissey failed in this appeal to identify any credible basis for his contentions (such as at ground 39) that the requirements for the making of well charging orders and declarations had not been satisfied. The trial judge in his analysis and approach clearly demonstrated that that contention was unmeritorious. He correctly accepted that pursuant to s.117(2) of the Land and Conveyancing Law Reform Act, 2009 the orders he was entitled to make included one for the taking of an account in respect of other encumbrances who asserted they had interest affecting the relevant property and for the making of all necessary inquires as to the respective priorities as between such encumbrances.

65. Mr. Morrissey's contentions that the relevant part of the Facility Letter of 3 May 2011 had been superseded by a subsequent facility letter was wholly unconvincing. Neither is Mr. Morrissey entitled now to advance a proposition that the well charging order had been granted in respect of a judgment sum *"which is obviously incorrect"*. The judgment sum is identified by reference to the consent order made in the High Court on 17 December 2015 where he consented to judgment against him in the sum of €24,970,000. His arguments are wholly unsustainable insofar as they seek to contest that now. In large measure his contentions amount in substance to a collateral attack on the consent orders obtained by AIB against him against which he never appealed.

The Receivers – Grounds 40-42

66. Insofar as Mr. Morrissey advances arguments now seeking to impugn the appointment or conduct of the Receivers appointed in 2014, such does not properly arise on foot of the motion or in light of the judgment appealed against. Insofar as the appeal is directed against the Court appointed receiver so appointed to realise the value of the Clonmelsh property (to exclude Mr. Morrissey's family home and specified retained lands) more particularly referred to above, such an order properly follows from the declarations of the President that the 2011 Facility Letter created an equitable mortgage and the consequential well charging order made by the court. A great deal of the argument opposing that application to appointment of the Receivers came from Malcomson Law at the hearing. They are not a party to this appeal. Pursuant to the terms of the Settlement Agreement and the Consent Letter signed on 31 January 2020, Mr. Morrissey unequivocally agreed to an order appointing the Receivers for the purposes therein specified and explicitly agreed to the conferral upon them of specified powers (to include the power of sale, referred to at paras. 10(i)-(vii) of the notice of motion the subject matter of this appeal). Additional powers were also sought by AIB/Everyday to be conferred by the court on the Receivers under the terms

of the notice of motion. It was entirely within the discretion of the trial judge to grant same in the discharge of his functions.

67. The President explained in great detail and with clarity why he concluded that the court did have power and was entitled on the evidence to make the orders sought appointing the Receivers with the further powers sought referred in the notice of motion, including those specifically derived from the Settlement Agreement and Consent Letter and the additional powers sought by AIB/Everyday.

68. Mr. Morrissey has failed to identify any cogent basis in respect of which the analysis at paras. 118-127 of the judgment, insofar as relevant to him, and the conclusions of the President as set forth in para. 128 of the judgment, could reasonably be interfered with by this Court. The President was satisfied "…*on the basis of (a) Mr. Morrissey's consent, (b) the declaration and orders made in relation to the creation and existence of an equitable mortgage, (c) the declaration and orders made in relation to the judgment mortgages, (d) the lengthy history of the dispute between the parties and the need for finality following the Settlement Agreement, and (e) the absence of any prejudice to the Malcomson Law Defendants"* that he should make the orders appointing Mr. McCann and Mr. Tennant as Receivers in the manner as sought. It was demonstrable that a core consideration was whether the making of such an order would prejudice the interest of Malcomson Law in the substantive claim. Clearly the form of order ultimately made addressed that consideration. Mr. Morrissey has not identified any valid basis for interfering with the said determination and the orders made in respect of the appointment of the Receivers and the powers to be conferred upon them as ordered.

Conclusion

69. Mr. Morrissey has failed to identify any error of law or principle or legitimate basis whereby this Court could interfere with or reverse any of the orders made by the President

and which are the subject matter of this appeal. In large measure, the notice of appeal purports to launch wide-ranging, novel assertions and very many issues which were never argued or advanced for consideration before the High Court. It is not open to Mr. Morrissey to launch new material and fresh arguments in this Court, without leave, in the context of pursuing this appeal in circumstances where such arguments were not advanced before the High Court.

70. Further the notice of appeal liberally asserts serious wrongdoing against various entities including a firm of solicitors not party to this appeal and makes assertions of *"deceit"*, *"fraud"* and wrongdoing which were not borne out. The trial judge was entirely correct in his conclusion that Mr. Morrissey's purported withdrawal from the Settlement Agreement was ineffectual. The trial judge was also correct in his analysis of the facts and circumstances which led him to the appropriate conclusion that there would be no unfairness visited upon Mr. Morrissey were the court to make orders in substance preventing him from purporting to withdraw his consent and for the court to effectively reject his purported withdrawal of his consent in all the circumstances outlined by the President. Mr. Morrissey was not entitled to withdraw his consent and further did not validly withdraw his consent which had been validly given in the first place. He identified no basis that undermined the order made pursuant to O.17, r.4 RSC substituting Everyday for AIB in the proceedings. There was compelling evidence before the High Court to satisfy the President that he had jurisdiction and was entitled to make a declaration that AIB had an equitable mortgage by virtue of the substance and effect of the Facility Letter of 3 May 2011 in the context of its due execution by Mr. Morrissey both in his capacity on behalf of DMIL and on his own behalf and further that arising therefrom and the circumstances, it was in turn appropriate and well within the President's discretion to make the well charging orders sought over the relevant properties identified in the Court Order.

71. Mr. Morrissey failed to identify any error of principle or any factor which cast doubt on the jurisdiction of the High Court to appoint receivers with, *inter alia*, a power of sale of the subject properties and further the President was entitled to make orders conferring additional relevant and proportionate powers in the said Receivers.

72. The President was correct in his conclusions that the appellant was in light of all the evidence not entitled to withdraw or purport to withdraw from the Settlement Agreement in the manner he had sought to do.

73. It follows that this appeal falls to be dismissed in its entirety.

Appeal 2023/170

Appeal against the refusal on 12 May 2023 of the President to review and/or to set aside the judgment of 14 April 2023

74. Notice of appeal 2023/170 is based on 63 grounds identical to those advanced in the earlier appeal disposed of above. It appears that grounds 50-52 and 63 (and possibly to a lesser extent Grounds 47-51) engage primarily with the President's decision and order of 12 May, 2023. It is contended that the trial judge refused to hear important evidence and to grant the review of the earlier substantive judgment as sought.

75. Denham J. (as she then was) in *Re Greendale Developments Limited (No. 3)* [2000] 2 IR 514 (*Greendale*) at p. 544 clarified the exceptionality that is attendant on the exercise of the jurisdiction, observing:

> *"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."

76. As this Court made clear in *Friends First Managed Pension Funds Limited v Smithwick and Ors.* [2019] IECA 197:

"16. Implicit in the jurisprudence is the importance of proportionality and finality. The exceptional jurisdiction is not an invitation to litigants who are dissatisfied with the outcome of an appeal hearing to apply to the court to review its determination so that a variation or a revocation of the judgment can take effect. In particular, the jurisdiction cannot appropriately be used as a vehicle to present further other or new arguments after judgment on material that was before the court which could have been deployed or availed of at the original appeal hearing for the proposition later advanced.

17. As was observed by MacMenamin J. in Bates & anor v Minister for Agriculture, Fisheries and Food & Ors. [2019] IESC 35 at para. 115 et seq. in considering the judgment of O'Donnell J. in Nash: -

> *'...the judgment lays a heavy emphasis on the duties of an applicant and principles which should be adhered to prior to making such an application. There is a duty on parties to make a careful assessment of the nature of the alleged error. They should ask themselves whether an error is trivial or inconsequential; whether it may be of some significance as a matter of simple accuracy, or whether because of its potential effect on the legitimate interests of the parties, or other individuals, it is fundamental. At the extreme end, an error may be 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. There is a duty to do justice fairly and without fear and favour*

> *which must guide this Court as all other courts. But to this I would add that in such an application a court must closely consider whether there is actually an error and if there is, what is its cause and effect, and whether the conduct or submissions of a party or parties contributed to what occurred? A court must look to the whole case, seen in the round.*
>
> *This is an exceptional jurisdiction. The fundamental question is whether, by reason of error, or some other extraneous consideration, it is plain that the outcome of the case cannot be said to have been an administration of justice for the purpose of Article 34 of the Constitution. In such circumstances, the Court may conclude that the judgment is not a 'decision' for the purposes of Article 34.4.6° of the Constitution. But the issue must be one which patently and substantively concerns an issue of constitutional justice, other than the merits of the decision as such. Then, the Court cannot make an order (See Greendale and Nash).'"* (para. 17)

77. The courts have been repeatedly encouraged by the Supreme Court to attach very great weight indeed to the principle of finality. Litigants are entitled to certainty in so far as possible and no court should lightly undertake the proposition of embarking on a process to set aside a final order or judgment save where the interests of justice or the obligation to protect or vindicate constitutional rights are engaged.

78. Such an application must go beyond generalised assertions such as those to be found in grounds 50-52, 47-49 or 63. Ground 63 of the notice of appeal asserts that the President "*failed to recognise and correct the fact as asserted by Mr. Morrissey that he did not receive a fair trial in accordance with law"*. No coherent arguments are articulated engaging with or addressing the essential proofs for such a broad assertion. In particular, Mr. Morrissey has not established that any issue of constitutional justice is engaged beyond generalised

bare assertions. In bringing such an application it is incumbent on Mr. Morrissey to discharge the "*very heavy onus"* involved. It would appear in light of his arguments that the dominant intention of Mr. Morrissey is to seek a revisiting of the merits of the decision which, as the Court of Appeal in *Launceston Property Finance DAC v Wright* [2020] IECA 146 made clear, is not a permissible purpose or basis for the exercise of the exceptional jurisdiction derived from the decision in *Greendale*.

79. The approach of Mr. Morrissey, as exemplified in his extensive notice of appeal and written submissions, strongly suggests that he is seeking to avail of the review mechanism as a species of appeal to enable him to attempt to reopen the High Court motion application and relitigate same raising further and new issues as a means of enabling him once more to relitigate the substance of the judgment of the 14 April 2023. I find that the trial judge's analysis of the application at p.19 of the Transcript of 12 May 2023 is correct.

80. In his affidavit sworn on the 25 April 2023 and filed on the 2 May 2023 Mr. Morrissey seeks to rely, *inter alia,* on the following assertions:

(i) That he provided *"no consideration"* in return for the guarantee grounding judgment against him. He alleges that the plenary summons was misleading in that it concealed the fact that the guarantee was not given in return for credit.

(ii) Secondly, he complains that the court was not informed regarding the other guarantors who had furnished guarantees and that claims against them were settled without Mr. Morrissey being informed. He asserts he was entitled to details of the said settlements.

(iii) Thirdly he contends that the settlement of 31 January 2020 had been entered into by him *"on the basis of misunderstanding or ignorance of the law on [his] part."* He raises a wide range of issues directed towards impugning the validity or in particular the enforceability of the guarantee including procedural issues. At

para. 5 he demands a whole series of items of information. It is altogether too late for him to be seeking disclosures in the nature of discovery after the conclusion of the hearing of the motion.

81. He proceeds to level assertions of wrongdoing or impropriety against agents of the Receivers (whom in the context of the affidavit must be understood to be the Receivers appointed over DMIL in the month of June 2014). He accuses the plaintiffs of having provided incomplete evidence to the court that *"should undermine its credibility"*. He further states *"It was also my intention to present other evidence uncovered by me since the 'completion' of the evidence in the case"* (para. 9) Mr. Morrissey accuses the Receivers of having always been *"extremely secretive"* and expresses concern regarding *"the extent to which the monies due to the Plaintiff by the debtor Company had been retained"*. He indirectly impugns the solicitors who acted for him as his legal team throughout the December 2019 mediation and the subsequent process of negotiation that culminated in the entering into an execution by him of the Settlement Agreement on the 31 January 2020 together with the letter of consent executed by him on the said date.

82. I have regard also to the terms of the affidavits of Mr. Morrissey sworn on the 3 and 9 May 2023. In light of same it is clear that Mr. Morrissey effectively seeks to reopen and reargue the matters considered and determined not alone in the judgment delivered by the President on the 14 April 2023 on foot of the notice of motion which issued on the 6 February 2020 but in effect seeks to resile from and reverse and effectively vacate the order made with his full consent. Such consent was given at a time when he was fully independently legally advised on the 17 December 2015 wherein he consented to judgment against him in the sum of €24,970,000. The latter judgment, as was stated above, was never appealed against.

83. Mr. Morrissey has failed to identify any defect in procedure or deficit in the conduct of the case or breach of fair procedures or constitutional rights in the manner in which this

case was undertaken as to the hearing or in regard to the judgment which is very comprehensive indeed and which was delivered on the 14 April 2023 which would warrant a making of the order sought the reviewing the judgment or setting aside, vacating or amending same as contended for. Further, there were no special or unusual circumstances established by Mr. Morrissey which would have justified the High Court in granting the relief sought or indeed this court in interfering with the judgment of the learned President and orders of the 12 May 2023 refusing Mr. Morrissey's motion of the 2 May 2023.

84. Mr. Morrissey failed to identify cogent reasons which warranted or necessitated the exercise of the exceptional jurisdiction to carry out the review sought or to set aside the judgment. He has signally failed to engage with the core obligation of an applicant who seeks to have a judgment set aside on the basis of a review. In particular he has failed to objectively demonstrate that there is any fundamental issue which goes to and signals a denial of justice derived from some error which is so fundamental in nature as to have a material and adverse effect on the result and decision of the High Court which in all the circumstances warranted the judgment of 14 April 2023 being set aside.

85. His submissions, the arguments advanced in court and the notice of appeal in this regard are substantially directed towards the merits of the said decisions and do not in any *bona fide* sense engage with or identify valid issues of constitutional justice to the requisite level of proof.

86. In substance one is driven to conclude that in large measure this application is being availed of by Mr. Morrissey as a vehicle to reopen the proceedings and adduce new evidence. In addition, he seeks to impugn the unappealed summary judgment in the sum of €24,970,000 obtained by AIB against him and to which, with the benefit of legal advice, he consented on 17 December 2015. He identified no legal basis for the making of the order sought. A motion brought under the so-called *Greendale* jurisprudence is not intended to be

availed of for such a purpose. In effect he wishes to revisit the merits of the decisions and orders of 2015 and 2023. Parties to litigation are entitled to finality. There is no doubt but that Mr. Morrissey was afforded ample opportunity by the High Court to argue each of his points and to address the matters being raised and the reliefs being sought by AIB/Everyday in the notice of motion and he availed in full of that right. He has not demonstrated that he has been the subject of any breach of constitutional rights or of fair procedure in the manner in which the court went about the conduct of the case or the management and treatment of the evidence before it leading to its determination. Albeit that fraud and deceit were alleged they were not established by Mr. Morrissey.

87. Mr. Morrissey has not adduced any evidence that remotely tends to suggest he has brought himself within that rare and exceptional category of cases where evidence pointing to a clear breach of constitutional rights has been demonstrated. Mr. Morrissey has not established that there are exceptional circumstances showing that a *Greendale* type remedy is necessitated or warranted in the interests of constitutional justice.

88. The language and clauses in the Settlement Agreement itself embodies an unequivocal acknowledgment by Mr. Morrissey that his liability to Everyday is continuing and that same arose pursuant to the personal guarantee he furnished in the first instance and the summary judgment to which he consented on 17 December 2015. He was fully legally represented on the relevant dates. The Settlement Agreement, as previously stated, was concluded after negotiations which ensued from a meditation held in the early part of December 2019 culminating in the events of 31 January 2020. Mr. Morrissey was fully legally represented by solicitors and counsel throughout that process. Twice senior counsel representing Mr. Morrissey informed the President that the orders in question would be made on consent. It is not open to Mr. Morrissey in the context of this appeal arising from the judgment and orders of the President to attempt to revisit the original unappealed judgment of 17 December

2015 to which, with the benefit of independent legal advice of solicitors and counsel he consented, for the benefit of AIB in the sum of €24,970,000.

89. Mr. Morrissey has not established objectively that there is any substantive issue that could fairly be characterised as being concerned with a denial of constitutional justice in the conduct of the proceedings culminating in the delivery of the judgment of the 14 April 2023. He is wholly precluded from seeking now to impugn the consent order for summary judgment made on the 17 December 2015. In large measure one is left with the clear impression that the dominant intention is to effect a collateral attack on the said summary judgment. Each ground of appeal advanced is directed towards the merits of either or both of the said decisions and fall far short of the test established by the jurisprudence including the judgment in *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 reopening of its decision. Firstly the application must patently and 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."*

Patently neither aspect has been established by the appellant in the instant case.

90. Viewed in the light of the jurisprudence, I am satisfied that Mr. Morrissey has failed to meet the high threshold and demonstrate the *"strong reasons"* which engaged the jurisdiction and which could warrant the High Court in the exercise of its exceptional jurisdiction to revisit its own written judgment of the 14 April 2023.

91. Understandably Mr. Morrissey disagrees with the judgment and its conclusions. All of his submissions and his arguments before the High Court make that very evident.

However, he has failed to establish any sound reason which could justify this Court in interfering with the assessment of the President that he had not met the relevant threshold as was determined in the *ex parte* determination thereof by the President when he came to consider the notice of motion of Mr. Morrissey of the 2 May 2023 seeking a review of the judgment seeking to have it set aside, vacated or amended.

92. I am satisfied that in substance this application to revisit amounted to a collateral attack not alone on the substantive judgment delivered on the 14 April 2023 and the orders made on the 12 May 2023 and perfected on the 9 June 2023 but the earlier consent order made in favour of AIB on the 17 December 2015. The effect of the application, if successful, could only lead a reassessment of the merits of the case and of the underlying summary judgment. It is not open to this court or indeed the High Court to simply vacate a judgment in the absence of a constitutional basis for adopting such a course of action. No such basis has been identified to the necessary or any level in the instant case.

Costs

93. There were two appeals. The appellant failed in both on all grounds and in my view, costs demonstrably follow the event in light of the jurisprudence, the Rules of the Superior Courts and the relevant provisions of the Legal Services Regulation Act, 2015 as amended including s.169. The respondents are entitled to an Order for their costs. However, in the circumstances given the manner in which both appeals were conducted, the appellant Mr. Morrissey should be liable for only one set of costs in regard to these appeals. Same to be referable to Appeal No. 2023/169. If any issue arises pertaining to same the parties to contact the Court of Appeal office **within 7 days from the date of delivery of this judgment** and an early date will be fixed for consideration of same, as appropriate.

94. Faherty and Haughton JJ. concur with this judgment.