APPROVED **[2023] IEHC 388**

THE HIGH COURT

Record No.: 2022/113 SP

Record No.: 2022/114 SP

BETWEEN:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

Plaintiff

-and-

TIMOTHY CAREY AND FINOLA COLGAN CAREY

Defendants

JUDGMENT of Mr. Justice Rory Mulcahy delivered on the 7th day of July 2023

Introduction

1. This judgment concerns two sets of proceedings, both commenced by way of special summons, by which the Plaintiff ("**the Bank"**) seeks various reliefs relating to a sum owing on a loan facility extended to the Defendants in 2010, and to a judgment obtained on 12 September 2016 in summary proceedings brought on foot of the Defendants' failure to repay that loan facility for the sum of €597,435.44 plus €396 costs.

2. In the proceedings bearing Record No. 2022/113 SP ("**the first Proceedings**"), the Bank seeks an Order that the sum of €597,435.44 plus €396 costs, together with interest on the said judgment stands well charged on lands and premises comprised in Folio WH2639, Folio WH16939F and Folio WH2997 all in County Westmeath both by virtue of a judgment mortgage in favour of the Bank in respect of the said lands and by virtue of a registered lien registered on the lands comprised in Folio WH2639 on 1 March 2017. The Bank also seeks an Order for sale of the said lands in default of payment and other ancillary relief.

3. In the proceedings bearing Record No. 2022/114 SP ("**the second Proceedings**"), the Bank seeks an Order for possession pursuant to section 62(7) of the Registration of Title Act, 1964 of lands comprised in Folio 7693F of the Register of Freeholders County Westmeath and Folio 2513 of the Register of Freeholders County Westmeath.

4. The Defendants raise a number of arguments by way of defence to the Plaintiff's claims, but their principal objection is that the sum in respect of which the Plaintiff obtained judgment is based on an incorrect calculation of interest.

Factual Background

5. Both sets of proceedings arise from lending by the Bank to the Defendants, who are husband and wife, which was restructured in 2010. By letter of offer dated 5 August 2010, the Bank extended a loan facility in the sum of €532,500 to the Defendants. The purpose of the loan was stated in the letter as being "[t]o assist with the restructure of existing facilities". Five separate account numbers, referable to the existing facilities, were listed.

6. The loan offer letter provided that the facility would expire on 31 October 2010 and set out repayment terms. The security held by the Bank is then detailed. A number of items are specified, but for present purposes, the following are relevant:

> *"First Legal Mortgage/Charge over the property at Greevebeg (Folio No: 7693F Co: Westmeath) comprising 0.12 hectares registered in the name of Mrs Finola Colgan-Carey & Mr Timothy Carey.*

First Legal Mortgage/Charge over the property at Glengorm, Co Westmeath (Folio No: 2513 Co: Westmeath) comprising 31.8 hectares in the name of Mr Timothy Carey.

Registered Lien over the property at Toorlisnamore (Folio No: 2639 Co: Westmeath) comprising 16 acres registered in the name of Mr Timothy Carey."

7. In the grounding affidavits filed on behalf of the Bank, Mr Andrew Larkin, described as a bank official, avers that this offer was made and accepted by the Defendants in writing on 2 September 2010. The loan offer letter exhibited in the proceedings is signed by each of the Defendants on that date. An affidavit of the second Defendant (sworn on behalf of both Defendants) does not dispute the extension of the loan facility, but states that it commenced from 6 September 2010. Nothing seems to turn on this discrepancy.

8. Mr Larkin avers that following the Defendants' failure to repay the loan in accordance with the terms of the loan offer, the Bank initiated proceedings by way of Summary Summons on 4 December 2013, Record Number 2013/4066 S, seeking the amount owing at that time, said to be €541,396.28 plus interest.

9. On foot of those summary proceedings, on 12 September 2016, judgment in default of appearance was entered in the Central Office of the High Court in the sum of €597,435.44 plus €396 for costs (the "**Default Judgment**"). That judgment sum was based on an affidavit of debt sworn on behalf of the Bank on 9 August 2016 by Mr Brendan Murphy, described as a business manager. The affidavit sets out how interest had been calculated on the Defendants' loan facility up to 8 August 2016. At paragraph 9, the affidavit states that "*the Plaintiff hereby waives its claim to further interest from the 9th day of August 2016."* The Defendants place some reliance on this averment.

10. On 1 March 2017, a judgment mortgage was registered by the Bank on Folios in which the Defendants (either jointly or individually) were said to have an estate or interest, those Folios being: WH7693R, WH2513, WH2639, WH2997, WH16939F all in the Register County of Westmeath.

11. Following an application from the Defendants, the Default Judgment was set aside by Order of the High Court on 29 May 2017. The Bank appealed the Order setting aside the Default Judgment to the Court of Appeal.

12. The Court of Appeal allowed the appeal against the Order of the High Court ([2018] IECA 109). As set out in the judgment of the Court of Appeal (Irvine J), the onus lies on a defendant in an application to set aside a default judgment to show that the judgment was irregularly obtained. If the judgment is obtained irregularly, it must be set aside irrespective of the merits of any defence. If, however, a defendant cannot satisfy that onus, that defendant must establish that there is a possible defence to the claim which has a reasonable prospect of success.

13. The Court of Appeal was satisfied that the judgment in default of appearance had not been obtained irregularly and that the Defendants had not discharged the burden of showing that they had a defence to the claim which had a reasonable prospect of success. It appears that the Defendants did not raise any issue regarding overcharging as a potential defence before the Court of Appeal.

14. By Order dated 10 May 2018, the Court of Appeal set aside the High Court Order and reinstated the Default Judgment.

15. The amount said to be due and owing by the Defendants to the Bank as of 13 June 2022 is €640,056.36.

16. The second Defendant, on behalf of both Defendants, now says that the Default Judgment entered was predicated on an incorrect calculation of the amount owing by the Defendants to the Bank as there was overcharging by the Bank of interest on one of the accounts which was restructured by the 2010 loan facility. The second Defendant exhibits a report of a firm of chartered accountants and registered auditors, Candor, that is said to demonstrate the overcharging. That report calculates that as of 17 July 2019 the amount overcharged by the Bank, and the cost of financing the excess interest, may have been up to €16,000. The Defendants say that this has certain consequences for the judgment mortgage registered by the Bank, which I will return to below.

17. On 26 July 2019, the Defendants issued a motion in the Court of Appeal seeking to strike out or set aside the Default Judgment and the judgment mortgage registered on foot thereof in March 2017. However, by email dated 29 July 2019, the Defendants were advised by the Office of the Court of Appeal that the motion should not have been accepted "*as the Court of Appeal does have jurisdiction to deal with the reliefs sought*". The motion was returned to the Defendants, and they were told that they could apply for a refund of any stamp fees paid.

18. The second Defendant sought clarification of this email and the apparent conflict between the statements in it regarding the motion not being accepted and the Court having jurisdiction to deal with the reliefs sought. Although the second Defendant avers that there was no response to this request, it seems clear that the email from the Office of the Court of Appeal was intended to state that the Court of Appeal did <u>not</u> have jurisdiction to deal with the motion which is why it was not being accepted. In any event, no further action was taken by the Defendants until the commencement of these two sets of proceedings.

The first proceedings

19. The first proceedings concern three different folios: Folio WH2639, which comprises agricultural land of c. 16 acres, Folio WH16939F, which includes an incomplete dwelling house, and Folio WH2997, which comprises 20.9273 hectares of land that is part of a stud ground residence. The Bank seeks a declaration that the sum of €597,435.44, plus €396 for costs, together with interest stands well charged against the interests of the Defendants in those Folios. The basis for these claims is the judgment mortgage registered against all three Folios. In addition, the Bank has a registered lien in its favour in relation to Folio WH2639.

20. The registered lien is referred to in the letter of offer described above. Mr Larkin explains in his affidavit that it was an equitable lien in the Bank's favour obtained by deposit of the land certificate for Folio WH2639 which was subsequently registered on 4 November 2008 pursuant to s. 73(3) of the Registration of Deeds and Title Act 2006 ("**the 2006 Act**"). Whether a registered lien is capable of securing future advances, in particular advances made after 31 December 2009 has been clarified by the Court of

Appeal (Pilkington J) in **Promontoria (Oyster) DAC v. Fox [2023] IECA 76**. I will return to this later.

21. As set out in the grounding affidavit to the Special Summons, on 29 September 2015, inhibitions were registered in respect of Ms Claire Clancy on Folio WH2639 and Ms Bernadette Colgan on Folio WH16939F. In both cases, the inhibition prohibits the registration of a disposition from the registered owner without the consent of the person in whose favour the inhibitions were registered. In the case of Ms Colgan, the inhibition is limited in time until September 2025. Both Ms Clancy and Ms Colgan were notified of the proceedings by registered letter dated 16 December 2022.

22. As noted, the Defendants say that on foot of the overcharging of interest, the Default Judgment was entered based on an incorrect amount. The Defendants say that because the amount in the Default Judgment was incorrect, the subsequent registration of the judgment mortgage is rendered invalid.

23. The second Defendant says that the Defendants did not receive notice from the Bank of its application to the Property Registration Authority for the registration of a lien in respect of Folio WH2639, nor did they receive a copy of the certificate. The Defendants state that this is a requirement of section 73(3)(c) of the 2006 Act.

24. The second named Defendant avers that Folio WH2997 includes the family home of the Defendants.

The second proceedings

25. In the second Proceedings, the Bank seeks an Order for possession pursuant to section 62(7) of the Registration of Title Act 1964 in respect of Folio WH7693F, comprising an area of 0.12 hectares and Folio WH2513, comprising 31.8 hectares, on the basis that the lands were charged/mortgaged by the Defendants to the Bank and the Defendants have failed to repay the amounts owing.

26. In respect of Folio WH7693F, the Bank says that an Indenture of Mortgage was made on or about 12 July 1989 ("**the 1989 Mortgage**") which charged the lands from the

Defendant to the Bank as a continuing security for any present or future balance due to the Bank from the Plaintiff.

27. In respect of Folio WH2513, the Bank says that a Deed of Mortgage and Charge made on or about 3 March 2008 ("**the 2008 Mortgage**") charged the lands from the Defendants to the Bank for any present or future balance due to the Bank from the Defendants. It should be noted that this Folio is registered solely in the name of one of the Defendants.

28. The Bank says that the Defendants have refused to pay the sums owing to the Bank which now stands at €646,837.24 as of 13 June 2022. The Bank states that it has written to the Defendants and called on them to deliver up possession of the lands described in the Folios within 10 days. The Defendants have not done so, and the Bank says that by virtue of the 1989 and 2008 Mortgages, a power of sale has arisen which is now exercisable.

29. The Defendants make the same point in relation to the issue of overcharging interest in the second proceedings as in the first proceedings.

30. The second Defendant, in a replying affidavit, also identifies issues with the documentation that is said to create both mortgages: neither the 1989 Mortgage, nor the 2008 Mortgage relied on by the Bank are signed, witnessed, or sealed by or on behalf of the Bank.

Hearing

31. Both proceedings were heard on 11 May 2023 and judgment was reserved. The Defendants appeared as litigants in person. Although they did not have the benefit of legal counsel, they were assisted in the presentation of their case by their daughter who acted as a so-called McKenzie Friend. The Defendants delivered written submissions in both sets of proceedings and the second Defendant made oral submissions on behalf of the Defendants with the occasional assistance of her daughter.

32. After the hearing had commenced, the second Defendant made a very belated application for an adjournment of the hearing, which application was opposed by the

Plaintiff. The Court adjourned briefly to consider the application and, in light of the principles identified as applying to applications for adjournments in **Minogue v. Clare County Council [2021] IECA 98** (see paragraph 138), I refused the application on the basis that the balance of justice did not favour an adjournment.

33. In **Minogue**, the following factors were identified as useful indicators of determining where the balance of justice lies where an application for an adjournment is made:

> *"(i). whether the party seeking the adjournment has already had adequate previous opportunities to deal with the matter and in particular had the benefit of previous adjournments;*
> *(ii). the lateness of any step sought to be taken by a party;*
> *(iii). the possibility of the adjournment being tactical;*
> *(iv). the extent of real prejudice to the other side;*
> *(v). the views and position of the other side more generally;*
> *(vi). the amount of time that had been allocated to the matter and the extent if any of disruption to the orderly conduct of business by the court;*
> *(vii). the extent of dislocation and inconvenience to other litigants by time of the court being unnecessarily absorbed - in that regard there is a huge difference between a case that will take one or more days or even a substantial portion of a day and a short matter listed on a Monday; and*
> *(viii). all other relevant circumstances."*

34. In considering the balance of justice, it is useful to recall the procedural history of the cases. The cases had been allocated a date for hearing in the Chancery list, having previously appeared in both the Master's List and the Chancery Special Summons List. The Defendants had filed affidavits and delivered written submissions. The purpose of the adjournment sought related to the desire to seek legal representation or a financial adviser to help them address the overcharging issue identified in the report that they had obtained from Candor in 2019. These matters had been addressed in detail in the Defendants' submissions. By their own account, they had previously tried to obtain legal representation and had been unable to do so, and they indicated that there were no concrete proposals in place regarding obtaining such representation, although they had not, as they said, given up hope.

35. The prejudice identified by the Bank related to the cost and inconvenience of preparing for hearing, a hearing which had already commenced. In addition, if an adjournment was granted, the Bank might be required to wait indefinitely before seeking to enforce its security while the Defendants made further attempts to obtain assistance to address

an issue – the alleged overcharging – which, on the Bank's case, was not relevant to either set of proceedings.

36. In light of all the above considerations, it seemed to me that an adjournment was not warranted. Although a Court would normally seek to facilitate a defendant in obtaining representation, be it legal or financial, there must be a limit to the accommodation which might be afforded where a defendant has failed to obtain representation despite having more than ample time to do so. The application for the adjournment could hardly have been made later in the day. The Defendants had had since July 2019 to obtain representation to assist them in relation to the issues raised by Candor. Not only had they not done so, but there was also no basis identified by them to think that that position would change. They had filed submissions which addressed the issues in respect of which they said they were seeking representation.

37. In those circumstances, it would have been prejudicial to the Plaintiff and a significant disruption to the orderly conduct of the Court's business to have granted an adjournment at the twelfth hour and accordingly I refused the application.

Well charging Order and Order for sale

38. There are two separate bases on which the well charging Orders and the Orders for sale have been sought. In respect of Folio WH16939F, WH2997 and WH2639 the Bank relies on the judgment mortgage dated 1 March 2017. For that purpose, the Bank relies on the provisions of section 117 of the Land and Conveyancing Law Reform Act 2009. In respect of Folio WH2639, the Bank also relies on a registered lien.

39. Section 117 of the 2009 Act states that

> *(1) Registration of a judgment mortgage under section 116 operates to charge the judgment debtor's estate or interest in the land with the judgment debt and entitles the judgment mortgagee to apply to the court for an order under this section or section 31.*
>
> *(2) On such an application the court may make—*
>
> > *(a) an order for the taking of an account of other incumbrances affecting the land, if any, and the making of inquiries as to the respective priorities of any such incumbrances,*

(b) an order for the sale of the land, and where appropriate, the distribution of the proceeds of sale,

(c) such other order for enforcement of the judgment mortgage as the court thinks appropriate.

40. In **Doyle v. Houston [2020] IECA 86**, the Court of Appeal (Costello J) explained that the Court could not look behind the judgment mortgage registered on the Folios at issue in those proceedings in light of section 31 of the Registration of Title Act 1964 which confirms that the register is conclusive evidence of the title of the owner of the land as appearing on the register:

> *"56. It follows that unless and until the entries of the judgment mortgages are cancelled this court cannot look behind the folio. Ms. Houston said that she applied to the PRA to vacate the entries but was informed that she must obtain an order of court. That was in 2017. To date, she has not obtained such an order. It follows that neither the High Court, nor this court could, or may, engage with her argument regarding the validity of the costs orders, or the validity of the judgment mortgages, and the appropriateness of the registration of same on the folio. To do so would be to seek to go behind the register, which is not possible in the circumstances of this case."*

41. The Bank also relies on a registered lien in respect of Folio WH2639, the proofs required to obtain a well charging Order and Order for sale were set out by the Court of Appeal in **Promontoria (Oyster) DAC v Greene [2021] IECA 93** (at paragraph 52):

> *"The only necessary proofs here were (a) that the monies were due and owing and (b) that the monies were secured by the registered lien. The existence of the security – the registered lien – was established by the register and by the Folio and did not require further proof. The basis on which the lien had been registered did not require proof."*

42. In terms of proving (b), the Court of Appeal was satisfied in that case that the circumstances surrounding the deposit of the land certificate were not a necessary proof:

> *"47 This is usefully illustrated by the material put before the High Court here. The facility letters relating to the Second and Third Facilities expressly identified the registered lien as security for those facilities. Once those letters were in evidence (and their admissibility was not disputed by Mr Greene), the*

> *"*relation of the debt to the deposit*" was sufficiently established, without any need to look back to the circumstances of the initial deposit of the land certificate. That appears to have the view of the Judge also, given that he was satisfied to grant the reliefs sought in relation to these facilities notwithstanding his view that Promontoria's evidence had not established the date of deposit with sufficient clarity. In my view,* Promontoria (Oyster) DAC v McKenna *provides a further example of a case where the lien holder's entitlement to relief can be demonstrated even in the absence of any evidence as to the date of deposit or indeed, evidence as to the circumstances in which the deposit occurred."*

43. As appears therefrom, the conclusiveness of the register can be relied on by a party to proceedings in respect of both judgment mortgages and registered liens.

Order for Possession

44. Section 62(7) of the Registration of Title Act 1964 has been repealed. However, it remains applicable to mortgages created before 1 December 2009 by virtue of section 1 of the Land and Conveyancing Law Reform Act 2013. Section 62(7) of the 1964 Act provides:

> *(7) When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession.*

45. In **Bank of Ireland v. Cody [2021] IESC 26**, the Supreme Court (Baker J) explained the limited proofs required to obtain an Order for possession pursuant to section 62(7):

> *"49. The owner of a charge who seeks to obtain possession pursuant to s. 62(7) has to prove two facts:*
>
> > *(a) That the plaintiff is the owner of the charge;*
> > *(b) That the right to seek possession has arisen and is exercisable on the facts."*
>
> *50. The summary process is facilitated by the conclusiveness of the Register as proof that the plaintiff is the registered owner of the charge is a matter of the production of the folio, and, as the Register is by reason of s. 31 of the Act of 1964 conclusive of ownership, sufficient evidence is shown by that means: see*

the discussion in the Court of Appeal in Tanager DAC v. Kane [2018] IECA 352. The judgment of the Court of Appeal inter alia held that the correctness of the Register cannot be challenged by way of defence in summary possession proceedings, and that a court hearing an application for possession pursuant to s. 62(7) of the Act of 1964 is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and the right to possession has arisen and become exercisable."

The Plaintiff's Case

46. The Plaintiff asserts that it has established the necessary proofs in respect of both applications.

47. In relation to the first proceedings insofar as a well charging Order is sought on foot of the judgment mortgage, the register is conclusive proof that the sum the subject of the judgment is due and owing and is secured on the properties in the relevant Folios. The Plaintiff relies on **Doyle v Houston**. It is not disputed that the sums due on foot of that judgment have not been discharged. In the circumstances, the Bank says that it is entitled to the Orders sought pursuant to s. 117 of the Land and Conveyancing Law Reform Act 2009.

48. As regards the registered lien, the Bank says that it has satisfied the required proofs *per* **Promontoria (Oyster) DAC v Greene**. As with the judgment mortgage, the Bank says that the existence of the security is established by the register. As in **Greene,** the facility letter makes clear that the lien was intended to operate as security for the sums the subject of that facility.

49. In respect of the possession proceedings, the Plaintiff says that it has satisfied the necessary proofs identified in **Cody**. In this regard, it again relies on the register to establish that it is the owner of charges in respect of the lands over which it seeks possession.

50. As regards the right to possession having arisen, it relies on the terms of the 1989 Mortgage and the 2008 Mortgage, describing them as "all sums" mortgages, securing all sums due from the Defendants, including the sums due on foot of the September

2016 judgment, as establishing that the Bank has an entitlement to possession in circumstances where that judgment has not been discharged.

The Defendants' case

51. The Defendants raise a number of points by way of defence. However, as noted above, their main concern relates to the Candor report and their contention that there has been some overcharging of interest by the Bank and that, accordingly, the judgment mortgage has been registered in respect of an "unsafe and false judgment sum".

52. The Defendants reference the decision of the Court of Appeal in **Launceston Property Finance DAC v. Wright [2020] IECA 146**, where that Court (at paragraph 7) summarised the nature of the jurisdiction to review or set aside an earlier judgment:

> *"In summary, the jurisdiction:-*
>
> *(i) is wholly exceptional;*
> *(ii) it must engage an issue of constitutional justice;*
> *(iii) requires the applicant to discharge a very heavy onus;*
> *(iv) is not for the purpose of revisiting the merits of the decision;*
> *(v) alleged errors which have no consequence for the result do not meet the required threshold;*
> *(vi) cannot be invoked on the basis of the discovery of new evidence;*
> *(vii) requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result.*
> *(viii) cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment.*
> *(ix) is to be distinguished from the application of the Slip Rule in respect of errors of fact which have no bearing on the outcome."*

53. The Defendants say that they meet the high threshold for re-opening the judgment and argue that the Bank cannot rely on the judgment or the judgment mortgage to ground either of its applications.

54. In relation to the first proceedings, the Defendants argue that insofar as the Bank seeks an Order that the judgment sum *together with interest thereon* is well charged, that the Bank has waived interest by its affidavit of debt and therefore is not entitled to the Order sought.

55. In respect of the second proceedings, as referred to above, the Defendants rely on the fact that the Mortgages relied on by the Bank have not been executed by the Bank and therefore cannot be relied on by it.

Discussion

56. In my view, the Plaintiff has established the necessary proofs for the Orders it seeks in both sets of proceedings and none of the issues raised by the Defendants provide a basis for refusing the reliefs sought.

57. As appears from the decisions referred to above, the register is to be regarded as conclusive evidence of the matters referred to therein. As is apparent from the register, the Plaintiff is the holder of a registered lien in respect of the lands comprised in Folio WH2639. Moreover, it has registered a judgment mortgage over the same Folio.

58. The Defendants' principal argument in relation to the registration of the judgment mortgage is that judgment was, in effect, given in the wrong amount. Although the Defendants contend that they have met the heavy onus for re-opening a judgment, this submission is, I am afraid, misconceived. It is not permissible for this Court to disregard an Order of the Court of Appeal simply on the basis that a party argues that that Court may have been led into error and that the threshold for that Court re-opening its judgment has been met.

59. Irrespective of the merits of any contention that there was an error in the calculation of the interest, upon which I express no view, it is a matter for the Court of Appeal as to whether the wholly exceptional jurisdiction to review a final judgment of that Court should be invoked. What is clear for present purposes is that no such application has been made to the Court of Appeal despite, as is pointed out by counsel for the Bank, the Defendants having had the benefit of an accountant's report since July 2019. No other basis for this court to engage in what is, in effect, a collateral attack on the Default Judgment is raised by the Defendants. 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.

60. The Defendants do not claim that there has been any repayment of the judgment sum. Accordingly, the Plaintiff has established for the purpose of its well charging proceedings that the judgment sum is due and owing. Moreover, the register offers conclusive evidence that the sums are secured by the judgment mortgage over the lands comprised in Folio WH2639, WH2997 and WH16939F.

61. Although the Defendants say that they were not notified of the application to register the lien or provided with the land certificate as required by section 73(3)(c) of the Registration of Deeds and Title Act 2006, this Court is not entitled to look behind the register in this regard. The Property Registration Authority were required to be satisfied that the requirements of the Act were met before registering the lien. The registration is conclusive evidence that they were so satisfied.

62. I am also satisfied, by reference to the loan facility letter that the registered lien was intended to secure the debt the subject matter of that loan facility and therefore the debt the subject matter of these proceedings.

63. Although the Defendants make no complaint in this regard, there had been some debate regarding whether, following the introduction of section 73, a registered lien was capable of securing advances made after 31 December 2009, being the date on which the deemed all existing liens created by deposit of land certificates ceased to have effect. As noted above, that question has been resolved in **Promontoria (Oyster) DAC v. Fox [2023] IECA 76** in which the Court of Appeal (Pilkington J) concluded that the 2006 Act had not changed the position as regards liens registered before 1 December 2009, *i.e.* they could secure future advances. Accordingly, the Defendants agreement that the registered lien relied on by the Bank is effective to secure the sums sought to be well charged in these proceedings notwithstanding that the loan facility was created after 31 December 2009.

64. Insofar as the Defendants claim that the Plaintiff waived any entitlement to interest in its affidavit of debt and should therefore be refused the relief sought insofar as it now seeks an Order that a sum *including interest at 2% on the judgment* is well charged, I do not believe that this argument is 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.

65. In this regard, it must be recalled what was the purpose of the affidavit of debt. Order 13, Rule 20 of the Rules of the Superior Courts requires that before judgment by default can be entered for any liquidated demand under Order 13 an affidavit must be filed specifying the sum then actually due. The express waiving of interest in an affidavit of debt is therefore a necessary device to ensure that a plaintiff seeking judgment for a liquidated sum in default of appearance can rely on that affidavit as accurately setting out the sum due where interest might otherwise have accrued between the date of swearing of the affidavit and the date of entering judgment.

66. In the circumstances, I am satisfied to make the well charging Orders, the Orders for sale and other ancillary Orders sought in the first proceedings. The Orders sought include an Order for Sale in accordance with the priority of burdens affecting the properties and an inquiry as to the respective priorities of any such burdens. Any interest of Claire Clancy or Bernadette Colgan reflected in the inhibitions registered on the relevant Folios can be addressed as part of that process.

67. The Bank has, in my view, also satisfied the necessary proofs for the purpose of the reliefs sought in the second proceedings. It is clear from the register that the lands over which the Bank seeks Orders for possession are charged in favour of the Bank. It is also clear from the terms of the 1989 Mortgage and the 2008 Mortgage that the entitlement to seek possession has arisen and is exercisable on the facts. This is not disputed by the Defendants. Each deed secured all sums due and owing, including sums due on foot of the judgment entered in March 2017. A judgment mortgage has been registered in relation to that judgment and there is no dispute but that those sums remain due and owing.

68. The only additional argument advanced by the Defendants in the second proceedings relates to the fact that neither the 1989 Mortgage nor the 2008 Mortgage were signed or sealed by the Bank. In circumstances where both deeds were executed by the Defendants, I am satisfied that that is not a basis for refusing to permit the Bank to

enforce its security. In **ACC v Kelly [2011] IEHC 7**, Clarke J (as he then was) was met with a similar argument, which he rejected in the following terms:

> *"9.4 Likewise, I am not satisfied that the fact that there was no evidence of ACC having executed the mortgage deed is of any relevance. I am more than satisfied on the evidence that both of the Kellys executed the mortgage deed. As the appointment of the receiver against the Kellys is an action taken as against them, it is only necessary that they have signed and executed the deed in order for it to be enforceable against them."*

Decision

69. Accordingly, I propose granting the Plaintiff the reliefs sought at Paragraphs 1, 2, 4, 5, 6, 7 and 8 of the Special Summons in the first proceedings.

70. In addition, I propose granting the Plaintiff the reliefs sought at Paragraphs 1 and 2 of the Special Summons in the second proceedings.

71. In circumstances where one of the Folios the subject of the proposed Orders may contain the Defendants' family home, I will hear the parties in relation to any stay and in relation to costs. For that purpose I will list the matter on 21 July 2023 at 10.30 am.