

THE HIGH COURT

[2023] IEHC 34

Record No. 2022/59 COS

IN THE MATTER OF ORLINGTON COMPANY

COMPANY LIMITED BY GUARANTEE

AND

IN THE MATTER OF AN APPLICATION BY OSSORY ROAD ENTERPRISE

PARK LIMITED

BETWEEN

OSSORY ROAD ENTERPRISE PARK LIMITED

APPLICANT

AND

ORLINGTON COMPANY, COMPANY LIMITED BY GAURANTEE

AND DECLAN ROGERS AND BRID ROGERS

RESPONDENTS

JUDGMENT of Ms. Justice Stack delivered on the 24th day of January, 2023

Introduction

1. This is an application for relief pursuant to ss. 169 and/or 173 of the Companies Act, 2014, (“the 2014 Act”) rectifying the register of members of Orlington Company, Company Limited by Guarantee (“the Management Company”) so as to name the applicant as a member of the Management Company in its register of members and to rectify that register, so as to remove the second and third respondents as members.

2. The Management Company is the owner of the common areas in Ossory Industrial Estate, Ossory Road, Dublin 3 (“the Estate”), comprising an internal roadway which it acquired by Conveyance made 20 September 1988, between P. C. Rentals Limited of the one part and the Management Company of the third part, subject to a right of way and various wayleaves which were to be enjoyed by the owners of the various Units in the Estate.

3. The second respondent acquired that part of the Estate comprising Units 1, 5A, 5B, 6, 7, 8, 8A, 9 and 10 (“the Units”) in the mid-1990s. In 2005, he mortgaged those Units to Allied Irish Banks plc (“AIB”), who subsequently sold the second respondent’s loan and securities to Everyday Finance Limited (“Everyday”). Everyday attempted to sell the Units at an online auction in April 2021, but the sale to the highest bidder fell through. The applicant, as one of the underbidders, was subsequently approached and entered into a contract to purchase the Units in September 2021. That sale closed in December 2021 on foot of seven deeds of conveyance dated 6 December 2021 (“the 2021 Conveyances”), to which I refer in more detail below.

4. The fundamental application being made is that, because the applicant has acquired the Units from the mortgagee for the time being, the applicant should take the place of the second respondent in the register of members of the Management Company. The second and third respondents are a married couple and are directors of the Management Company. Neither the Management Company nor the second and third respondents, as directors, have agreed to the registration of the applicant as a member, and the applicant now applies to court to compel such registration and to remove the second and third respondent from the register of members.

5. Subsequent to that completion of the sale, the applicant had to bring an interlocutory injunction to restrain the second respondent from holding himself out as being the owner of the Units, and from collecting rents from the sub-tenants in occupation of some of those

Units. The interlocutory application is subject of a previous judgment given by me in proceedings bearing Record No. 2021/6816P and entitled “*Ossory Road Enterprise Park Ltd, plaintiff, and Declan Rogers, Tom Harty, and Rogers Recycling Ltd, defendants*” (“the 2021 Proceedings”), delivered on 7 October, 2022, [2022] IEHC 556, to which it will be convenient to refer in due course.

6. It is accepted that the Management Company is a company limited by guarantee (“CLG”) for the purposes of the 2014 Act. CLGs are regulated by Part 18 of the 2014 Act, and s. 1173(1) expressly provides that the provisions of Parts 1 to 14 of the 2014 Act apply to a CLG, except to the extent that they are modified by that section or by any other provision of Part 18.

7. Subsection (3) of s. 1173 provides:

“Any of *Parts 1 to 14* that makes provision by reference to—

(a) membership arising by virtue of a shareholding, or

(b) right or incidents of membership, including the right to vote or receive a distribution, arising by virtue of a shareholding,

shall be read, in the case of a CLG, as making such provision in the analogous context in which membership, or rights or incidents of membership, may arise in the case of a CLG.”

8. Subsection (5) of s. 1173 provides that the provisions of the 2014 Act specified in the Table to that section shall not apply to a CLG and, as Chapter 5 of Part 3 of the 2015 Act, the provisions relating to the transfer of shares and the registration of ownership of shares are (with one exception relating to s. 94 which is not material here) disapplied in relation to CLGs.

9. The applicant relies on ss. 169 and 173, which are contained in Part 4 of the 2014 Act, which is not excluded from application to CLGs, either by s. 1173 or any other specific

provision of Part 18. Indeed, s. 1201, which is contained in Part 18, confirms that s. 169 applies to CLGs in a modified form, as follows:

- “(1) Subject to *subsection (5)*, a company shall keep a register of its members and enter in it the following particulars:
- (a) the names, addresses of the members ...
 - (b) the date at which each person was entered in the register as a member; and
 - (c) the date at which any person ceased to be a member.
- (2) *Sections 215 to 217* (rights of inspection, requests for copies, etc.) apply to the register of members.
- (3) The entries required under *paragraphs (a) and (b) of subsection (1)* shall be made within 28 days after the date of conclusion of the agreement with the company to become a member or, in the case of a subscriber of the constitution, within 28 days after the date of registration of the company.
- (4) The entry required under *subsection (1)(c)* shall be made—
- (a) within 28 days after the date when the person concerned ceased to be a member; or
 - (b) if the person ceased to be a member otherwise than as a result of action by the company, within 28 days after the date of production to the company of evidence satisfactory to the company of the occurrence of the event whereby the person ceased to be a member.
- (5) ...
- (6) Where a company makes default in complying with any of the requirements of *subsection (1) or subsections (3) to (5)*, the company and any officer of it who is in default shall be guilty of a category 3 offence.”

10. Section 173 provides:

“(1) If—

(a) the name of any person is, without sufficient cause, entered in the register of members or omitted from it, in contravention of *subsections (1) and (3) of section 169*, or

(b) default is made in entering on the register, within the period fixed by *subsection (4) of section 169*, the fact of any person's having ceased to be a member,

the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of compensation for any loss sustained by any party aggrieved.

(3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his or her name entered in or omitted from the register (whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand) and generally may decide any question necessary or expedient to be decided for rectification of the register.

(4) The court when making an order for rectification of the register shall by its order direct, if appropriate, notice of the rectification to be given to the Registrar.

(5) A company may, without application to the court, at any time rectify any error or omission in the register but such a rectification shall not adversely affect any person unless he or she agrees to the rectification made.

(6) The company shall, within 21 days after the date on which the rectification under *subsection (5)* has been made, give notice, in the prescribed form, of the rectification to the Registrar if the error or omission referred to in *subsection (5)* also occurs in any document forwarded by the company to the Registrar.

(7) Without prejudice to the generality of *subsection (5)*, a rectification may be effected by the company under that subsection of an error or omission that relates to the amount of the company's issued share capital (whether it consists of an overstatement or understatement of it) and *subsection (6)* shall apply, in the circumstances there set out, in the event of such a rectification.”

11. Section 173 replaces s. 122 of the Companies Act, 1963 as amended, which has been held to constitute a discretionary remedy, albeit one which, being exercised on a summary basis, does not permit the resolution of issues of fact: see *In Re Park Magic Mobile Solutions Ltd* [2017] IEHC 287, *per* Baker J., and *Banfi Ltd v. Moran* [2006] IEHC 257, *per* Laffoy J. However, as is clear from s. 173 (3), the jurisdiction incorporates the determination of any question relating to the title of any person who is a party to the application, to have his or her name entered in or omitted from the register as well as any other question which is necessary or expedient to be decided for rectification of the register. Apart from the limitation that conflicts of fact cannot be resolved, this summary jurisdiction is therefore sufficiently wide to resolve disputes as to the interpretation of documents, such as the Articles of Association and documents of title.

12. I propose to consider the application in its own terms, that is, by reference to the claimed right of the applicant to be registered as a member, before then dealing with the specific objections raised by the respondents.

Right of applicant to be registered as member

13. The applicant claims that it is entitled, as of right pursuant to the Articles of Association of the Management Company to be admitted to membership of the Management Company.

14. There were seven subscribers to the Memorandum of Association which was dated 10 May 1988. It is sufficient for the purposes of this application merely to note that neither the second nor the third respondent was a subscriber to the Memorandum, which is hardly surprising, given that the second respondent only acquired the fee simple in the Units between 1994 and 1998.

15. Clauses 2 - 7 of the Articles of Association (“the Articles”) are contained in a section headed “Members” and Clauses 2 - 6 provide:

- “**2.** The number of members with which the Company is proposed to be registered is seven but the Directors may from time to time register an increase in members.
- 3.** The persons whose names are entered in the Register of Members and any Unit-owner who applies for membership and such other persons as the Director should admit membership, shall be members of the Company.
- 4.** Where two or more persons jointly are the Unit-owners of one Unit in the Estate they shall together constitute one member and the person whose name first appears in the Register of Members shall exercise the voting and other powers vested in such members.
- 5.** Those persons whose names are entered in the Register of Members and who are not Unit-owners shall cease to be members as soon as the Unit-owners of all the units on the Estate have become members. A member shall cease to be such on ceasing to be a Unit-owner and on the registration as a member of his Successor

in Title. A member shall have the right at any time to resign his membership of the Company.

6. The trustee in bankruptcy of any bankrupt member of (sic) the personal representative of any deceased member shall be entitled to become a member if at the time of his application for membership he is a Unit-owner.”

Clause 7 appears to be a sub-heading or an error of some kind and therefore it is not necessary to set it out here.

16. Article 1 of the Articles defines “the Unit-owners” as meaning “the owners for the time being of the industrial Units on the Estate”.

17. The argument of the applicant is straightforward: it says that, since it has acquired a number of Units in the Estate, it is entitled to be registered as a member. It says that this is clear from the provisions of the Articles cited above and, in particular, Clause 3 which it is submitted means that any Unit-owner who applies for membership is entitled to be registered within 28 days of calling upon the company and/or the directors to register that membership.

18. By contrast, the respondents argue that Clause 3 should be interpreted so as to provide that the directors have an absolute discretion *both* in relation to Unit-owners who apply for membership *and* “such other persons” as to whether or not they shall be registered.

19. I have no hesitation in rejecting the argument of the respondents which relies on what appears to be a strained and improbable interpretation of the Articles . It seems quite plain that Clause 3 identifies three categories of person who may be registered as members: the persons whose names were entered into the register of members, any Unit-owner who applies for membership, and such other persons as the directors shall admit to membership. Once a person falls within any one of those three categories, they are then entitled to registration, as evidenced by use of the word “shall”.

20. Even the original subscribers, who fall within the first category of person entitled to membership of the Management Company, cease to be members in accordance with Clause 5 as soon as the Unit-owners of all of the Units on the Estate have become members. It is quite manifest reading Clauses 2, 4, 5 and 6 together, that ownership of a Unit entitles the person or persons entitled thereto to be registered as members, and there is no residual discretion in the directors to refuse registration or recognition of that membership. As submitted by counsel for the applicant, the fact that membership of the company is dependent on ownership is also supported by Clause 6 which provides for the transmission on bankruptcy or death of membership of the Unit-owner.

21. It seems to me that the only sensible interpretation of Clause 3 is that a Unit-owner, who applies for membership, is entitled to be registered as such.

22. The respondents also relied on s. 1199 (1) which provides that subscribers to the memorandum of association of a CLG shall be deemed to have agreed to become members of the CLG, and, on its registration, shall be entered as members in its register of members, and on subs. (2) which provides:

“(2) Such other persons

(a) being persons—

(i) whom the directors admit to membership; or

(ii) who are admitted to membership, pursuant to provisions that the constitution may contain in that behalf, whether provisions that—

(I) provide a separate power to; or

(II) supplement or limit, or exclude,

any power of the directors in that regard;

and

(b) whose names are entered in its register of members,

shall be members of the CLG.”

23. I do not think that s. 1199 has any effect on this application as subs. (a) (ii) clearly contemplates a provision which would permit all Unit-owners to become members of a CLG. The argument of the applicant is therefore clearly correct, and I now turn to the various objections raised by the respondents in order to consider whether there is any substance in them.

Objections of the respondents

i. Whether the applicant is a “Unit-owner” within the meaning of the Articles of Association.

24. The respondents dispute the contention of the applicant, that it is the owner for the time being of various Units in the Estate on a number of grounds. The first of these is that the applicant holds only a leasehold interest in the Units which it has bought because the 2021 Conveyances mistakenly purported to convey the Units in fee simple, even though the mortgage granted by the second respondent to AIB was a mortgage by a demise for a term of 10,000 years.

25. No point has been taken on the conveyance or assignment of AIB’s interest to Everyday, presumably because the deed by which mortgage sale documents tend to simply provide that, where the mortgage is one by demise, the leasehold term is assigned to the person purchasing the loans and securities, and any freehold interest is conveyed, so all eventualities were covered.

26. Detailed argument was made on behalf of the second respondent at interlocutory stage in the 2021 Proceedings to the effect that, having failed to specifically assign the leasehold

interest, the 2021 Conveyances were ineffective to convey any interest in the Units. I found that there was a fair question to be tried that s. 76 of the Land and Conveyancing Law Reform Act, 2009 (“the 2009 Act”), commonly referred to as the “all estates clause”, operated so as to convey any interest vested in the grantor with the result that the leasehold interest in the Units had been assigned to the applicant. In coming to this conclusion, I applied *Thellusson v. Liddard* [1900] 2 Ch. 635, in which it was held that s. 63 of the Conveyancing Act, 1881 (of which s. 76 is a re-enactment) applied to a purported conveyance of the fee simple and was effective to assign the equitable interest in a leasehold term, which was the only estate or interest held by the grantor at the date of the deed.

27. The applicant now asks that I would apply that reasoning so as to now finally determine, in this application, that the applicant has acquired the residue of the term of years created by the 2005 Mortgage.

28. In this application, the second respondent did not contend that s. 76 did not operate so as to assign the leasehold interest to the applicant, but rather argued that, because only a leasehold interest had been assigned to the applicant, it cannot be regarded as a “Unit-owner” within the meaning of Article 3 of the Articles .

29. I think anyone familiar with the conveyancing of multi-unit developments and, in particular multi-unit buildings, would be surprised at the suggestion that the holder of the residue of a term of 10,000 years created in 2005, not subject to the payment of rent or to any covenants and without a covenant of re-entry, was not to be regarded as the rightful owner of a property. As the director of the applicant points out in his supplemental affidavit, such a title that is deemed in conveyancing practice to be good marketable title. In fact, I understand that lending institutions accept leasehold title as security, provided at least 70 years of the term remains. In this case, the applicant has, as conceded by the respondents, the right to remain in possession for the residue of the term of 10,000 years created by the 2005

Mortgage. Nevertheless, the respondents contend that the applicant cannot be regarded as the “owner for the time being” of the Units.

30. In considering this argument, I would first point out that it appears to overlook the fact that 2021 Conveyances, by reason of the operation of s. 76 of the 2009 Act, also conveyed to the applicant the beneficial interest in the fee simple reversion expectant on the determination of the leasehold term. The Mortgage not only demised the Units to AIB but also contained a declaration that the freehold reversion would be held on trust for AIB and its successors, which include the applicant. Therefore, at the date of the 2021 Conveyances, Everyday held not only the residue of the term created by the Mortgage, but also the beneficial interest in the freehold reversion. In this case, the application of s. 76 to the 2021 Conveyances has the effect that the applicant holds not only the residue of the 10,000 year leasehold term, but also the beneficial interest in the freehold reversion.

31. From the date of the mortgage, the only estate or interest held by the second respondent was the bare legal estate in the fee simple reversion. A bare legal estate of this kind is a nominal interest only — of no real value — and is subject at all times to direction by the beneficial owner that the interest be vested in the beneficial owner or its nominee. Indeed, for that purpose, clause 5.07 of the Mortgage makes it clear that the second respondent had irrevocably appointed the Secretary of the mortgagee as his attorney, and sub-para. (a) of that Clause confirmed that the attorney so appointed had authority “to assign the freehold or leasehold reversions hereinbefore reserved or any further or other interest the mortgagor may hereafter have during the continuance of this security in the mortgaged property to the Bank or as the Bank shall direct”. (The reference to the leasehold reversion being a reference to the fact that, had the mortgagor held a leasehold interest in the mortgaged premises, the demise would be for the residue of the term or terms held by the mortgagor less three days. This is not applicable here as the second respondent held the Units in fee simple.)

32. The respondents' counsel raised the question of whether the Secretary of Everyday, who has executed a Deed of Rectification, dated 15 June 2022, so as to convey the outstanding freehold interest to the applicant, had capacity to execute that deed — suggesting that the lawfully appointed attorney was the Secretary for the time being of AIB at the date of the Mortgage.

33. However, I do not need to determine that point as, pursuant to the 2021 Conveyances, the applicant holds both the residue of the 10,000 year term created by the Mortgage and the beneficial interest in the fee simple reversion. Although I was urged to leave issues of title to the 2021 Proceedings, where they are also in issue, I do not see any reason why I should do so. I have a clear jurisdiction under s. 173(3) to determine matters of title.

34. The two interests held by the applicant are more than sufficient to bring it within the definition of “Unit-owner” and entitle it to registration as a member of the company.

35. For the avoidance of doubt, I would like to add that, even if the beneficial interest in the fee simple reversion had not been conveyed by the 2021 Conveyances, in my view, the holder of the residue of a 10,000 year lease would quite manifestly be regarded as the “owner for the time being” within the meaning of the Articles, and the applicant would in any event be entitled to be registered as a member on that basis alone.

36. Memoranda and Articles of Association are not technical documents to be interpreted like a statute but are, in the words of Carroll J. in *Roper v. Ward* [1981] ILRM 408 at 412, “commercial documents and should be construed to give them reasonable business efficacy”. There is no technical meaning given in the Articles to “Unit-owner” or to the concept of ownership, that is, it does not require that the ownership be freehold or that it would be leasehold of any particular type. Bearing that in mind, I think the correct approach is to interpret that phrase so to include the holder of long leasehold terms, not subject to a commercial rent. I think it would be strange if the holder of a very lengthy leasehold term,

not subject to a rent or to a covenant for re-entry, was not regarded as the “owner” of the property in question.

37. While it does not apply to this Estate, it is notable that s. 1 of the Multi Unit Developments Act, 2011, defines “unit owner” as the person, other than the Management Company, “who holds the highest freehold or leasehold estate or interest in respect of a unit in a multi-unit development”, thereby reflecting the general understanding of conveyancers and lending institutions, that a lengthy leasehold interest constitutes ownership.

38. I also think those members of the public who have purchased apartments in this country would rightly regard as absurd any suggestion that the fact that they are nominally tenants of very long leases, such that they and their successors-in-title are entitled to remain in possession for periods of hundreds (or even thousands) of years, means they are not owners of them. Interpretation of these Articles in the manner contended for by the respondents could result in a very undesirable precedent for the interpretation of very many constitutions of owners management companies (“OMCs”) throughout the country, resulting in owners of residential property (and indeed many commercial properties also) from being unable to participate in their OMC.

39. In my view the respondents argument, that the owner of a long lease of this kind is not the owner, is misconceived and cannot be accepted.

40. The next argument raised by the respondent for a proposition that the application not be regarded as a “Unit-owner” is that the applicant has not yet become registered in the Land Registry as owner of the various Units, contrary to the compulsory registration provisions in s. 25 of the Registration of Title Act, 1964, as substituted by s. 128 of the 2009 Act, which provides:

“A person shall not acquire an estate or interest in land in any case in which registration of ownership of the land is or becomes compulsory under section 23 or 24

unless the person is registered as owner of the estate or interest within 6 months after the purported acquisition or at such later time as the Authority (or, in case of refusal, the court) may sanction in any particular case, but on any such registration the person's title shall relate back to the date of the purported acquisition, and any dealings with the land before the registration shall have effect accordingly.”

41. This argument also lacks merit for the reasons set out by the Supreme Court in *Camiveo Ltd v. Dunnes Stores* [2015] 2 I.R. 698, [2015] IESC 43, where Clarke J. stated (at para. 44) that while it was clear from s. 25 that, even though no estate or interest in the land in question passed until such time as first registration is affected, “a purchaser has a sufficient equity in the property to give them a right to the land which is valid against anyone other than a registered transferee for value”. The second respondent is not a registered transferee for value.

42. At para. 47, Clarke J. continued:

“It seems to me to follow that there is nothing in s. 25 which precludes a person who has been the subject of an apparently valid assurance of lands which are subject to an obligation of first registration from enforcing any of the rights which go with the ownership of the lands in question pending first registration being put into effect.”

As I have already determined, the Articles confers a right to membership of the company which is connected to and dependent on ownership of the Units in this Estates. That right may therefore be enforced, even pending first registration.

43. The next objection is that the Conveyance of Units 8, 9 and 10 to the applicant is void because it is in breach of a covenant by the second respondent contained in a Conveyance made 14 August 1995, between Steve Hamilton, David Young and Kenneth Kilbride of the first part, the Management Company of the second part and the second respondent of the

third part (“the 1995 Conveyance”). Pursuant to clause 3 of that conveyance, the second respondent entered into the following covenant:

“The [second respondent] hereby covenants with the Vendors and [the Management Company] that the Purchaser, his executors, administrators and assigns will at all times hereinafter contribute and pay to the Management Company a proportion of the costs of repair, upkeep and maintenance of the lands edged yellow on map No. 2 attached to Indenture of Conveyance dated the 19th September 1988 and made between P.C. Rentals Limited of the first part and the Vendors of the third part, including without prejudice to the generality of the foregoing the cost of repair, upkeep and maintenance of the roadways and pavements thereon and the lighting, fittings and all services including underground electricity supply, water supply, underground telephone wires, connection and public liability insurance in respect thereof. The contribution payable by the Purchaser and the owner for the time being of [Units 8, 9 and 10 and a strip of land near Unit 10] shall be based on the ratio of the floor area of [Units 8, 9 and 10, and adjacent strip of land] to the aggregate floor areas of the other units at Ossory Industrial Estate.”

44. Clause 4 contained a further covenant on the part of the second respondent which is in the following terms:

“The [second respondent] and the persons deriving title under him will not execute any Conveyance or Lease of [Units 8, 9 and 10] unless contemporaneously therewith the Grantee, Purchaser, Assignee or Lessee shall enter into covenants with the Vendor and the Management Company in the terms of Clause 3 hereof and in the case of a Conveyance the Vendor and the Management Company shall thereupon release the Purchaser from his obligations hereunder (but without prejudice to any remedy in respect of any antecedent breach of any of the covenants hereunder).”

45. It was therefore argued that the failure of the applicant to enter into such a covenant with the Management Company at the time it acquired Units 8, 9 and 10 rendered the conveyance of those units to the applicant void. However, no authority was cited for this proposition. It was submitted that the covenant was “near enough to a condition” but I think it is clear from clauses 3 and 4 of the 1995 Conveyance that that is not the case. The provisions of clauses 3 and 4 are clearly referred to in clause 2 as “covenants” and this is a clear statement by the parties to the 1995 Conveyance (including the second respondent) that the clause was to operate as a covenant and not as a condition.

46. Furthermore, the fact that clause 4 of the 1995 Conveyance appears to provide or at the very least assume that the second respondent remains liable to the Management Company for any breach of the covenant contained in clause 3 *after* a conveyance to a purchaser which does not contain the required covenant, indicates that the parties to the 1995 Conveyance (including the second respondent) were acknowledging that any such onward conveyance would nevertheless be valid. The provisions are rather intended to provide an incentive to the second respondent to ensure that the necessary covenant is included in any conveyance executed by him as grantor, by providing that the remedy for any breach of the covenant in the clause 3 would continue to lie against him unless he ensured that any purchaser entered into a direct covenant with the Management Company for performance of the obligations initially imposed on him by that clause. I do not think there is any substance to this argument.

47. In any event, as stated at the outset, the jurisdiction under s. 173 is a discretionary one. I would have to take into account, in exercise of that discretion, the fact that when the solicitors acting for the respondents complained about the breach of this covenant in their letter of 28 January 2022 to the applicant’s solicitors, the applicant’s solicitors demonstrated an immediate willingness on the part of the applicant to enter into the necessary covenant with the Management Company by sending, under cover of letter dated 7 February 2022, a

Deed of Covenant executed by the applicant. However, notwithstanding the terms of the 1995 Conveyance, the Management Company and directors (through their solicitor) did not agree to execute it or enter into any negotiation as to its contents. Instead, they asserted that the 2021 Conveyances were void for failure to include the covenant.

48. I have already found that this argument is wrong in law and, therefore, no good reason for failing to enter into a direct covenant with the applicant has been put forward. It seems clear that the argument about the covenant has nothing to do with ensuring that the legal rights of the Management Company were being secured and is instead merely a device by which the second respondent attempts to avoid the reality that the Units which he originally owned have now been sold to the applicant.

49. This argument appears therefore to be an entirely unmeritorious one, designed to frustrate the exercise by the applicant of its rights as owner of various Units in the Estate.

ii. The relevance of the proceedings relating to the sale process

50. Finally, there is the issue of parallel proceedings brought by the second respondent in which he questions the *bona fides* of the sale to the applicant. It is also asserted in these proceedings that the sale was, in effect, fraudulent and that it was always intended simply to sell to the applicant.

51. The second respondent relies on proceedings brought by him and bearing High Court Record no. 2021/2378P, which were issued on 13 April 2021. The copy plenary summons exhibited in this application is the redacted one furnished to the applicant, pursuant to the contract for sale. However, it is clear from the Courts Service records exhibited that the proceedings were brought by the second respondent against AIB, Everyday and the Receiver appointed by AIB and who subsequently acted for Everyday. The applicant is not a party to

those proceedings and no relief setting aside any of the 2021 Conveyances to the applicant is sought.

52. In the 2021 Proceedings there is a suggestion, as there is in these proceedings, that the sale to the applicant was one at an undervalue. This suggestion is based on the fact that a third party, who bid a higher amount than the applicant, was not approached when the initial sale to the successful bidder fell through. Instead the vendor negotiated with the applicant, who ultimately paid €1,252,000 for the Units. From that, it is inferred that Everyday and/or the Receiver acted in collusion with the applicant to sell the Units at an undervalue, ignoring the higher underbidder, Robert Healy, who had bid €1,413,000.

53. Mr. Healy has sworn an affidavit in the 2021 Proceedings in which he says that he provided proof of funds as required of all bidders. He does not actually say what level of funding he had to prove before being allowed to participate in the auction.

54. Assuming for the moment that Everyday and/or the Receiver chose, without a sufficient basis, to accept the applicant's lower offer, there is no evidence whatsoever of impropriety in the sale process. The applicant was not the highest underbidder but the evidence goes no further than that, and it cannot be assumed that the decision to accept the lower offer was not for good reasons.

55. Perhaps most critically on this point, the usual remedy for any impropriety by a mortgagee in exercise of its power of sale is against the mortgagee in damages and not the purchaser: see s. 21(2) of the Conveyancing Act, 1881, and s. 103 of the 2009 Act. The default position is that the 2021 Conveyances themselves will not be set aside.

56. The only proceedings in which it is sought to set aside the 2021 Conveyances are the 2021 Proceedings, which are yet to be determined. The question in this application is whether it should be refused on the basis that those proceedings might be successful.

57. In fairness to counsel for the respondents, he did not go so far as to say that this application could not be determined prior to determination of the various proceedings, but he suggested it would not be prudent to do so. However, in exercising the discretion under s. 173, the starting point is that the applicant is, on the basis of the documents of title furnished, the owner of the Units holding the residue of a 10,000 year term and the beneficial interest in the fee simple reversion. As such, it is entitled to be registered as a member of the Management Company.

58. Furthermore, the applicant has been the owner of the Units for over a year. It called on the Management Company (and the second and third respondents as directors) to register it as a member in correspondence commencing on 8 December 2021. Notwithstanding the 28 day time limit in the Articles of Association, that has not happened. I can see no legal basis for further delaying the registration of the applicant as a member.

59. The duties of this Management Company would appear to be relatively straightforward in comparison with many other OMCs, relating mainly to the internal road in the Estate. Nevertheless, it is not in the interests of any of the Unit-owners that the legitimate governance of the OMC would be interfered with any longer. There is reference in the second respondent's affidavit to the remaining Unit-owners having declined to apply to become members, as they would be entitled to do under the Articles, as they did not wish to incur expense. However, the whole point of an OMC is to ensure good management of common areas in multi-unit developments such as this. In the long run, it seems likely that the reasonable exercise by a properly-run OMC of its powers in relation to the common areas would reduce overall expenditure by avoiding the significant one-off costs which might ultimately arise by reason of an ongoing failure to maintain and repair the common areas. This comment is, of course, *obiter*, as my task is only to decide whether the applicant is entitled to be registered as a member. The question of why other persons so entitled do not

exercise their right to membership is irrelevant to the determination of the existence of the applicant's right.

60. Should the second respondent ultimately succeed in setting aside the 2021 Conveyances, then the applicant would, in accordance with the proper interpretation of the Articles as set out above, automatically cease to be a member of the Management Company and the second respondent will be restored to membership. However, to refuse to register the applicant now would be to deny the applicant its *prima facie* right to membership.

Conclusion

61. As the applicant is the Unit-owner for the time being of the Units, it follows that I should make an Order directing rectification of the register of members so as to record the applicant's membership of the Management Company.

62. It follows from the finding I have made as to the applicant's title to the Units that the second respondent is no longer a Unit-owner, as all of the Units previously owned by him are now owned by the applicant. I will therefore make an Order that the register of members be rectified so as to remove him as a member of the Management Company.

63. I will list the matter in early course to hear counsel on the implications of this judgment for the membership of the third respondent, in relation to the precise form of Order and to determine the costs of this application.