

THE HIGH COURT

[2023] IEHC 363

Bankruptcy No. 4009

IN THE MATTER OF SECTION 61(6) OF THE BANKRUPTCY ACTS 1988

TO 2015

AND

IN THE MATTER OF THE ESTATE OF SAMUEL SNODDY,

A DISCHARGED BANKRUPT

THE HIGH COURT

BANKRUPTCY NO. 4009

BANKRUPTCY NO. 4008

BANKRUPTCY NO. 5171

IN THE MATTER OF SECTION 61(6) OF THE BANKRUPTCY ACT, 1988

TO 2015

AND

IN THE MATTER OF THE ESTATES OF SAMUEL SNODDY,

THOMAS SNODDY AND PAUL BROWNE, DISCHARGED BANKRUPTS

AND

DAVID MAVROUDIS

RESPONDENT

AND

FERGAL BROWNE

NOTICE PARTY

THE HIGH COURT

CIRCUIT COURT RECORD NO: 2017/0025A

SOUTH EASTERN CIRCUIT COUNTY OF CARLOW

BETWEEN

DAVID MAVROUDIS

PLAINTIFF

AND

SAM SNODDY, TOM SNODDY, FERGAL BROWNE AND PAUL BROWNE

DEFENDANTS

JUDGMENT of Mr Justice Mark Sanfey delivered on the 23rd day of June 2023.

Introduction

1. This judgment relates to three separate but related matters set out in the titles above, primarily concerning the estate of Samuel Snoddy, who was adjudicated bankrupt on 6 February 2017 and has since been discharged. The applications before the court are as follows:

- (1) An application by the Official Assignee in Bankruptcy (**‘the OA’**) pursuant to s.61(6) of the Bankruptcy Act 1988 as amended to direct the OA to compromise certain proceedings between Carlow County Council and the OA in terms set out in a negotiated settlement agreement of 19 October 2021 (**‘the settlement application’**);

(2) A further application by the OA pursuant to s.61(6) seeking directions in relation to the sums to be paid to a secured creditor, David Mavroudis (**‘Mr Mavroudis’**), on foot of judgment mortgages registered by him against the interests of Samuel Snoddy, Thomas Snoddy, Paul Browne (all three of whom are discharged bankrupts) (**‘the discharged bankrupts’**) and Fergal Browne, who together compromise the “Snoddy-Browne” partnership, in respect of a number of properties. The interests of the said bankrupts vest in the OA for the benefit of their respective creditors (**‘the judgment mortgage value application’**);

(3) An appeal by Mr Mavroudis from an order of the Circuit Court (Her Honour Judge Alice Doyle) of 20 October 2021 in proceedings issued by Mr Mavroudis seeking a well charging order and an order for the sale of lands contained in folio CW1789F. The issue relates primarily to the respective priorities of judgment mortgages registered over the property by Mr Mavroudis, and a legal and beneficial interest in the property contended for by a Ms Mary Keenan which is referenced at special condition 16 of a contract for sale of the property (**‘the Circuit Court appeal’**).

2. All of the foregoing applications were heard at one sitting of this Court. The OA was represented by senior and junior counsel, and various of the notice parties were also represented by counsel. Mr Mavroudis, who was a respondent to the first two applications and the moving party in the third, represented himself. All of the parties delivered written submissions in each of the three applications, and supplemented them with detailed oral submissions during the hearing. In this regard, I have had access to transcripts of the hearing, and the digital audio recording where necessary.

3. There was some debate at the outset of the hearing as to the order in which the applications should be heard. As the first application mentioned above traversed comprehensively the extremely complicated and indeed convoluted history of the matter, I heard the applications in the order set out above, and propose to deal with them in this judgment in the same order.

1. THE SETTLEMENT APPLICATION

4. The relief sought by the OA in this application is expressed in the notice of motion as follows:

“1. An order pursuant to s.61(6) of the Bankruptcy Act 1988, (as amended) directing the Applicant herein, the Official Assignee in the Estate of Samuel Snoddy, to compromise proceedings bearing record no. 00154/2019 in the County of Carlow as between Carlow County Council and the Applicants herein in the terms as set out in the settlement agreement dated 19 October 2021.”

5. The grounding affidavit for the application was sworn on 11 November 2021 by Michael Ian Larkin, who is the Official Assignee in Bankruptcy. This affidavit set out the background to the matter in detail, and the rationale for the reliefs sought. Mr Mavroudis, who is a secured creditor in the bankruptcy of each of the discharged bankrupts above, was served with the application and acted as a *legitimus contradictor* in respect of the application. Mr Mavroudis swore a very lengthy replying affidavit of 10 December 2021, and a subsequent affidavit of 01 February 2022. Carlow County Council (**‘the Council’**) was also placed on notice of the application, and Mr Pat Delaney, Chief Financial Officer of the Council, swore a brief affidavit supporting the OA’s application on 12 January 2022. Mr Larkin also swore a short affidavit on 14 January 2022 in response to the first affidavit of Mr Mavroudis.

6. It should be noted that Mr Mavroudis and the Council have been put on notice of the OA's application pursuant to directions of the court (Humphreys J) given on 23 June 2021. The Council initiated proceedings in the Circuit Court (record no. 00154/2019) (**'the Circuit Court proceedings'**) in which various reliefs were sought against the OA, including a declaration that the Council hold the beneficial interest in Entry 1 on part 1(A) of folio CW25036F, which consists of a partially built road and bridge at Ballinacarrig, County Carlow, and an order for specific performance to compel the OA to execute the transfer of that folio.

7. Mr Mavroudis is a secured creditor in the bankruptcy of each of the discharged bankrupts on foot of a High Court judgment in the amount of €243,087.97, together with interests and costs, against the Snoddy-Browne partnership. The judgment was obtained by Mr Mavroudis due to non-payment of fees for architectural services rendered by him to the Snoddy-Browne partnership, and Mr Mavroudis subsequently registered a number of judgment mortgages in respect of a number of folios, one of which was the aforesaid folio CW25036F.

8. The background to the application is set out in the OA's grounding affidavit, and I will summarise it as briefly as possible. Samuel Snoddy, trading as USL Homes, entered into an agreement on 9 May 2005 (**'the 2005 agreement'**) with the Council. The OA characterises, at para. 12 of his affidavit, the 2005 agreement as "a poorly drafted document the likes of which often leads to lengthy and costly litigation if parties disagree as to the meaning of it". This statement is certainly accurate in the present case.

9. In the 2005 agreement, USL Homes undertook, in the event of a grant of planning permission for certain lands set out in the agreement, to construct the road and bridge to specifications set out in the agreement. On substantial completion of the

road and bridge, USL Homes was to deliver and the Council was to accept a deed of transfer of the developer's interest in the road and bridge. The agreement contained a convoluted clause as to how the cost of construction was to be financed:

“7. USL understands that the lands which it is proposed to develop, if successful with its planning application...are currently unzoned lands and therefore the housing element of the development is not subject to the requirements of Part V of the Planning and Development Act 2000. In the interests of equity USL Homes is prepared to accept a financial duty equivalent to the cost of meeting our Part V obligation. This financial duty will be contributed to the cost of infrastructure provision at the site and already referred to at Nos. 1 & 2 above and will be recovered against the costs of construction of bridge and roads.”

10. The OA suggests at para. 13(v) of his affidavit that the development levies and “levies arising from future applications on the land” were to be used to recover the costs of construction of the road and bridge and that the Part V equivalent contribution would be “offset by Carlow County Council in consideration of the costs incurred by USL Homes in the provision of the public infrastructure comprising the road and bridge”. This has proved a major matter of contention between the OA and the Council on one hand, and Mr Mavroudis on the other. Schedule A to the 2005 agreement provided for an agreed estimate of costs of construction in the sum of €2,375,500, with development levies payable to Carlow County Council in the sum of €1,863,750, together with a sum of €511,700 to be offset against future developments on the same lands.

11. In this regard, para. 14 of the 2005 agreement provided as follows:

“14. Development levies arising from the proposal the subject of planning reference...and levies arising from future planning applications on the Land shall be used to recover the cost of construction of the bridge and road and the Part V equivalent specific contribution shall be offset by Carlow County Council in consideration of the costs incurred by USL Homes in the provision of the public infrastructure identified above. The initial estimated costs of the road and services and the estimated development levies, land costs and part V equivalent are set out in Schedule A attached hereto.”

12. The system of development levies being used to recover the cost of construction of the road and bridge was thus set out at para. 14 of the 2005 agreement. The OA contends that the sum of €2,375,800 in credits was to be made available to USL, and that the credits were to be divided between “Fixed Credits” and “Floating Credits”. The fixed credits were set out in schedule A of the agreement as “development levies payable to Carlow County Council”, amounting to €1,835,790; a further €511,700 was “to be offset against future developments on same lands”.

13. The OA contends that proper construction of the agreement is that USL would get credit in these amounts in respect of development levies on lands developed by it for which it would otherwise have been liable. The Council would get the benefit of the road and bridge without having to fund its construction; USL would recoup its cost by not having to discharge levies on the development of adjoining lands.

14. The road and bridge are contained in Entry 1 on part 1(A) of folio CW25036F County Carlow. The parties agree that substantial completion of the road and bridge had taken place by November 2007; at that point, pursuant to para. 12 of the 2005 agreement, the road and bridge should have at that stage been transferred to the Council. This never took place. The OA’s position is that Samuel Snoddy’s legal title

in the road and bridge vested, upon Mr Snoddy's adjudication, in the OA pursuant to s.44(1) of the Act. Prior to this, Mr Snoddy had issued High Court proceedings arising out of the 2005 agreement against the Council bearing record number 2012/1900/P. Those proceedings were struck out on 24 October 2012, apparently for want of prosecution, by the High Court (Kelly J), with costs awarded to the Council.

The settlement agreement

15. The Circuit Court proceedings issued by the Council against the OA in 2019 sought an order of specific performance against the OA, asserting that the Council held the beneficial interest in Entry 1 of part 1(A) of folio CW25036F, and seeking an order of specific performance compelling the transfer of the road and bridge. The OA accepts, as a matter of law, that the Council has been the owner of the equitable interest in the road and bridge since substantial completion occurred in 2007.

16. Mr Mavroudis registered judgment mortgages against folio CW25036F on 11 November 2013 and 5 November 2015. The OA's position is that the judgment mortgages, in accordance with s.117(3) of the Land and Conveyancing Law Reform Act 2009, are "subject to any right or incumbrance affecting the judgment debtor's land, whether registered or not, at the time of its registration", and are thus subject to the beneficial interest of the Council.

17. The OA avers that he has "...engaged in protracted and ultimately successful negotiations with the Council resulting in a settlement agreement [**'the settlement agreement'**] dated 19 October 2021..." [para. 31, affidavit of 11 November 2021], and exhibits the settlement agreement together with annexed documents to his affidavit. In the recitals to the settlement agreement, the OA acknowledges "...that the Council holds the 100% beneficial interest in the Land and that the Council is entitled to be registered as the registered owner of the fee simple interest in the land" [recital

(Q)]. It was further acknowledged at recital (R) that "...the Official Assignee has indicated that Mr Snoddy does not have a *bona fide* defence to the Circuit Court proceedings and accordingly the Official Assignee does not intend entering a defence to those proceedings". The parties acknowledge and agree that "...the full amount of the fixed and floating credits have [sic] been beneficially owned by Mr Snoddy since completion of the construction in 2007 and have [sic] been available for his use since that time" [recital (S)].

18. The settlement agreement provides for the execution and delivery by the OA to the Council of a deed of transfer of the property comprised in Entry no. 1 on part 1(A) of folio 25036F of the Register of Freeholders County Carlow. The parties agree the costs due to the Council in respect of Mr Snoddy's 2012 proceedings at €150,000, and the settlement agreement provides for a set off as between those costs and the balance of the floating credits attributable under the 2005 agreement, "which set-off leaves a balancing amount in respect of the floating credits available for use by the Official Assignee of €325,096.59". On execution and delivery of the deed of transfer, this latter balance is to be compromised by the payment by the Council to the OA of the sum of €150,000 in full and final settlement of any entitlements or liabilities in relation to the floating credits.

19. The parties agree that any future amount received by the Council in respect of development levies is to be "...applied against any balance of the Fixed Credits remaining due under the 2005 agreement". [Paragraph 2.5].

20. The agreement provides for the remission by the Council to the OA of any development levies received in respect of the lands, save that the OA acknowledges the maximum amount recoverable by him from the Council in respect of fixed credits as €1,033,722.40. This sum represents 56% of the agreed fixed credits; Irish Water,

which was established pursuant to the Water Services Act 2013, is now the appropriate recipient of certain development levies previously payable to the Council. Irish Water has accepted that an appropriate percentage of the development levies to be received by it in respect of the lands is represented by a figure of 44%, credit for which levies would in turn be due to Samuel Snoddy/the OA pursuant to the 2005 agreement. The effect of the settlement agreement is that the OA acknowledges that the monetary liability payable by the Council to the OA upon receipt of development levies is limited to 56% of the total sum in respect of fixed credits in the 2005 agreement. The OA avers at para. 37 of his affidavit that he has however "...not released any claim that I on behalf of the estate may have against Irish Water and say I am entitled to rely on the acknowledgement between the Council and Irish Water [in correspondence between the Council and Irish Water as to the appropriate percentages]."

21. The settlement agreement clearly states that the Council "shall have no obligation to the Official Assignee in respect of fixed credit levy amounts not received by the Council" [para. 2.11]. In short, the Council is only obliged to remit fixed credit levy amounts to the extent that they are received, and then only to a maximum of €1,043,722.40. If the land is not developed, with the result that no development levies are received by the Council, there will be no funds remitted to the OA.

22. In a paragraph of the settlement agreement which exercised Mr Mavroudis considerably, it is stated that

"2.14. The Official Assignee shall assist the Council in any reasonable application for the removal/cancellation by the Property Registration Authority of the judgment mortgages registered by Mr David Mavroudis against the Land or otherwise a declaration or direction that such security

should be removed/cancelled is made by a judgment of the High Court or Circuit Court. In addition, the Official Assignee shall use its best endeavours to oppose any existing or future proceedings or applications, brought by Mr David Mavroudis, seeking any relief whatsoever in respect of any Judgment Mortgage(s) registered by him over the land, or otherwise claiming an interest in the Land, where such a claim concerns an interest alleged to be held by Mr Samuel Snoddy, in the land, save where to do so would constitute a breach of any Order or Direction of the High Court”.

23. Samuel Snoddy executed a trust agreement in December 2004 in which he assigned to Fergal Browne and Paul Browne each a 25% share of his beneficial interest in folio CW25036F. Mr Snoddy also assigned half of his remaining 50% beneficial interest in the folio to Thomas Snoddy. Accordingly, each of the members of the Snoddy/Browne partnership has a 25% beneficial interest in folio CW25036F. The OA therefore has to allocate any monies flowing from the credits as they are received between the four shareholders. Mr Fergal Browne, who is not a discharged bankrupt, has consented to this arrangement.

24. There are further conditions in the agreement to which it is not necessary to refer in any detail. The agreement concludes with a “condition precedent”, which provides that “...the coming into effect of the provisions of this agreement is subject to approval by order of the High Court. In the absence of such approval by the High Court this Agreement is void between the parties”. Accordingly, the present application is effectively for the approval by the High Court of the settlement agreement.

25. In this regard, the OA avers as follows at the conclusion of his grounding affidavit:

“64. I am concerned by the volume of litigation being instituted as against this office in relation to the Estate to the detriment of all of the creditors in the Estate and I also express significant concern that additional litigation is ongoing against the Discharged Bankrupts outside of the bankruptcy and indeed outside the jurisdiction of this Honourable Court and the Act. I further say and believe that as Official Assignee that I must be satisfied that there is a commercial benefit to the estate of any bankruptcy before embarking on contentious litigation. Furthermore, I say that this motion has been directed by the court on foot of representations made by Mr Mavroudis.

65. I say and believe that the settlement agreement is the best compromise for the benefit of the Estate. I say that I am confined to giving effect to the terms of the 2005 Agreement and I say that on any objective analysis, that has been accomplished in a fair and transparent manner.

66. To that end, I respectfully say that it is in the best interests of all parties that this settlement agreement is approved by this Honourable Court and that resources can be focused on the allocation of Credits and the realisation of other assets rather than defending motions that are frequently unnecessary, repetitive and/or premature.”

The affidavit of Mr Mavroudis

26. Mr Mavroudis replied to the OA’s affidavit with an affidavit sworn on 10 December 2021. This affidavit comprises a densely-typed forty-seven pages, setting out the deponent’s views at considerable length. Mr Mavroudis’ net position is expressed as follows at para. 10 of the affidavit:

“...I say that the subject asset, being Part of the lands in land folio CW25036F, should not be compromised at all, nor indeed should the asset be

transferred to Carlow County Council until full payment of the remaining sum of €2,341,386.59 is paid to the Applicant/Official Assignee for the benefit of the bankruptcy estate together with interests [sic] under the European Communities (Late Payments in Commercial Transactions) Regulations 2002 since July 2007”.

27. At para. 13 of his affidavit, Mr Mavroudis sets out, over six pages, various grounds which he contends warrant the rejection of the settlement agreement and the refusal of the reliefs sought by the OA. The remainder of his affidavit consists mainly of a paragraph by paragraph rebuttal of the points made by the OA in the grounding affidavit. At para. 135, Mr Mavroudis gives a detailed two-page summary of the reasons for his contention that “...the proposed settlement agreement gives rise to more dispute than it actually is capable of resolving...”.

Further affidavits

28. The affidavit of Mr Delaney on behalf of the Council, sworn on 12 January 2022, succinctly expresses the Council’s position. It is contended that the OA will “now receive the benefit of development levies generated from these lands, in accordance with [the 2005 agreement]...” [para. 6]...the agreement “...not only creates a significant monetary benefit in favour of the estate in bankruptcy but also removes the long-standing impasse to the construction of much needed infrastructural and housing developments in Carlow” [para. 7]. Mr Delaney avers that many of the matters raised by Mr Mavroudis in his affidavit are either “outside the remit” of the motion, or not relevant to it. He describes the contention of Mr Mavroudis “that the sum of €2,341,386.59 is owing by the Council for the benefit of the estate in bankruptcy...” as “simply not correct”. He concludes that

“11...I say that in the absence of the said Settlement Agreement being approved and effected, the Council will be forced to continue with other existing court proceedings, in order to enforce its legal rights in respect of the requisite transfer of legal ownership, having regard to its entire beneficial ownership in the aforementioned road and bridge. I say and am advised that this route would involve the incurring of substantial, further legal costs for all parties, but will yield no further income for the estate in Bankruptcy for the foreseeable future. Such an eventuality is, I say and believe and am advised, undesirable for all involved.”

29. Mr Larkin swore a further short affidavit on 14 January 2022, in which he took issue with various points made by Mr Mavroudis in his affidavit. In relation to the general approach of Mr Mavroudis, he avers as follows:

“15. Mr Mavroudis has taken the opportunity to oppose every action this office intends to take to realise a benefit for the creditors in this matter. He does so without any regard to the other creditors in the Estates. Whilst Mr Mavroudis has the security of the judgment mortgage (subject to rights affecting land), the other creditors do not and so by embarking on a course of action that is becoming very costly to defend, he is doing so at a cost ultimately to himself but also to the unsecured creditors in the Estates”.

30. Mr Mavroudis swore a further twelve-page affidavit on 1 February 2022. The affidavit takes issue with the OA’s second affidavit, and is severely critical of him in some respects. At para. 27 of the affidavit, he avers as follows:

“The Official Assignee’s mandatory duties under s.61(1) of the Bankruptcy Act 1988 as amended are to get in and realise the assets of bankrupts for the primary benefit of the bankruptcy estate creditors, and thereafter the bankrupts

themselves in a timely manner that maximises the value of those assets which in this case the Official Assignee is failing to do in leveraging the portion that Carlow County Council is on record as stating that it has no rights whatsoever to receive, but urgently requires, to compel full payment of all sums that are owed under the May 2005 contract, so as to proceed all legitimate bankruptcy creditors the entirety (100%) of sums owed to them immediately, rather than a mere fraction of same in a protracted drip feed that risks the rights of the creditors being dissipated further to potential statutory limitations that the Official Assignee may later seek to argue. I say that such an approach represents an unacceptable fraud to the best interests of all legitimate creditors in the bankruptcy estate.”

31. Mr Mavroudis concludes by seeking the dismissal of the OA’s motion and suggesting the following orders:

“(a) An order requiring Carlow County Council to immediately pay the sums due of €2,341,386.59 together with continuing interest further to the European Communities (Late Payments in Commercial Transactions) Regulations 2002 at the rate of 7% plus ECB main refinancing rate per annum from 30 days from 31 July 2007;

(b) that Carlow County Council provide unhindered, unobstructed, free access to road connectivity from the Eire Óg Link Road to the north of the road and bridge in folio CW25036F and services, as per Clauses/Conditions 10 & 20 of the May 2005 contract;

(c) and that only following the full payment of those sums that the road and bridge as delineated in red on the map exhibited in the ‘DM13’ exhibit of Dan McInerney’s Affidavit dated 28th June 2018 as is exhibited in my exhibit

‘DMSA 15’ the Official Assignee is to transfer the said road and bridge into the ownership and charge of Carlow County Council, and not at all in the event of any further non-compliance under the May 2005 contract in respect of points A and B above”.

Compromise of proceedings generally

32. Section 61 of the Bankruptcy Act 1988 as amended (**‘the Act’**) relates to the function and powers of the OA. His functions “are to get in and realise the property, to ascertain the debts and liabilities and to distribute the assets in accordance with provisions of this Act” [s.61(2)]. In s.61(3) the following powers are given to the OA “in the performance of his functions”:

“(3) In the performance of his functions the Official Assignee shall, in particular, have power -

(a) to sell the property by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in lots and for the purpose of selling land to carry out such sale by lease, sub-lease or otherwise and to sell any reversion expectant upon the determination of any such lease,

(b) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim present or future, certain or contingent, ascertained or sounding only in damages whereby the bankrupt or arranging debtor may be rendered liable,

(c) to compromise all debts and liabilities capable of resulting in debts and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between

the bankrupt or arranging debtor and any debtor and all questions in any way relating to or affecting the assets or the proceedings on such terms as may be agreed and take any security for the discharge of any debt, liability or claim, and give a complete discharge in respect thereof,

(d) to institute, continue or defend any proceedings relating to the property.”

33. Section 61(6) – the subsection invoked by the OA as the basis for the present application – and s.61(7) are as follows:

“(6) The Official Assignee may in case of doubt or difficulty seek the directions of the Court in connection with the affairs of any bankrupt or arranging debtor.

(7) The exercise by the Official Assignee of the powers conferred by this section shall be subject to the control of the Court, and any creditor or other person who in the opinion of the Court has an interest may apply to the Court in relation to the exercise or proposed exercise of those powers.”

34. The section makes clear that the OA has an independent power to compromise claims of the bankrupt, and does not require the assistance or approval of the court in this regard. The OA is certainly expected to carry out his functions independently of the courts in as far as is set out in the Act, and to exercise appropriate judgment in accordance with the powers granted to him by legislation. It has however been the practice of successive incumbents of the office of Official Assignee, since the inception of the Act, to seek on occasion the approval of the court for the compromise of matters which may be regarded as particularly difficult or controversial. Such an application provides a level of comfort for the OA. His preferred course of action may

be approved by the court or it may not; either way, he receives the imprimatur of the court for the course of action he must take. The court will normally take into account the views of any relevant party particularly affected by the proposed course of action.

35. In *Re Gibbons* [1958] IR 98, the Supreme Court acknowledged the right of the OA under pre-1988 legislation to conduct litigation and, by extension, to compromise an action for the good of the estate. As Budd J remarked at p. 103:

“...[The OA] could do anything that an ordinary litigant might do in the conduct of the action, all of which means that he might legitimately involve the estate in vast expense without further recourse to the Court. He acts as a businessman, charged with the duty of acting in the best interests of the creditors. He has the advice and assistance of counsel and solicitor. Combined with them, he is in a better position than anyone else to judge the merits of the case. If, as suggested, a compromise is to be brought before the court for approval, the Judge must rely to a very great extent on the views of the Official Assignee and his counsel, who have the most complete knowledge of the case. There is not, therefore, in most cases an obvious and compelling reason for reference back to the Court. No doubt in a case where some point of peculiar difficulty arises, it would be prudent of him to consult the Court...”

36. The application will normally be made by the OA in circumstances where he has taken all appropriate advice in relation to the legal merits of the action which he proposes to compromise, and to the practical aspects of prosecuting the litigation. One of the major factors in this latter regard is an assessment of the benefits which would likely accrue from prosecuting the litigation when measured against the cost which would be incurred in doing so. As in any litigation, a considered assessment must be

made of the factors which will inform the conclusion of the compromise that the OA can recommend to the court as being prudent in all the circumstances.

The OA's position

37. The OA submits that the court “should be slow to substitute its view for that of the Official Assignee and its advisers who have had involvement with the dispute over a significant number of years” [written submissions para. 7]. It is suggested that this approach is consistent with the views of Budd J in *Gibbons* as set out above.

38. The OA points out at para. 12 of his written submissions that Mr Mavroudis does not urge settlement on different terms, but wishes to bring about a situation where “the only acceptable compromise of the May 2005 contract is for an order of this Honourable Court to issue requiring Carlow County Council to immediately pay the full sum of €2,375,000...”, as per para. 67 of Mavroudis’ affidavit of 10 December 2021.

39. The OA submits that the burden for Mr Mavroudis to dissuade the court from approving the settlement agreement is “...an extremely high one in circumstances where he not only has to assert that significant sums can be recovered on a quantum meruit basis or similar, but also demonstrate how that is to occur when it is simply not what the 2005 agreement provides for. The position is complicated by the fact that the agreement dates from 17 years ago and nearly 12 years prior to the bankruptcy of Mr Snoddy” [para. 15 written submissions].

40. At para. 25 of his written submissions, the OA sets out “the following obvious difficulties” with the litigation which would be necessary to deliver Mr Mavroudis’ desired outcome:

“(i) The Official Assignee would have to rescind a 17 year old contract where public infrastructure had been built and planning permission obtained on the undertaking that it would be built;

(ii) If the contract was rescinded for non-payment – which is unlikely having regard to its overall purpose – the Official Assignee would have ownership of a Folio containing a road and a bridge;

(iii) He has to enforce a contract where payment was conditional on Carlow County Council obtaining the Development Levies to pay the sums due. By way of the terms of Settlement they are now going to pay 56% of the value of the same Development Levies. The claim for the other 44% is left open as against Irish Water.

(iv) Prior proceedings had been taken by the Bankrupt against Carlow County Council in relation to that contract and dismissed for want of prosecution on 24 October 2012;

(v) Alternatively, the Official Assignee could, as appears to be suggested by Mr Mavroudis, endeavour to recover a contract debt that was well in excess of six years old at the date of adjudication.

(vi) It is noteworthy that Mr Mavroudis himself at paragraph 104(a) suggests the 2005 agreement is *ultra vires* the County Council, without specifying why. This would mean the action would have to be pursued as a *quasi-contract* action or as being based on a representation.”

41. The OA’s view is that the settlement agreement is the best compromise available to the OA, arrived at after protracted and difficult negotiations with the Council. The net effect of the agreement is that the Council will pay the sum of €150,000, set off costs of the abandoned 2012 proceedings against the “floating

credits”, and will pay up to a maximum of €1,043,722.40 as development levies from other parties become payable to the Council. The OA contends that “this is not a situation where there is another immediately obvious way of recovering any sums at all which does not involve litigation of an extremely difficult nature” [written submissions para. 28].

42. The OA submits that any prejudice to Mr Mavroudis is “minimal”. He is a secured creditor on more than one folio, and “...it is anticipated that the bulk of all or any sums due to him will be paid out on foot of his judgment mortgage over folio CW1798F” [written submissions para. 31]. The amount to be paid is to be determined in the second issue (“the judgment mortgage value application”) in this judgment.

The Council’s position

43. The Council made brief written submissions which supported the OA’s position. Its position was expressed at para. 20 of the written submissions as follows:

“The setting aside of the Settlement Agreement will compel the Council to advance its proceedings in the Circuit Court where it seeks the transfer of the legal interest in the Road and Bridge. It is noteworthy, at this juncture to make the following observations:

- (a) All parties agree that the 2005 agreement was entered into between Mr Snoddy and the Council.
- (b) All parties agree that Mr Snoddy constructed the Road and Bridge.
- (c) All parties agree that Mr Snoddy obtained the benefit of the Credits.
- (d) All parties agree that the Council were entitled to the transfer of the legal interest in the Road and Bridge in or about 2007.”

44. The written submissions conclude by reiterating that, if the settlement agreement is not approved, the Council will be forced to proceed with the Circuit

Court proceedings, which will incur additional and unnecessary costs to both the Council and the estate in bankruptcy. It is contended that "...[i]t is the shared view of the Council and the Official Assignee that the Council is likely to succeed in its case. This eventuality is likely to result in another Order for Costs against the Estate in Bankruptcy which the Council will be entitled to offset against any monies which may fall due to the Bankruptcy Estate under the 2005 agreement. If the Official Assignee is forced to seek the enforcement of the 2005 agreement it is potentially barred from doing so at this remove".

Mr Mavroudis' position

45. The essential disagreement between the Council and the OA on the one hand, and Mr Mavroudis on the other, derives from Mr Mavroudis' view that the 2005 contract was a "'fixed price'/'lump sum' 'design and build contract' under which the discharged bankrupt was to construct the road and bridge for a pre-determined price, but not to finance the works..." [para. 18 written submissions]. Mr Mavroudis is of the view that this is the proper interpretation of the contract generally, and clause 14 in particular. He considers that, Mr Snoddy having carried out the works, he is entitled to be paid the full contractual price, and is not required to receive payment by means of a "drip feed" of development levies payable at some uncertain time in the future. As he puts it at para. 24 of his written submissions,

"Clause 14 merely facilitated the parties to expediently offset what would in the normal course of events be two large sets of mutually occurring obligations, which circumstances did not occur in the aftermath of the 2008 crisis, from which the Carlow property market has still not fully recovered. However, such events are specifically excluded from the risks that the

discharged Bankrupt was to own under clause 17, meaning that the Council are fully responsible for same”.

46. Mr Mavroudis fundamentally disputes the proposition that the equitable interest in the road and bridge passed to the Council in November 2007. He argues that s.52 of the Land and Conveyancing Law Reform Act 2009 (**‘the 2009 Act’**), which provides that the entire beneficial interest passes to a purchaser on the making of a contract for the sale of land, does not apply to the present circumstances as the contract pre-dates the coming into force of that section. Mr Mavroudis contends that where the Council has only partially paid the consideration due under the contract, its rights are proportionate only to the consideration actually discharged, and that where the Council has breached the contract, it can be rescinded pursuant to s.52(2)(c) and (d) of the 2009 Act.

47. In his lengthy submissions, Mr Mavroudis makes a number of points in relation to the ways in which he alleges that the Council are in breach of contract, and addresses a number of matters which he maintains should result in the compromise being rejected, with the inevitable result that the Circuit Court proceedings of the Council against the OA would proceed, or alternatively the OA would launch separate proceedings against the Council.

Analysis and conclusions

48. In approaching the question of whether or not the settlement should be approved, the court is mindful of the comments of Budd J in *re Gibbons*. The settlement concluded with the Council is recommended by the OA after an exhaustive examination of the merits of the issue and the prospects of success if the Circuit Court proceedings were to be defended or separate proceedings issued by the OA on behalf of the creditors. The settlement itself has been the subject of protracted negotiation

with the Council. It can be said with some justice that the OA and his legal advisers “have the most complete knowledge of the case”, and that the court should be slow to “second-guess” the assessment of the OA, which has been made in the interests of all the creditors, and bearing in mind such pragmatic factors as the exposure of the estates of the discharged bankrupts to costs in the event that the OA proceeds with the litigation and is unsuccessful, the ability of the estates to fund any such litigation, and the general interest of procuring an outcome which provides some certainty and the likelihood of an income stream which will provide funds for the general body of creditors.

49. Such applications are often made by the OA without the court having the benefit of an opposing view. In the present case, Mr Mavroudis has, both in person and in print, eloquently set out his views at considerable length as to why the settlement should be rejected. Although he does not posit a roadmap as to how the matter would proceed, the logical conclusion from his submissions is that the OA should fight the issues with the Council in whatever forum the litigation would inhabit. Mr Mavroudis does not have regard in his submissions to the cost of doing so; he is simply of the view that the correct interpretation of the 2005 agreement is that the Council is obliged to pay Mr Snoddy the sum of €2,375,500 for the works that Mr Snoddy completed in 2007, and that the interpretation that the Council is obliged only to transfer to the OA monies received in respect of development levies to a certain maximum value is simply wrong.

50. While Mr Mavroudis made many criticisms of the settlement agreement, it seems to me that this central issue is critical to the question of whether the settlement should be approved. If Mr Mavroudis is right, and the correct view of the 2005 agreement is that it was a “design and build” contract which simply required Mr

Snoddy to be paid in full for the completed works, it might well be that the proposed settlement could be regarded as an unacceptable compromise.

51. The clear view of the OA and the Council, as expressed in the settlement agreement, is that the 2005 agreement provided only for the provision of fixed and floating credits to Mr Snoddy, and the settlement agreement provides for payment to the OA of development levies corresponding to the fixed credits as they are paid to the Council. The settlement seeks to give effect to the 2005 agreement in providing for payment of fixed credit amounts as they are received by the Council, and compromise of the liability to pay floating credits. If the settlement is not implemented, the Council's intention is to proceed with the Circuit Court proceedings for a declaration that the Council holds the beneficial interest in the road and bridge, and an order of specific performance compelling the OA to execute the transfer of folio CW25036F. The OA's view is that there is no defence to these proceedings.

52. The 2005 agreement, and particularly clauses 7 and 14 set out at paras. 9 and 11 respectively above, is not a masterpiece of drafting, to put it mildly. Paragraph 7 in particular is unclear and confusing. However, in my view it is tolerably clear from the agreement that what was envisaged was that the "Part V equivalent specific contribution" was to be "offset by Carlow County Council in consideration of the costs incurred by USL Homes in the provision of the public infrastructure identified above". Development levies and "levies arising from future planning applications on the land" were to be used "to recover the cost of construction of the bridge and road...". The road and bridge were to be transferred to the Council on substantial completion.

53. In essence, USL Homes agreed to fund the infrastructure required for the development; it was prepared to accept a "financial duty" which would be "recovered

against the costs of construction of the bridge and roads”. Presumably in the development climate which prevailed in 2005, USL Homes considered this a worthwhile investment which it would recoup if its planning applications for substantial development on the adjoining lands were successful.

54. In the 2012 proceedings entitled “The High Court, Commercial, Record no. 2012/1900P between Samuel Snoddy trading as USL Homes plaintiff and Carlow County Council defendant”, Mr Snoddy sought damages against the Council for what he alleged was breach of a representation to him by the Council that it would construct a separate roadway together with an adjoining roundabout within a certain timeframe which would join the roadway constructed by him “...thereby making the filling station, hotel, residential development, and remaining lands accessible from the main Wexford Road, Carlow...” [para. 5 statement of claim]. Mr Snoddy argued that he entered into the 2005 agreement, which he characterises at para. 4 of the statement of claim as a “legally binding written agreement”, on the basis of this representation, which he alleged was breached by the Council.

55. A full defence was entered by the Council, which included a preliminary objection that the claim was statute-barred. By an order of 24 October 2012, the High Court (Kelly J, as he then was) struck out the plaintiff’s claim for breach of an “unless” order providing for the furnishing by Mr Snoddy of witness statements.

56. The pleadings in that action do not suggest that there was any issue as to how Mr Snoddy was to be paid for construction of the road and bridge. However, in the Circuit Court proceedings, Mr Snoddy swore a short affidavit on 14 October 2021 with a view to clarifying the amount of credits of which he had availed under the 2005 agreement; he had in fact used a credit in the sum of €36,613.41 “in respect of three units I developed at Rosebury Hill”. The fixed credits in the 2005 agreement

accordingly were to be reduced by this amount. At para. 2 of his affidavit, Mr Snoddy averred as follows: -

“2. I say that I entered into an agreement with Carlow County Council in 2005 **(the 2005 agreement)** wherein it was agreed, *inter alia*, that I would construct a road and bridge in the area of Ballincarrig, Carlow as defined in the 2005 agreement. The road and bridge is now comprised in entry no. 1 plan BPPV1 on Part 1A on folio CW25036F Co. Carlow. In return, the Council contracted that it would make available development levy credits (**‘the credits’**) to be utilised by me in accordance with the 2005 agreement and as subsequently clarified by the Council and I in 2006”.

57. It is clear from this paragraph that Mr Snoddy, the contracting party to the 2005 agreement with the Council, shares the view of the Council and the OA that he was to be repaid for the construction of the road and bridge by the allocation of development levy credits, part of which he in fact utilised for his development at Rosebury Hill.

58. In circumstances where both of the contracting parties to the 2005 agreement are of the view that this is the correct interpretation of the 2005 agreement, it is very difficult to see how any case could be made on a “design and build” basis or a quantum meruit basis. It seems to me that the 2005 agreement, while not very well expressed, would be likely to be viewed by a court as bearing the interpretation placed on it by the Council, Mr Snoddy and the OA.

59. The proposed settlement seeks to give effect to the 2005 agreement in a pragmatic way. It will provide the sum of €150,000 to the OA, and hopefully a stream of income as the “fixed credit levy amounts” as defined in the settlement are paid over

to the OA. It will avoid the need for substantial legal costs to be incurred, and the exposure to a liability for costs in the event that costs are awarded against the OA.

60. It does not seem to me that the Council relies on the provisions of s.52 of the 2009 Act to establish that the 2005 agreement granted it a beneficial interest in the road and bridge. The terms of the agreement itself provided that USL Homes was obliged to transfer the property “on substantial completion of the roads and service” [clause 12], which the parties agree took place in November 2007. The Circuit Court proceedings seek to compel performance of this obligation, and it is difficult to see how the Council would not be entitled to such an order. The agreement clearly envisaged that the beneficial interest in the land would pass to the Council on substantial completion. Section 52(2)(d) provides in any event that the general principle that “...the entire beneficial interest passes to the purchaser on the making, after the commencement of this chapter, of an enforceable contract for the sale or other disposition of land” does not affect any provision to the contrary in the contract.

61. Likewise, the settlement agreement does not interfere with the judgment mortgages registered by Mr Mavroudis. Pursuant to s.117(3) of the 2009 Act, a judgment mortgage is “...subject to any right or incumbrance affecting the judgment debtor’s land, whether registered or not, at the time of its registration”. In this regard, see the judgment of Keane J in *Larionov Foundation v Leo Prendergast & Sons (Engineering) Limited* [2017] IEHC 192 at paras. 37 to 42. It seems to me that the view that the beneficial interest in lands resides in the Council is one more likely to be taken by a court than the view of Mr Mavroudis that the interest does not pass to the Council until the lands are paid for in full.

62. I have not dealt with all of the criticisms made by Mr Mavroudis of the settlement in his affidavits and submissions, as I do not consider it necessary to do so.

Mr Mavroudis is not a party to the Circuit Court proceedings, nor does he have the *locus standi* to prosecute proceedings against the Council with a view to obtaining the reliefs which he maintains should be sought. The rejection of the settlement agreement will entail considerable cost and expense, and delay to the resolution of the issues surrounding the estates of the discharged bankrupts. Mr Mavroudis is not at risk of incurring these costs. The chances of success, if the OA were to proceed along the lines advocated by Mr Mavroudis, are slim, particularly as none of the parties actually involved in the 2005 agreement considers that the agreement should be interpreted in the manner contended for by Mr Mavroudis.

63. In my view, the settlement agreement is a pragmatic solution which seeks to give effect, in as far as possible, to the 2005 agreement. It keeps the legal costs to a minimum. It produces tangible benefits for the estates of the discharged bankrupts. It sets at nought the risk of substantial liabilities to costs being incurred by the OA if his defence of the Circuit Court proceedings, or prosecution of other proceedings, were unsuccessful. The factors set out in the OA's submissions at para. 40 above, which would militate against a successful pursuit of Mr Mavroudis' objectives, would be avoided. The settlement agreement may not be perfect, or address all concerns, but it seems to me to be in the best interests of the creditors and the estates of the discharged bankrupts.

64. For the reasons set out above, I propose to make an order in the terms set out at para. 1 of the OA's notice of motion.

2. THE JUDGMENT MORTGAGE VALUE APPLICATION

65. The second application before me relates to an application by the OA for directions of the court pursuant to s.61(6) in relation to the sum secured by judgment mortgages registered by Mr Mavroudis on folio 1789F County Carlow. The notice of

motion contends that the appropriate sum is €290,915.60, although the OA accepted that this figure would now be somewhat higher for reasons that I shall explain below; Mr Mavroudis contends for a very much larger figure, providing a detailed schedule in his affidavit of 11 March 2022 which contends for a figure of €934,918.57. Essentially, the OA requires clarity on the principles which are to apply on the calculation of the sum secured by the judgment mortgage.

66. Affidavits were submitted by the OA, Mr Mavroudis and Fergal Browne, the only one of the Snoddy Browne partners who is not a discharged bankrupt and who is a notice party to the application. The OA and Mr Browne were represented by counsel at the hearing; Mr Mavroudis represented himself. The OA and Mr Mavroudis presented detailed written submissions.

67. An order for the sale of the lands comprised in folio 1789F has been approved in Circuit Court proceedings bearing record no. 2017/0025A in the County of Carlow. There is an issue as to the priority of Mr Mavroudis' judgment mortgages over an alleged entitlement on the part of Ms Mary Keenan to be built a new home on the folio, or to receive payment in lieu. This issue is the subject of the third application "the Circuit Court appeal". This issue, and the issue of the value of Mr Mavroudis' judgment mortgages, have to be clarified before the sale can proceed.

68. Counsel for the OA identified two issues to be resolved by the court: firstly, the scope of the judgment mortgages, *i.e.*, what liabilities to Mr Mavroudis do the judgment mortgages encompass? Secondly, the issue of the period over which interest would run, and the possible application of the Statute of Limitations to the interest claimed by Mr Mavroudis.

Background

69. In order to deal with the issue of the value of the judgement mortgages, it is necessary to examine the circumstances in which Mr Mavroudis obtained judgment against the Snoddy Browne partnership.

70. Mr Mavroudis was appointed as an architect by the partnership, and carried out works in that capacity. There was a dispute between the parties as to the fees owed to Mr Mavroudis, who referred the dispute to arbitration on 29 October 2010. Mr David O’Leary (**‘the arbitrator’**) was appointed as arbitrator, and ultimately issued an “Interim Award no. 1” on 1 August 2012. In the award, the arbitrator determined that there were outstanding fees due to Mr Mavroudis of €155,841.65. The arbitrator permitted a claim for interest pursuant to the Late Payments in Commercial Transactions Regulations 2002 (**‘the late payment regulations’**) in the sum of €12,420.00 giving a total payable of €168,261.65 exclusive of VAT. The arbitrator also stated as follows:

“...(x) I rule and direct that interest shall apply at the rate of 8% simple on the amount awarded that remains outstanding for 30 calendar days after the date of publication of this Interim Award no. 1.

In summary the Respondents shall pay the Claimant the sum of €168,261.65 plus interest as applicable under (x).

All figures are exclusive of value added tax which shall be paid by the Respondents at the applicable rate.

This is my final award on matters the subject of stage 1 of the hearing before me except as to costs.

I hereby reserve for stage 2 of the hearing the question of damages for breach of copyright and quantum under the counterclaim where applicable.

I hereby reserve the issue of costs of the reference to Arbitration and this award to my Final Award pending completion of stage 2 of the hearing”.

71. The OA initially approached the issue of interest on the basis that it was governed by the provisions of the Courts Acts, with the result that the figure of 8% would have been reduced to 2% in 2017. However, at the hearing before me, counsel for the OA very properly accepted that this was an error, and that the reference to interest in the arbitrator’s award and the subsequent order of the High Court giving effect to that award was to interest in accordance with s.18 of the Arbitration Act 2010, so that the rate of 8% was to apply consistently in accordance with the arbitrator’s award.

72. By a letter of 7 January 2013, the arbitrator amended his award to correct an error, with the result that the claimant was deemed entitled to a sum of €41,790.85, rather than €12,420.00, in respect of interest. The sum payable with interest was therefore amended to €197,632.50, this figure to be subject to the interest provision at para. (x) of the award, *i.e.*, the 8% rate.

73. By an order of 26 June 2013, the High Court (Laffoy J) refused an application by the Snoddy Browne partnership for various orders relating to the arbitrator’s award. The court ordered that the partnership “do pay to the respondent their costs of the proceedings herein when taxed and ascertained”, Mr Mavroudis being the respondent. The record number of those proceedings was 2013/54MCA.

74. In subsequent proceedings [record no. 2013/68MCA] by Mr Mavroudis to enforce the arbitrator’s award, the High Court (Laffoy J) ordered on 1 July 2013 that Mr Mavroudis recover “the sum of €243,087.97 together with interest at 8% on the sum of €197,632.50 from the 5th January 2013 and that the Respondents do pay to the

Applicant his costs of the proceedings herein when taxed and ascertained in default of agreement...”.

75. The orders of 1 July 2013 and 26 June 2013 were registered by Mr Mavroudis against folio 1789F as judgment mortgages on 11 November 2013 and 5 November 2015 respectively. The folio notes that the judgments are registered against a number of other folios, including folio CW25036F, the folio at the heart of the settlement claim.

76. At an exhibit to para. 21 of the affidavit of Mr Mavroudis sworn on 11 March 2022 in the present application, Mr Mavroudis sets out his tabulation of what he contends is comprised in the judgment mortgages. This comes to a total of €934,918.57, and appears to include all of the costs incurred by Mr Mavroudis in the arbitration, and an array of other costs which Mr Mavroudis asserts that he incurred, together with calculations of interest under the late payment regulations.

The OA’s position

77. The OA contends that the order of Laffoy J of 1 July 2013, which is registered as a judgment mortgage against folio 1789F by Mr Mavroudis, comprises a sum of €243,087.97, and interest of 8% on the VAT exclusive sum of €197,632.50. He contends that the application of s.11(6)(b) of the statute of limitations means that the 8% interest is capped at six years. In a letter of 2 February 2022, the solicitors for the OA indicated that he would agree a figure of €19,816.61 in respect of Mr Mavroudis’ solicitor’s costs of defending the High Court proceedings 2013/54MCA, and of prosecuting the application to confirm the arbitrator’s award (2013/68MCA), without the need for taxation. In submissions to the court, counsel for the OA accepted that these costs attracted interest, but only at the level of 2% - rather than the rate contended for by Mr Mavroudis pursuant to the late payment regulations – as

provided for in s.30 of the Courts and Courts Officers Act 2002. Although it was not argued, it may be that the six-year limitation in s.11(6)(b) of the Statute of Limitations applies to this claim also.

78. The arbitrator gave his final award on 18 October 2013, and awarded Mr Mavroudis his costs of the arbitration. However, this award post-dates the order of Laffoy J of 1 July 2013. The OA submits that these costs could not be included in the order of the High Court when the interim award of the arbitrator of 1 August 2012 had expressly reserved the costs of the arbitration to his final award. The OA relies on s.23(1) of the Arbitration Act 2010, which is as follows:

“(1) An award (other than an award within the meaning of section 25) made by an arbitral tribunal under an arbitration agreement shall be enforceable in the State either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect and where leave is given, judgment may be entered in terms of the award.”

79. As the OA submits, the phrase “in terms of the award” in the present context refers to the interim award of the arbitrator – not the subsequent final award. The OA contends that, even if the costs of the arbitration had somehow been included in the order of 1 July 2013, they have not been agreed or taxed and, it is submitted, cannot therefore form part of the secured sum. Any further sums from other proceedings are not agreed or taxed, and in any event not subject to the High Court order and therefore not part of the secured sum.

Mr Mavroudis’ position

80. Mr Mavroudis contends that the order of 1 July 2013 must be construed as providing for the costs of the arbitration. As he put it in oral submissions, “...it was agreed by the parties that it was all the one arbitration. There was no distinction that

the award that was made, that was published in December 2012 was a separate arbitration award to that that was made in October 2013...” [day 2, p.45, lines 13 to 17]. He submits that “...the arbitration costs are included in the judgment sum on foot of being linked proceedings with the interim award...” [day 2, p.46, lines 22 to 24].

81. Mr Mavroudis submits that, where the order of Laffoy J states that “...the respondents do pay to the applicant his costs of the proceedings herein when taxed and ascertained in default of agreement...”, this must be deemed to be a reference to the costs of the arbitration. It was submitted that Laffoy J was not precluded from doing so “...because she wasn’t interfering with the arbitrator, the subject of the arbitration award” [day 2, p.52, lines 12 to 16]. Mr Mavroudis contended that “...from day one the parties have effectively agreed that the results of the arbitration were the one arbitration. So that even where costs were not directly dealt with in the interim award, they are retrospectively includable and provisioned for in the order dated 1 July 2013 on that basis...” [day 2, p.56, line 26 to p.57, line 2].

82. Mr Mavroudis contended that the Statute of Limitations did not apply to the calculation of interest. He contends that any limitation would be at odds with s.18 of the Arbitration Act 2010, which gives the arbitrator power to award interest “in respect of any period up to date of payment...”. He also suggests that the late payment regulations do not provide for a limitation, and must take precedence over a domestic statute.

Mr Browne’s position

83. Counsel on behalf of Mr Fergal Browne confirmed to the court that Mr Browne accepted the OA’s position that a judgment mortgage could only include the sums set out in the judgment, and that the applicable judgment was that arising from the order of Laffoy J of 1 July 2013. Mr Browne also agreed that the appropriate rate

of interest was a flat simple interest rate of 8% in accordance with s.18 of the Arbitration Act 2010. Mr Browne accepts the OA's position that Mr Mavroudis' costs of the application cannot be regarded as part of the judgment mortgage, as they were not awarded by the arbitrator in advance of the order of 1 July 2013, nor are they taxed or agreed, which Mr Browne accepts would be necessary for inclusion in the amount secured by the judgment mortgage.

84. It was also submitted that, the arbitrator having provided for interest on a certain basis, and that award having been given effect in the judgment of the court, the application or otherwise of interest under late payments regulations does not arise.

Analysis and conclusion

85. It is clear that the arbitrator, in his interim award as amended, awarded a sum of €41,790.85 "pursuant to the Late Payments in Commercial Transactions Regulations 2002" in relation to the sum for outstanding fees. Separately, he awarded 8% interest on the amount awarded. In doing so, he clearly applied a rate of interest in accordance with his power to do so pursuant to s.18 of the Arbitration Act 2010. The High Court, in its order of 1 July 2013, duly gave effect to these awards.

86. The arbitrator in the interim award specifically reserved the costs of the arbitration to his final award, "pending completion of stage two of the hearing". This award was not made until 18 October 2013. This is a common procedure among arbitrators; on making a final award, an arbitrator is *functus officio*, and arbitrators will often adjourn the question of costs after making a substantive award to give the parties an opportunity to consider their positions and make submissions if necessary before making the final award. The High Court cannot anticipate an arbitrator's award of costs. It can only give effect to an existing award made by the arbitrator; this is what the High Court did in making the order of 1 July 2013. There is simply no basis

upon which that order can be regarded as incorporating the subsequent award of costs by the arbitrator. A separate application would have to have been made after the final award to have that award recognised in a court order.

87. Further, while the orders of 26 June 2013 and 1 July 2013 in proceedings 2013/54MCA and 2013/68MCA grant Mr Mavroudis his “costs of the proceedings”, it is clearly the costs of those named proceedings that are awarded – not the costs subsequently awarded by the arbitrator in the final award.

88. As regards the sum of €19,816.61 agreed as due to the solicitors for Mr Mavroudis, it is clear that, pursuant to s.30(1)(a) and (b) of the Courts and Courts Officers Act, 2002, the applicable rate of interest on costs awarded to a party is 2%, payable from the date the quantum of the costs was agreed until the amount is paid. The correspondence suggests that the sum appears to have been agreed by letter of the solicitors for the OA of 2 February 2022, so one would have thought it unlikely that a “six-year cap” would arise, even if, as a matter of law, such a cap is applicable.

89. As regards the statute of limitations, the applicable subsection is s.11(6)(b):
“No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due”.

90. The award of interest by the arbitrator, as we have seen, was made under the Arbitration Act. The late payments regulations have no application to the award by the arbitrator of 8% interest, which was made under a completely separate statutory provision. It follows that the interaction or relationship, if any, between the statute of limitations and the late payments regulations has no application in the present case. The issue of the primacy of EU law over domestic law simply does not arise.

91. The OA contends, as we have seen, that the 8% interest awarded by the arbitrator and contained in the order of Laffoy J of 1 July 2013 is capped at six years

due to the provisions of s.11(6)(b). In *Lowsley v Forbes* [1999] 1 AC 329, the House of Lords held that the equivalent provision in the UK – s.24(2) of the Limitation Act 1980 – applied a six-year cap to recovery of interest on judgments. As Lord Lloyd of Berwick, in a judgment approved by all of the members of the court, stated at p. 342, para. F:

“...There would seem to be no reason why the relevant words in section 24(2) ‘no arrears of interest...shall be recovered’ should not be given their ordinary meaning, so as to bar execution after six years in respect of *all* judgments. It is what the words say. ‘Recovered’ has a broad meaning. It is not confined to recovery by fresh action”. [Emphasis in original].

92. The UK courts appear to have distinguished between an action on a judgment and a creditor who enforces his rights under an equitable charge created by a charging order. As Irvine J (as she then was), in *Ulster Investment Bank Limited v Rockrohan Estate Limited* [2009] IEHC 4, pointed out – having reviewed the comments on the correct interpretation of the decision in *Lowsley* of Millett LJ in *Ezekiel v Erakpo* [1997] 1 WLR 340 at 350, and Lloyd LJ in *Yorkshire Bank Finance Limited v Mulhall* [2008] EWCA Civ 1156 at para. 24 – “...*Lowsley* is only authority for the proposition that where a judgment debt becomes the basis for a charging order that the charging order can only secure six years judgment interest on the relevant lands...” [p.38-39 of judgment].

93. Although obiter, I agree with the view of *Lowsley* expressed by Irvine J. It seems to me that s.11(6)(b) must be given its ordinary meaning such that the security of Mr Mavroudis is limited to six years’ interest from the date of judgment.

Conclusions

94. It follows from the analysis of the issues at paras. 85 to 93 above that the positions on the various issues put forward by the OA and summarised at paras. 77 to 79 above are correct, and govern the calculation of the sums covered by the judgment mortgages. For the avoidance of doubt, I accept the submission that costs which are not taxed, ascertained or agreed, cannot form part of the secured sum.

95. As the principles governing the calculation of the sums covering the judgment mortgages are now clear, they can readily be implemented by the parties, who can agree the appropriate sums. I will grant liberty to apply in the event of any unforeseen difficulty.

96. I am conscious that, as a result of the principles set out above, many claims made by Mr Mavroudis do not come within the security of the judgment mortgages. In particular, the costs order made by the arbitrator in favour of Mr Mavroudis in October 2013 is not the subject of security. It is of course open to Mr Mavroudis to prove an unsecured claim in the estates of the discharged bankrupts, although whether such a claim would bear fruit in terms of a distribution by the OA remains to be seen. While I have some sympathy for Mr Mavroudis in this regard, the realisation and distribution by the OA of the assets of the estates of bankrupts must be effected in accordance with established legal principles and in accordance with the OA's statutory duty.

97. In response to the OA's motion, I will make orders directing that:

(1) The amounts secured by judgment mortgages registered by Mr Mavroudis on folio 1789F County Carlow are as follows:

(a) The sum of €243,087.97;

(b) interest of 8% on the sum of €197,632.50 for a period of six years from 1 July 2013;

(c) the sum of €19,816.61 in respect of the costs of proceedings 2013 54MCA and 2013 68MCA;

(d) interest of 2% on the VAT exclusive portion of the said costs from 2 February 2022;

(e) less the instalments already paid to Mr Mavroudis of €41,240.

(2) The parties are to agree the quantum of the appropriate amounts and shall have liberty to apply in the event of difficulty.

98. I will indicate how I propose to deal with costs in relation to each of the three applications at the end of this judgment.

3. THE CIRCUIT APPEAL

99. In relation to this matter, while there was one central issue which all parties agreed had to be decided by the court, there was otherwise wholesale disagreement as to what issues were before the court, and what the court must decide. Indeed, almost half the time for submissions on the matter was spent by the court trying to get to the bottom of precisely what it was being asked to do and on what basis, with the various parties either disagreeing between themselves in this regard, or being unsure as to what exactly was properly before the court.

100. In an effort to untangle the mess, I propose to set out the background to the events in the Circuit Court, and the documentation underpinning the appeal. I will also set out in some detail the background relating to the issue which all parties are agreed must be determined by this Court, although, in truth, it does not appear to be properly the subject of an appeal before this Court.

The Circuit Court proceeding

101. As we have seen, Mr Mavroudis obtained orders of the High Court on 26 June 2013 and 1 July 2013 granting him judgment in the terms I have set out above. By a

“civil bill for well-charging relief” issued on 20 February 2017 in the Circuit Court, South Eastern Circuit, County of Carlow, record no. 00025/2017, Mr Mavroudis sought various reliefs against the four members of the Snoddy Browne partnership. Primarily, he sought declarations that his judgment mortgages stood well charged against the interest of the defendants in folio CW1789F and folio CW25036F of the Register of Freeholders of the County of Carlow. He sought a further declaration that the judgment mortgages stood well charged as against the interest of the third defendant – Fergal Browne – in folios CW22135F and CW26546F of the Register of Freeholders of the County of Carlow. Mr Mavroudis sought the usual order that the defendants make immediate payment of the sums the subject of the judgment mortgages and that, in default of payment, the judgment mortgages “be enforced by the sale of the defendants’ interest in parts of folio CW1789F..., the defendants ‘interest in the said lands comprised in folio CW25036F...and the third named defendant’s interest in the properties comprised in folios CW22135F and CW26546F...”. Mr Mavroudis also sought an order that “all necessary accounts be taken, enquires had and directions given”. It is of some note that Mr Mavroudis was at this point represented by solicitor and counsel.

102. The then incumbent of the office of Official Assignee, Christopher Lehane, became involved on behalf of the first and second defendants, Sam Snoddy and Tom Snoddy, who by that stage had been adjudicated bankrupt. There were some further procedural steps which do not concern us for present purposes. Ultimately, on 19 June 2019, an order was made by the Circuit Court that there be “an order for the sale of the Defendant’s [sic] interest in part of folio CW1789F plan DA17V”, and an undertaking that Mr Mavroudis would furnish a deed of discharge in relation to his

judgment mortgage to allow for the sale to take place. Mr Mavroudis was awarded the costs of that application.

103. Ultimately, by an order of the County Registrar for the County of Carlow of 14 September 2021, it was ordered that the case be entered for hearing on 20 October 2021 at Carlow Circuit Court “for the purpose only of approving the sale of lands, currently before this Honourable Court”. The order goes on to state as follows:

“...The remainder of this case to be adjourned as so ordered by the order of Judge James McCourt dated 24th June 2021”. No further indication is given in the order as to exactly what issues were being adjourned, nor does this Court have a copy of the order of His Honour Judge James McCourt of 24 June 2021.

104. The matter duly came before the Circuit Court (Her Honour Judge Alice Doyle) on 20 October 2021. The order of that date expresses the proceedings as “coming before the Court this day for an order to approve the sale of the lands at Eire Og Link Road, Ballincarrig, Quinagh, Carlow”. The curial part of the order is as follows:

“THE COURT DOTH ORDER

1. That the offer of the sale of lands approx. 2.07Ha at Eire Og Link Road, Ballincarrig, Quinagh, Carlow Folio No. CW1789F be APPROVED.
2. Direct the Official Assignee deliver to the Plaintiff a copy of the Contract of Sale and all other documents set out in the Contract within 48 hours.
3. That execution hereon be stayed for a period of ten days from this date. In the event of an appeal to the High Court, such stay to continue pending determination of said appeal should same be lodged.”

105. In his affidavit grounding the present appeal, Mr Mavroudis states that the subject of the appeal is the order of Judge Doyle, “approving the sale of Plan No.

DA17V, Land Folio CW1789F sale as per the conditions set out in a contract of sale dated 19th October 2021...”. At para. 41 of his affidavit, Mr Mavroudis avers that, at the hearing before Judge Doyle, he “...had no opportunity to review the [contract] dated the previous day on 19th October 2021, and Judge Doyle did not have time to conduct in-depth review of the sale documents where the matter came before her for hearing on the basis that all details of the sale had been agreed between the parties beforehand, which they had not. Therefore Judge Doyle made her Order approving the sale, but made provision in her Order for me to obtain a copy of the contract and all documents referred to in same and appeal her Order if I was dissatisfied with their content, which is what I have done”.

106. In his affidavit, Mr Mavroudis goes on to express objections to both the order of the Circuit Court of 20 October 2021, and the contract with which he was subsequently presented by the OA.

107. In his written submissions to this Court, Mr Mavroudis states that “...[w]hen the matter came before Judge Alice Doyle on 20 October 2021 for approval, Judge Doyle was entirely unaware that the Official Assignee was discharging significant sums to Mary Keenan from the sold lands ahead of my judgment mortgage securities...[a]t the aforementioned Court date, the appellant requested that the judge review the provisions relating to Mary Keenan...” [Paragraphs 15-16 written submissions]. The position of Mr Mavroudis is that the court decided to approve the contract, but give him an opportunity to appeal against the order approving the contract if there were terms in it to which he objected.

The contract

108. Mr Mavroudis exhibits to his affidavit a copy of the contract with which he was presented. The vendors are the OA in respect of the estates of Samuel Snoddy,

Thomas Snoddy and Paul Browne. Mr Fergal Browne in his own capacity is the other vendor. The purchase price is expressed to be €600,000. The land the subject of the contract is described as follows:

“ALL THAT AND THOSE part of the subject property comprised in folio 1789F of the Register County Carlow consisting of 5.5 acres or thereabouts statute measure and identified as plan DAI7V on the said Folio and for the avoidance of doubt is outlined with a red verge line on the attached map titled **‘Map 1’**.

TOGETHER WITH the right to pass and re-pass with or without vehicles at all times over and along the roadway comprised in plan BPPV1 of Folio 25036F County Carlow as coloured yellow on the attached map titled **‘Map 2’** (**‘the roadway’**)

Held in fee simple”. [Bold in original]

109. It is clear from the special conditions of sale that the assistance of Ms Mary Keenan is required in relation to a number of matters in order to close the sale. Ms Keenan was the original vendor of folio 1789F to the Snoddy Browne partnership in 2003; while the monetary obligations under that contract were discharged, a deed of transfer was never executed by Ms Keenan, with the result that she continues to be the registered owner on the folio. Among the contractual documents furnished to Mr Mavroudis subsequent to the order of the Circuit Court on 20 October 2021 was a letter from Messrs Clarke Jeffers & Co., Solicitors acting on behalf of Ms Keenan, of 13 March 2019. The letter read as follows:

“Dear Sirs,

As solicitors for Ms Mary Keenan we confirm that our client consents to the sale of lands contained on folio 1789F of the registered County of Carlow [to the purchaser].

Ms Keenan's consent is strictly subject to binding contracts for sale being entered into within a period of 3 weeks from the date of this letter. In addition our client's consent will expire upon the period of 4 weeks from the date of the said contracts.

Finally, our client's consent is strictly subject to us receiving the sum of €215,000 within 7 days from the date of completion of the sale."

110. The issue which all parties are agreed must be decided by this Court is that of priority between Ms Keenan, who alleges an interest in the property for which she must be compensated from the proceeds of sale, and the judgment mortgages registered by Mr Mavroudis. It is necessary to set out the circumstances in which Ms Keenan alleges this entitlement.

Ms Keenan's claim

111. By a contract for sale in writing of 13 November 2003 ("**the 2003 contract**"), Ms Keenan, who was the registered owner of folio no. 1789F since 23 March 1992, agreed to sell a property referred to in the contract as "lot A", which was part of the property comprised in folio no. 1789F, together with certain property comprised in other folios, to Mr Samuel Snoddy. By two option agreements of 13 November 2003, Ms Keenan granted Mr Snoddy an option to purchase further properties ('lot B' and 'lot C') which were also part of the property comprised in folio 1789F. The consideration for the sale of lot A was an agreement to pay specified purchase monies, and a further element as expressed in special condition 16 of the 2003 contract:

“16. The purchaser agrees that together with the consideration to be paid herein, he shall construct a dwelling house using the same materials and workmanship as all other houses being constructed in the estate, free of charge and convey said dwelling house to the vendor on completion. For the purposes of the contract it shall be agreed that the gift passing from the purchaser to the vendor shall be valued at builders [sic] cost. It is agreed at the time of conveyance the subject dwelling house shall be fully functional and ready for habitation”.

112. Ms Keenan subsequently agreed to sell lots B and C to Mr Snoddy, and parted with possession of lot A, lot B and lot C after the contracts were made. At the direction of Mr Snoddy, the various lots were transferred to limited companies who became registered owners of those properties.

113. It is accepted that the entirety of the purchase monies due under the contracts for the three lots have been paid by the first respondent to the notice party. Ms Keenan however contends that Mr Snoddy has not completed the contract for sale in respect of lot A as he has yet to provide Ms Keenan with the dwelling house referred to in special condition 16 above.

114. Ms Keenan’s position is that she is not obliged to participate in the transfer of the part of lot A which remains registered under folio 1789F to her until either the house has been provided to her or alternatively until monetary compensation in lieu of that house is paid to her. In her submissions, it is stated that she, Mr Browne and the OA have agreed terms in this regard, in that Ms Keenan is agreeable to receive a sum of €215,000 from the proceeds of sale. However, her position is that her interest in receiving this money has priority over the judgment mortgages registered by Mr

Mavroudis, whether by way of a resulting trust or a vendor's lien. Her position in this regard is rejected by Mr Mavroudis.

How to proceed

115. Mr Mavroudis, having now had the opportunity to consider the contract for sale, has a variety of objections to it, and wished to be permitted to proceed with those objections at the hearing of this court. All of the other parties, all of whom were represented by counsel – in the case of the OA and Ms Keenan, by senior counsel – were of the view that the only matter which should be resolved was the question of priority between the equitable claim of Ms Keenan and the judgment mortgages of Mr Mavroudis. In fairness to Mr Mavroudis, in para.1 of his notice of appeal he stated clearly that “the plaintiff seeks amendment of several of the terms of that contract and said sale approval” [*i.e.*, as referred to in the order of Judge Doyle]. The second paragraph of his notice of appeal was as follows:

“2. The verbal Ruling of Ms Justice Alice Doyle in the same hearing in which the order was made, where the judge ruled a Ms Mary Keenan was entitled to be discharged a sum approximate to €215,000, that the defendants seek to discharge to her from the proceeds of sale in priority ahead of the first priority ranking sums secured by the judgment mortgages of the plaintiff, in satisfaction of a condition 16 of a contract for sale dated in or around 13 November 2003, which ruling the plaintiff disputes as being incorrect or that Ms Keenan has any entitlement to;...”.

116. There were three further points of appeal in relation to the discharge of auctioneer's costs, the question of surplus funds over and above “the secured currently liquidated sums”; and a complaint that no order had been made that Mr Mavroudis be paid his costs.

117. The point was made by a number of counsel for the various parties present at the hearing of the appeal – the Official Assignee, Carlow County Council, Fergal Browne and Ms Keenan – that, having sought a well charging order and order for sale from the Circuit Court, Mr Mavroudis was seeking to appeal the very order for sale he had sought. On the other hand, it does not appear that Mr Mavroudis was given any opportunity to consider the terms of the contract for sale in advance of the application before the Circuit Court, a factor which was clearly borne in mind by the court in allowing a stay so that Mr Mavroudis could consider the contractual documentation, and appeal the order for sale if he objected to it.

118. However, this has resulted in an unsatisfactory situation where the terms of the contract for sale have not been thrashed out between the parties, nor have the objections of Mr Mavroudis been put to the Circuit Court so that appropriate orders could be made, from which an appeal to this court could be lodged if necessary.

119. It was also to the forefront of the minds of the parties that, if Mr Mavroudis were to be successful in establishing that the value of his security were in excess of €900,000 as he maintained, the question of priorities between his claim and that of Ms Keenan was of paramount importance, in that, if Mr Mavroudis' claim had priority, the sale proceeds of €600,000 would go in their entirety to him. If, on the other hand, the value of his judgment mortgages was of an order for which the OA contended, the sale proceeds would discharge Ms Keenan's claim – if she had priority – and the vast majority, if not all, of the amount secured by the judgment mortgages. As we have seen, I was of the view that the OA's approach to valuation of the judgement mortgage was correct.

120. With this in mind, counsel for the OA urged the court simply to decide the priorities issue, on the basis that, if this issue were resolved, it might not be necessary

to resolve any further issues, in that both Ms Keenan and Mr Mavroudis would have most if not all of their claims satisfied from the sale proceeds. After much heated discussion at the hearing before me, the parties accepted that this approach was appropriate. I summarised the position as follows:

“...In relation to the application I have heard this afternoon, the appeal of the Circuit Court order, I will decide the issue in relation to priority between Ms Keenan and Mr Mavroudis between the vendor’s lien and the judgment mortgage. I will then bring the parties back before the court to make submissions in the light of my findings. I will be giving the parties an opportunity to put their heads together to be sensible in relation to a contract that everybody seems to want to go through. I won’t decide any question of costs at that stage either. I will be inviting submissions on costs at that stage.”

[Day 2, p.161, line 23 to p.162, line 5].

121. Given that the order of the Circuit Court did not refer to the issue of priorities between the claims of Ms Keenan and Mr Mavroudis, it does not seem to me that the issue is properly before this court in terms of the appeal. However, given the consensus between the parties that this is the key issue, I will treat the issue as akin to an application to this Court for directions pursuant to s.61(6) of the Bankruptcy Act 1988 as amended. In this way, the court can give directions which hopefully will assist the parties to agree matters going forward, or which will assist the Circuit Court in the event that it has to revisit the matter by way of accounts and enquiries.

The interest contended for by Ms Keenan

122. Mary Keenan swore an affidavit in the present application on 28 February 2022. In that affidavit, she sets out the background to the matter, and the circumstances in which she entered into a contract for sale of the lands comprised in

folio 1789F to Sam Snoddy on 16 October 2003. She was, at the time of the affidavit, “...approaching 80 years of age this year and have never been married nor do I have any children. I am a retired farmer living alone in Ballinacarrig House, County Carlow...I became the registered owner of Ballinacarrig House on 23 March 1992” [para. 8].

Ms Keenan goes on to explain that:

“11. From my point of view, the House [to be provided in accordance with special condition 16] was an important part of the transaction. At the time of the sale, I was approaching my sixtieth birthday and recognised that my home at Ballinacarrig House could be difficult to live in in later life. My home comprises of a large farmhouse which is over 300 years old, and which has a high cost of ongoing maintenance, and which is difficult to heat. The prospect of having a new smaller but energy efficient house on the estate was very appealing. I therefore viewed this house as somewhere for me to move when I was older without having to leave my homeplace on the Estate”.

123. The affidavit goes on to set out the subsequent developments in relation to the land, including the sub-sales by Mr Snoddy to other companies, and what Ms Keenan regards as the current status of the lands. She addresses the matters set out in the grounding affidavit of Mr Mavroudis of 11 January 2021. At para. 3 of her affidavit, she succinctly summarises her position as follows:

“3. The legal title to the Lands is registered in my name. As will be elaborated upon, I agreed to sell the Lands to the first Respondent in consideration of the payment of a purchase price and the provision of a house within the development which he intended to carry out thereon. While the purchase price has been paid, the first Respondent has not provided me with the house as

agreed or money in lieu of that house. Consequently, the full beneficial interest in the Lands has not been passed to the first Respondent and part of the beneficial interest therein remains vested in me. The judgment mortgage which the Appellant has registered against the Lands is in respect of the Respondent's interests therein only and does not, and moreover cannot, affect my legal and beneficial interest therein. Further or alternatively, I hold a vendor's lien in the Lands to which the Appellant's judgment mortgage is statutorily subject."

124. The proposed contract of 19 October 2021 acknowledges Ms Keenan's position. It contains, *inter alia*, the following clauses:

"5.2 Mary Keenan is the legal owner of the Subject Property and subject to a further order of the Circuit Court as per special condition 9.9 the Vendors will procure that the Assurance and related documents on Completion will be executed in the manner set out in Special Condition 19.5.

...19.5 The vendor has already completed the purchase of all the lands comprised in the contract for sale and two option agreements being the documents referred to at number 2 of the Documents Schedule hereto but no Deed of transfer has been executed. The full consideration was paid when the purchase completed in December 2005. The sale herein will proceed by way of sub-sale and the Vendors will procure that Mary Keenan will join in the said Deed of Sub-Sale to transfer her Legal Interest in the Subject Property and will furnish a Section 72 Declaration, a Family Law Declaration, Declarations as per 19.1 and 19.2 above, a certificate as per 19.3 above and the confirmation as per 19.8 below.

...19.8 Special Condition 16 of the contract of sale dated 13th November 2003 contains a covenant to build a dwellinghouse on the subject property for the original registered owner, Mary Keenan. On Closing, Mary Keenan, through her solicitors, will furnish a letter confirming that Special Condition 16 of the said contract of sale has been complied with in full.”

125. It should be noted that, contrary to what is stated in special condition 19.5 above, Ms Keenan contends that the full consideration was not paid to her when the purchase was completed in December 2005, as the house which was to be built for her was part of the consideration for the sale. The sentence appears to be intended to convey that the purchase monies referred to in the 2003 contract were paid to Ms Keenan, which she accepts.

126. Very detailed written submissions were proffered on behalf of Ms Keenan, which were ably supplemented by oral submissions by senior counsel at the hearing. Counsel contended that special condition 16 of the 2003 contract provided for an extra element of consideration over and above the payment of purchase monies, and that this was the correct construction of the special condition notwithstanding the reference to a “gift passing from the purchaser to the vendor”; counsel submitted that it was “manifestly clear that that is an error...I would submit...that what was intended was the word ‘consideration’. It’s clearly not a gift...” [day 2, p.86, line 26 to p.87, line 3].

127. In presenting the case to the court, counsel for Ms Keenan dealt very cursorily with the first basis upon which it was contended that Ms Keenan had an equitable interest in the land which arose upon the execution of the contract for sale, *i.e.*, an equitable interest arising due to resulting trust principles. In the written submissions, it

was contended that the guiding principle was as set out in *Rose v Watson* [1864] 10 HL CAS 672, in which Lord Cranworth, at pp. 683-4, stated:

“There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent”.

128. Counsel pointed out that this statement of law had been approved by Kenny J in *Tempany v Hynes* [1976] IR 101, and that the principles adopted by the majority of the Supreme Court in *Tempany v Hynes* applied to the November 2003 contract, which came into force prior to the reversal of the *Tempany v Hynes* principles by s.52 of the 2009 Act.

129. However, counsel indicated that he was not “actively pursuing” the *Tempany v Hynes* point “...because the value of that interest...is insubstantial. I am primarily focussing on the vendor’s lien” [day 2, p.92, lines 18 to 21].

130. In that regard, counsel relied squarely on the decision of Meredith J, as subsequently confirmed by the Supreme Court, in *The Munster and Leinster Bank Limited v McGlashan* [1937] IR 525. The court stated at pp. 528-529:

“...equity recognises a lien on the lands in favour of the vendor to secure the unfulfilled obligation of the purchaser, which equity is of course binding on a third party with notice. This lien is bestowed by equity for the protection of

vendors - as in the converse cases for the protection of purchasers, who have paid the purchase money but not obtained the conveyance - quite independently, as is well settled, of any contract between the parties. That is only reasonable, because the typical cases are those where the obligations on one side or the other are prematurely performed...and consequently where what gives rise to the lien was from the nature of the case not in contemplation. As authority for the proposition that the lien exists in the case of an annuity or of a sum of money to be paid at a date subsequent to the conveyance as well as in the case of purchase money to be paid at the time of the transfer, it is sufficient to refer to the Irish case of *Richardson v. McCausland* [citation given]...”.

131. In *McGlashan*, the court held that a vendor’s lien ranks in priority to a subsequent equitable mortgage by deposit of title deeds when the mortgagee had notice. As counsel for Ms Keenan points out, an equitable mortgage is one for value, whereas a judgment mortgagee is “a mere volunteer”.

132. While much case law is cited in the written submissions on behalf of Ms Keenan, counsel based his submissions squarely on the principle set out in *McGlashan* and adopted by the Supreme Court in that case, to the effect that the vendor’s lien arises by operation of law upon a contract for sale, and remained in force until the consideration is discharged. The submissions also cite learned texts in this regard, including the following passage from Keane, *Law of Trusts* (2017, 3rd Edition):

“The vendor is entitled to remain in possession of the property until completion unless the contract provides otherwise. He is also entitled to a ‘lien’ on the property for the balance of the purchase money until it has been

paid and this lien will continue in existence after completion, if any of the purchase money remains outstanding. The lien means that the vendor is entitled, if necessary, to have the property sold in order to have this price paid in full". [Paragraph 13.41].

133. The authorities set out in the written submissions on behalf of Ms Keenan suggest that the vendor's lien is an equitable interest which "...creates a charge upon and an interest in the property sold, in the same manner as if that charge had been created in writing". [Cozens-Hardy LJ in *Re Stucley* [1906] 1 CH67 at 83.] The authorities suggest that the vendor's lien may not defeat a subsequent purchaser who takes the legal estate without notice; hence the submission of counsel to the effect that a judgment mortgagee is a mere volunteer, who is not protected against the prior equitable charge created by the vendor's lien.

134. As regards the question of priority, counsel relied upon s.117(3) of the 2009 Act, which provides that "...the judgment mortgage is subject to any right or incumbrance affecting the judgment debtor's land, whether registered or not, at the time of its registration". Counsel went on to refer to s.71(2) of the Registration of Title Act 1964, as substituted by s.130 of the 2009 Act, which states that

"(2) Registration [of a judgement mortgage] under subsection (1) shall operate to charge the estate or interest of the judgment debtor subject to –

(a) the burdens, if any, registered as affecting that estate or interest,

(b) the burdens to which, though not so registered, that estate or interest is subject by virtue of section 72,

(c) all unregistered rights subject to which the judgment debtor held that estate or interest at the time of registration,

and with the effect stated in s.117 of the said 2009 Act".

135. Counsel also referred to the judgment of Keane J in *Larianov Foundation v. Leo Prendergast & Sons (Engineering Limited)* [2017] IEHC 192, at para. 40 of which Keane J adopted the statement by Wylie in the “Land and Conveyancing Law Reform Act 2009: Annotations and Commentary” (2009) that “...[t]his confirms the position of a judgment mortgagee is not a ‘purchaser’ but is a *mere volunteer*. Thus the judgment mortgage is subject to the prior rights or incumbrances affecting the judgment debtor’s interest in the land, whether or not they have been registered and whether or not the judgment mortgagee has notice of them...” [italics added].

136. It is contended on behalf of Ms Keenan that, as her legal and equitable interests in the property subsisted at the time of registration of the judgment mortgages, those mortgages were subject and subordinate to her equitable interests.

The position of Mr Mavroudis

137. Mr Mavroudis made a wide range of points both in his oral submissions and in his very detailed written submissions as to why special condition 16 did not give rise to an equitable right or a vendor’s lien. He argued firstly that the maps made clear that the housing estate which was to be built on foot of the 2003 contract was not comprised in the lot which was to be the subject of the present contract: Mr Mavroudis pointed out that “it is on the far side of the road to the housing estate in question” [day 2, p.99, lines 19-20]. Accordingly, the house which was to be provided to Ms Keenan was not originally intended to be on the property now being sold.

138. Secondly, Mr Mavroudis argued that a letter written on behalf of Ms Keenan by her solicitor on 30 April 2018 expressly acknowledged that special condition 16 had been released in relation to the portions of land transferred by her pursuant to the 2003 contract.

139. The letter of 30 April 2018 was written by a firm of solicitors in Carlow to Mr Mavroudis, primarily for the purpose of providing information so that Ms Keenan would not have to attend court in response to a summons issued by Mr Mavroudis.

The letter refers to “our client: Mary Keenan, Ballincarrig”, but goes on to say

“At no stage did our client [the reference in this sentence to “our client” is clearly an error] build or construct any units for Ms Keenan, as referred to in your summons. Nor was there any agreement to write off contractual obligations for the building or construction of any property between the parties.

In addition to the foregoing our client maintains that the sale of the 34 acres of land at Ballincarrig, Carlow has not yet completed and will not complete until such time as the special conditions of that contract are adhered to. In particular the condition under which our client was to receive a house from the property in sale. As specified previously, this house was to be of Mary Keenan’s choosing. Indeed when former pieces of land were released by Ms Keenan she specifically released the condition in relation to those pieces of land. At all times Ms Keenan maintains her right to refuse to complete the sale of any lands belonging to Mr Snoddy until such time as those monies are duly discharged”.

140. Mr Mavroudis also referred to a supporting schedule which Ms Keenan had proffered to the Revenue Commissioners in respect of a calculation of capital gains tax regarding the sale of land to Mr Snoddy. The schedule contains an item “value of house under contract per auctioneer’s valuation...€180,000”. Mr Mavroudis suggests that this is evidence that, as Ms Keenan appears to be paying capital gains tax in

relation to the value of the house, the only inference can be that she received the value of the house.

141. In fact, Ms Keenan addresses this at paras. 19 and 20 of her affidavit of 28 February 2022 in respect of the present application when she avers as follows:

“19. I say that in 2005 I discharged a capital gains tax (‘CGT’) bill associated with the sale of the lands to the first respondent. As part of this payment CGT was paid for the house which formed part of the consideration under the contract pursuant to Special Condition 16. The value at construction cost was estimated at €180,000 on this and CGT was paid accordingly...

20. I say in 2009 when the development of the house did not occur and property prices were falling rapidly as the economy faltered, an application was made for a rebate of the CGT. I am aware that I will have to repay CGT in the future if the house is built or payment in lieu, but in 2009 it was more desirable to have the cashflow...”.

142. Mr Mavroudis contends that, properly construed, special condition 16 required that an estate of houses be built and that Ms Keenan should get one of those houses. Accordingly, he contends that, as no estate was built, Ms Keenan is not entitled to a house. Condition 16 states “...the purchaser agrees that together with the consideration to be paid herein, he shall construct a dwelling house using the same materials and workmanship as all other houses being constructed in the estate...”. Mr Mavroudis interprets this as meaning that “there must be an estate and Ms Keenan must get one of the houses on that estate”. Mr Mavroudis also suggests that, as the contract was drafted by the solicitors for Ms Keenan, it must be construed *contra proferentem*. Mr Mavroudis suggests that Ms Keenan has contravened s.70 of the Bankruptcy Act 1988, which is as follows:

“70. (1) Where a person claims any property which is in the possession of the bankrupt at the date of adjudication he shall file with the Official Assignee a claim verified by affidavit.

(2) The Official Assignee may give notice in writing to any person to prove his claim to property which is in the possession of the bankrupt at the date of adjudication and, unless within one month after the service of the notice that person files with the Official Assignee a claim verified by affidavit, the Official Assignee may, with the sanction of the Court, sell or dispose of the property free of any right or interest therein of that person.”

143. It is submitted that Ms Keenan has not filed a claim pursuant to this section, and accordingly is “not entitled to receive a distribution in the bankruptcy estate” [day 2, p.117, lines 7 to 8].

144. Mr Mavroudis submits that Ms Keenan was in fact paid the full consideration under the contract: “...she has no rights to or to be discharged from the lands being sold – where such rights occur, if they remain extant at all, they apply to other lands, most relevantly those in the housing estate that were transferred to Ridgeway Homes Ltd. to which Ms Keenan consented to discharging the Special Condition 16 from”. [Paragraph 68 written submissions].

Analysis

145. Before addressing the question of priorities, I consider it appropriate to address Mr Mavroudis’ objections to Ms Keenan’s asserted vendor’s lien.

146. Mr Mavroudis complains that the house which was to be provided pursuant to special condition 16 in the 2003 contract was not to be constructed in the location of the property now being transferred. This point seems to me to be without merit. The property now sought to be transferred is comprised in folio 1789F, which was the

subject of the 2003 contract. Ms Keenan's point is that the provision of a house was part of the consideration for that contract, and to the extent that the consideration has not been discharged, she is entitled to a vendor's lien in respect of the undischarged portion. The precise location of where the house was to be built on the original lands is neither here nor there.

147. It is suggested that it was represented by the solicitors for Ms Keenan that she "specifically released the condition in relation to those pieces of land" which had been transferred under the 2003 contract. I do not read the correspondence that way.

Certainly, the letter of 30 April 2018 from Ms Keenan's solicitors is confusing, and not well expressed. However, it contains the unequivocal statement that "Ms Keenan maintains her right to refuse to complete the sale of any lands belonging to Mr Snoddy until such time as those monies are duly discharged". In addition, there is the letter from the same firm acting on behalf of Ms Keenan of 13 March 2019 quoted at para. 109 above, in which Ms Keenan furnishes her consent to the sale of the lands in folio 1789F but provides that such consent is "...strictly subject to us receiving the sum of €215,000 within seven days from the date of completion of the sale". It does not seem to me that Ms Keenan can be regarded as having somehow waived or released her claim for the vendor's lien for which she now contends.

148. In relation to the suggestion that the CGT documentation made available to the Revenue Commissioners suggests that Ms Keenan received the value of €180,000 in respect of the house which was to be provided to her, Ms Keenan has provided an explanation on affidavit of the circumstances in which this occurred. There is no evidence that Ms Keenan was paid €180,000, or any other sum, in lieu of provision of the house which was to be provided under special condition no. 16. The evidence of Ms Keenan is that she sought a rebate of the capital gains tax which she had paid on

the expectation that she would receive €180,000. I have no reason to disbelieve her evidence, and accept it.

149. Mr Mavroudis argues that, as the housing estate was not built, the proper construction of special condition 16 is that Ms Keenan was not entitled to a house. I do not think that the obligation in special condition 16 to “construct a dwelling house using the same materials and workmanship as all other houses being constructed in the estate” can be read to mean that if no houses were built, Ms Keenan would not be entitled to a house. The reference was to the standard of workmanship; it cannot be inferred that Ms Keenan was only entitled to a house if there were an estate built.

150. I do not consider that the *contra proferentem* rule requires to be deployed in this case. For a start, Mr Mavroudis was not a party to the 2003 contract, and cannot invoke the maxim. In any event, I do not accept that special condition 16 is ambiguous, or that there was any imbalance in bargaining power between the parties to the 2003 contract which would require the application of the *contra proferentem* rule.

151. I think also that Mr Mavroudis’ point in relation to s.70 of the Bankruptcy Act 1988 as amended is misconceived. The section provides a mechanism whereby the OA can resolve competing claims to property in the possession of the bankrupt, so that if he requires a person to prove a claim, and that person does not within a month file a claim verified by affidavit, the OA can, with the sanction of the court, sell or dispose of the property free of any right or interest of that person. It does not provide for a blanket disqualification of the claim of a person who does not submit a formal claim verified by affidavit. In any event, it does not seem to me that the section is directed towards the resolution of complex issues regarding estates and interests in land, but is primarily directed towards assets which are “in the possession of the

bankrupt” at the date of his adjudication. Section 70 has no application to the present situation. In any event, s.136(2) of the Bankruptcy Act 1988 expressly recognises the power of secured creditors to deal with their security as if the usual effects of adjudication on creditor’s remedies did not apply. If Ms Keenan’s vendor’s lien exists, it is an equitable right which attaches to the property and is not affected by the bankruptcy regime.

152. I am satisfied that Ms Keenan has established and is entitled to a vendor’s lien in respect of the proposed contract of sale. I accept that it is an equitable right that Ms Keenan can invoke in order to secure the contractual entitlement which she agreed at special condition 16 of the 2003 contract. I find that the provision of the house was part of the consideration for the transfer of the lands in that contract. While the condition refers to a “gift”, the contract as a whole and the evidence of Ms Keenan in relation to the surrounding circumstances of the contract suggest to me that the term is inappropriate and was not intended to convey that the house to be provided was not part of what Ms Keenan was entitled to expect, along with the purchase monies, in return for the lands she was to transfer.

153. While the vendor’s lien normally confers a right to apply for specific performance to compel sale of the property and for the consideration to be discharged from the proceeds, it is well established that the vendor may be entitled to damages in lieu of the specific performance of the condition giving rise to the lien. In this regard, see *Vandaleur v Dargan* [1981] ILRM 75 and *Joyce v O’Shea* [2009] IEHC 415. In the present case, the parties to the contract have negotiated the sum of €215,000 as an appropriate sum for discharge of the vendor’s lien, and there is no evidence before me which would suggest that this is not a *bona fide* and appropriate measure of damages or compensation required to discharge the lien.

154. As regards priorities between the lien and the judgment mortgages, the position is clear. As a judgment mortgagee, Mr Mavroudis is a volunteer and takes subject to the prior equitable interest of Ms Keenan. The position is clearly set out in the statutory provisions set out above, and in the decision of Keane J in *Larianov*.

155. In summary, then, I have reached the following conclusions:

(i) Ms Keenan has established a vendor's lien on the property the subject of the proposed contract of 19 October 2021 for a sum payable in discharge of consideration due to Ms Keenan pursuant to special condition 16 of the 2003 contract;

(ii) to the extent that the contract approved by order of the Circuit Court of 20 October 2021 provides for deduction of a sum from the sale proceeds to be paid to Ms Keenan, that provision is in accordance with the rights and obligations of the parties and secured creditors;

(iii) the said vendor's lien must be discharged in priority to the judgment mortgages registered against the folio pertaining to the lands in sale.

Conclusions generally

156. It may be that the conclusions which I have expressed in relation to each of the three issues above will at least have had the advantage of bringing some clarity to those issues so that the parties can progress this interminable saga. The parties will require some time to consider this judgment and confer as to its effect. I hope the parties will approach the various matters in a constructive manner, with a view to achieving pragmatic resolutions of their various claims.

157. I propose to give the parties three weeks from the date of delivery of this judgment to make written submissions of not more than 1000 words in relation to each of the three issues regarding the orders to be made arising from this judgment,

including in relation to the question of costs. The word limit will be strictly enforced, and submissions which exceed it will not be accepted. Under no circumstances will any re-argument of any of the issues addressed in this judgment be permitted.

158. In the event that I require to be addressed in relation to the orders, or in relation to any other matter, I will fix a date before the end of the present term for this purpose.