



**UNAPPROVED  
THE COURT OF APPEAL**

**Court of Appeal Number: 2021/239  
Neutral Citation Number [2023] IECA 239**

**Costello J.  
Faherty J.  
Allen J.**

**BETWEEN/**

**MYLES KIRBY**

**PLAINTIFF/  
RESPONDENT**

**- AND -**

**PETER MCCANN AND JOAN MCCANN**

**DEFENDANTS/  
APPELLANTS**

**Judgment of Ms Justice Faherty dated the 6<sup>th</sup> day of October 2023**

1. This is an appeal from an Order of the High Court (Clarke C.J.) dated 30 July 2021 whereunder the defendants were ordered to vacate and deliver up possession of part of the lands and premises known as Kilmurray House, Falls Road, Rathmichael, Dublin 18 – specifically land to the rear of Kilmurray House. The defendants are the registered owners of the lands and reside in Kilmurray House.
2. For ease of reference, the lands to the rear of Kilmurray House will be referred to as “*the Property*”.
3. The plaintiff (hereinafter “*the Receiver*”) was appointed as Receiver over the Property on or about 6 November 2020.

**Background**

4. By Facility Agreement dated 20 June 2018 (“*the June 2018 Facility*”) between Greenwich Securities Limited (“*Greenwich*”), the McCanns (hereinafter “*the defendants*”) and Emerald Sky DAC and Lotus Decalia DAC (“*the Lenders*”), the Lenders lent Greenwich a facility in the sum of €730,000 subject to certain terms.
5. The purpose of the loan was to provide funds to finance an agreement to be entered into between Greenwich and the defendants (“*the Property Loan Agreement*”) whereby Greenwich would lend €730,000 to the defendants to enable them to discharge an existing judgment mortgage which had been secured against the interest of the first defendant in the Kilmurry House lands.
6. In the Property Loan Agreement, the property in respect of which the funds were being lent was defined in clause 1 as “*a site for nine houses on land to the rear of Kilmurry House...*”.
7. As deposed to by the Receiver in his affidavit sworn 4 March 2021, the judgment mortgage had been registered by the first defendant’s erstwhile solicitor pursuant to a judgment obtained by the solicitor in 2012 against the first defendant in respect of unpaid legal fees. The judgment mortgage was registered in circumstances where the Circuit Court held that a conveyance of *inter alia* the Property from the first defendant and the second defendant to the second defendant had been done with the intention to defraud creditors, including the first defendant’s erstwhile solicitor. The Circuit Court declared the said conveyance void and set it aside. This finding was upheld on appeal to the High Court (Binchy J.) by written judgment delivered on 21 July 2016 ([2016] IEHC 443).
8. Pursuant to clause 6 of the June 2018 Facility, the obligations of Greenwich to the Lenders were to be secured by a guarantee and indemnity from the defendants in respect of

Grenwich's repayment obligations supported by and limited to a mortgage and charge from the defendants creating a first fixed charge over, *inter alia*, the Property.

**9.** The mortgage was duly executed on 20 June 2018. Furthermore, by way of Limited Recourse Guarantee and Indemnity ("*the Guarantee*") dated 20 June 2018, the defendants irrevocably and unconditionally guaranteed to pay the Lenders on demand the amount of Greenwich's obligations to the Lenders, when same became due for payment or discharge. The Lenders' recourse under the Guarantee was limited to the defendants' interest in the assets secured by the Mortgage.

**10.** By a Facility Agreement dated 21 June 2019 ("*the June 2019 Facility Agreement*") between Greenwich, as Borrower, the defendants-described as the owners of the Property- and the Lenders, the Lenders agreed to make available to Greenwich a facility in the sum of €300,000 subject to the terms set out in the June 2019 Facility Agreement. The purpose of this Facility was to provide development finance to fund the construction of units on a site of pre-planning zoned residential development land at Lee Road in Cork. The security provided for the June 2019 Facility Agreement included the Guarantee and Mortgage entered into by the defendants on 20 June 2018.

**11.** Both Facilities expired on 20 June 2020.

**12.** By letter dated 9 October 2020, Greenwich were informed by the Lenders that a capital balance of €1,101,435.36 and €10,972.70 interest was outstanding on the Facilities. There followed correspondence between the Lenders' solicitors, AMOSS, and O'Sullivan & Associates, solicitors for Greenwich, wherein, *inter alia*, Greenwich's position was that the Lenders had sought to frustrate the drawdown of the loan the subject of the June 2019 Facility Agreement, a claim the Lenders refuted.

**13.** On 2 November 2020, AMOSS wrote to Greenwich calling on it to repay the June 2018 Facility and the June 2019 Facility.

14. Two days later, on 4 November 2020, AMOSS wrote to the defendants calling on them to discharge €1,111,594.26 pursuant to the Guarantee. The defendants were advised that unless the demand was met, the Lenders would appoint a receiver over the Property.

15. The demand not having been met, on 6 November 2020 the Lenders appointed the plaintiff as receiver over the Property.

16. Greenwich's response was to institute proceedings by plenary summons on 9 November 2020 seeking, *inter alia*, injunctive relief in respect of the two Facilities and to prevent the Lenders from dealing with the secured properties.

17. On 14 January 2021, AMOSS solicitors wrote to the defendants calling on them to provide the Receiver with immediate access to the Property. The Property was accessible by a gate which required a code to open.

18. By letter dated 20 January 2021, the first defendant alleged that the Lenders had no entitlement to appoint a receiver and that the legal charges taken over various properties including the Property were "*illegal and invalid*". The letter further contended that the Lenders were in breach of The Central Bank Act, 1997. On 21 January 2021 AMOSS replied to the first defendant's letter refuting the allegations set out therein and indicating, *inter alia*, that the Receiver would take steps to gain access to the Property. On 22 January 2021, the Receiver's agents visited the Property but could not get access as the gate at the Property remained locked.

19. On 25 January 2021, the first defendant responded to the AMOSS' letter of 21 January, seeking a copy of the Lenders' money lending licenses and alleging "*deceit, deception and fraudulent acts*" on the part of the Lenders. It was alleged that the Lenders were "*trading insolvently*". The letter repeated the earlier allegation that the mortgage was "*illegal*".

**20.** On 8 February 2021, Beauchamps Solicitors (acting on behalf of the Receiver) wrote to the defendants asserting the entitlement of the Receiver under the Mortgage to take possession of the Property and calling on the defendants to, *inter alia*, surrender possession.

**21.** On 14 February 2021, the first defendant advised the Receiver that the defendants would “*be placing this matter in the hands of the Garda National Economic Crime Bureau responsible for acts of financial fraud and corruption*”. The letter concluded by stating that the defendants would also “*be placing this matter in the hands of the Unauthorised Providers Unit and the Enforcement Advisory Division, together with Financial Crime of the Central Bank of Ireland*”.

**22.** The within proceedings issued on 15 March 2021 by which the Receiver seeks an order that the defendants deliver up possession of the Property. A statement of claim was delivered on 26 November 2021.

**23.** The motion seeking interlocutory relief issued on 22 March 2021 and was grounded on an affidavit sworn by the Receiver on 4 March 2021.

**24.** The first defendant swore a replying affidavit on 14 April 2021.

**25.** In his replying affidavit the first defendant referred to discussions which he says took place in 2018 between Blakeshaw Investments Limited (“Blakeshaw”) which was the owner of zoned residential land located on Lee Road, Cork City and the Lenders and Greenwich. The purpose of the discussions was said to have been to obtain development finance of a loan facility of €730,000 from the Lenders “*in order to pay off an existing owed debt*”, together with the Lenders providing a work in progress facility of €300,000 for the building of three houses and associated works and the conversion of a church located on the Lee Road lands.

26. At para. 11 he averred that the security provided to the Lenders “*was strictly on the basis of the work - in - progress facility*” (the referred to €300,000) being made available by the Lenders for the completion of the Lee Road development, the sale proceeds of which would then repay the June 2018 loan of €730,000 and the June 2019 Facility back to the Lenders.

27. At paras. 15 and 16 the first defendant pointed to the Lenders having “*requested further security consisting of 4 zoned residential sites fully developed located in Skerries County Dublin*” which, he said, resulted in the Lenders having more than adequate security for the loan of €730,000.

28. The first defendant’s position was that that the security given over the Property “*was given on the basis of a top up only in the event of a shortfall limited to €280,000*” (para. 18). He stated, at para. 19:

“*...in June 2018 Greenwich Securities Ltd received the facility of €730,000 from the Lender using the security of the 8 sites in Cork and the existing church, together with the 4 sites in Skerries County Dublin and the top up only of security known as the land behind Kilmurray House ..the security given was made available to the Lender strictly on the basis of the work in progress facility being made available immediately after the drawdown of the June 2018 facility of the €730,000 in order for the 3 houses to be built and the existing church to be converted into a three bedroomed house for the purpose of selling the completed 3 houses and church for €1,680,000 and paying back the June 2018 loan of €730,000 and the June 2019 work-in-progress of €300,000 totalling €1,030,000.*”

29. According to the first defendant, the Lenders “*purposely set out to frustrate the agreement with the intention to cause the borrower into default on the loan by way of not lending the money that the Lenders agreed to lend*” (para. 36).

**30.** At para. 40 of his affidavit, the first defendant averred as follows:

*“...I say that the loan facilities were always subject to a work-in-progress facility been fully made available by the Lenders. I say that it was also agreed with the lenders that a work in progress facility would be made available in order to built (sic) the 3 houses, convert the church into a 3 bedroom house and sell all four units for €1,680,000 to members of the public in order to pay back the June 2018 facility and the June 2019 facility totalling €1,030,000. I say that the security was given strictly on the basis of the full work in progress facility being made available by the lenders and the full facility of €300,000 would be allowed to be fully drawn down.”*

**31.** At para. 58, he referred to his request of 25 January 2021 for a copy of the Lenders’ money lending licence or authorisation from the Central Bank, a request which the first defendant says was denied.

**32.** At para. 61, the first defendant addressed the Receiver’s contention that he had refused access to the Property, stating that at no stage had he been aware of the Receiver’s agents ringing the bell to his home on 22 January 2021 and that no appointment had been made with him or his family by the Lenders to gain access to the Property for an inspection. At para. 63, he referred to his letter to Beauchamps Solicitors of 14 February 2021 requesting a copy of the Lenders’ money lending licence/authorisation from the Central Bank. It was the first defendant’s understanding that *“it is a requirement from the Central Bank to be authorised to lend such monies in Ireland”*. According to the first defendant, *“the Central Bank confirmed that Emerald Sky 2 Designated Activity Company and Lotus Decalia Designated Activity Company (the Lenders) were unauthorised by the Central Bank to lend such monies in Ireland”*.

**33.** The first defendant’s claims were replied to by Mr. Ian Lawlor on behalf of the Lenders by affidavit sworn 29 April 2021, denying the alleged breaches of financial

services law and regulations. According to Mr. Lawlor, the first defendant's attempt to make the June 2018 facility conditional on the June 2019 Facility was "*demonstrably incorrect*" having regard to the timing of the two Facilities. It was said that the Mortgage in issue here had been given in respect of the June 2018 Facility and was in no way contingent on or related to the June 2019 Facility.

**34.** On 29 April 2021, the Receiver swore a further affidavit responding in large part to the first defendant's claim that access to the Property was not through the gates of Kilmurray House but rather accessed via a security wall located on the right-hand side of the entrance to the premises. He averred that it was plain from an examination of the Mortgage and the Map attached to it that the Security included the access road which connected the main public road to the undeveloped lands at the rear of Kilmurray House. The access gate formed part of the charged property and abutted the public road. Moreover, as the gate was demonstrably not located on the defendants' family home, there was no basis for refusing access beyond that gate.

**35.** The Receiver also addressed the claim that the secured land formed part of the defendants' family home, stating that this claim was inconsistent with the express terms of the June 2018 Facility. He referred to a number of letters sent by his solicitors to the defendants seeking access to the Property.

**36.** The first defendant swore two further affidavits on 12 May 2021.

**37.** Responding to Mr. Lawlor's affidavit, he averred that he was authorised by Blakeshaw, Greenwich and the Guarantors to do so. As a consultant to Greenwich, he claimed to have previously personally dealt with the Lenders on a day-to-day basis in respect of both the June 2018 Facility and the June 2019 Facility. He reiterated that he was a named party on both loan agreements and a party to the assurances given by the Lenders by way of guarantees including making available the full work-in-progress facility to



Grenwich for the completion of the Lee Road development so that the loans totalling €1,030,000 could be repaid from the proceeds of sale of the Lee Road development. He claimed that he received a verbal indemnity from the Lenders before the drawdown of the June 2018 Facility and that it had always been the “*agreed strategy*” that the Lenders would provide the full work-in-progress facility. According to the first defendant, the failure of the Lenders to allow the drawdown of the full amount of the June 2019 Facility resulted in Greenwich having to inject cash payments of €320,829 on top of the €215,286.50 work-in-progress provided by the Lenders as part of the June 2019 Facility.

**38.** At para. 9 (and repeated at paras. 18 and 35) of his affidavit, the first defendant claimed that the provision of the Property as security “*was to be used as a temporary measure only*” and that when further security or cash representing a value of €280,000 was made available by Greenwich to the Lenders, the Property was to be released of all charges by the Lenders. He claimed that this had been achieved by Greenwich having made a payment of €320,829 to the Lenders. He further claimed that under no circumstances would he have made available valuable security (the Property) valued at €1.7m (together with lands at Cork valued at €900,000 and lands Skerries valued at €280,000) against a loan of €730,000 unless the previously referred to indemnities and assurances (to provide Greenwich with the full work-in-progress funds, and to release the Property to the defendants) had been given by the Lenders. At para. 10, he stated that “[*t*]he cause of these proceedings are as a result of the Lenders refusing to allow the drawdown of the full work-in-progress facility as per the June 2018 facility and the June 2019 facility...”.

**39.** According to the first defendant, the 2019 June Facility had been managed in accordance with its terms and conditions and it was not the case, as the Lenders alleged, that there had been claimed drawdown amounts that exceeded the value the Lenders had placed on works. Any extra drawdown amounts sought by Greenwich, he said, had been

agreed with the Lenders “*and would not constitute consistent serious issues*” “*or give grounds for withdrawing the remainder of the June 2019 work-in-progress facility*” (at para. 11). The first defendant went on (at para. 12) to take issue with Lenders’ refusal to allow further drawdowns from the June 2019 Facility after December 2019 and asserted (at para. 15) that the Lenders had “*an ulterior motive in frustrating the loan*”. He disputed that the loans were in default at any point up to when the Lenders decided to withdraw the June 2019 Facility, which was some seven months into the twelve-month loan period, and he asserted that the Lenders were purposely pushing Grenwich into default of both loan facilities “*in order to gain access to the high level security held by the Lenders*” (para. 20).

**40.** At para. 21, the first defendant described himself as a “*victim*” of the default caused by the Lenders and asserted that it was not correct for the Lenders to make demands against him in view of their default in having withdrawn the June 2019 Facility seven months into its term and in circumstance where he had been given “*verbal assurances and indemnities by the Lenders of a full work-in-progress facility being made available to complete the 4 housing units in Cork and such verbal indemnities, assurances and agreements were broken*”.

**41.** The first defendant disputed Mr. Lawlor’s contention that he had issues with the interest rate of 15% stating that what he took issue with was the Lenders overcharging on monies that had not been lent. He said that interest had been charged on the full amount of work in progress facility of €300,000 in circumstances where only €215,286.50 had been lent. He further asserted that it was incorrect for the Lenders to base their refusal to provide the balance of the June 2019 Facility on the fact that the project was behind schedule where there was never an agreed schedule for the different stages of the development. It was also incorrect of the Lenders to claim that it had been agreed in January 2020 that completion of the housing units was not feasible within the five months remaining on the

June 2019 Facility in circumstances where 95% of the development works of the entire site- 85% of the works in converting the church and 35% of the housing units- had been completed. According to the first defendant, as of 20 February 2020, the Lenders were happy with the works that had been carried out and they had confirmed that there were no outstanding issues. The Lenders had never conveyed to the first defendant at the meetings in January and February 2020 that they were contemplating withholding funds from the June 2019 Facility or that they would not be paying the sum of €58,925 which was still due on foot of the June 2019 Facility - a sum that Greenwich continued to pursue in the following months to no avail.

**42.** The first defendant described the Lenders' course of action as having caused serious consequences for Blakeshaw and Greenwich and other Guarantors connected with the loan. He further averred (at para. 31) that other funding had been secured by Greenwich at the time the Receiver was appointed but that the Lenders did not allow time for the new lenders to carry out their due diligence.

**43.** At para. 38, the first defendant described the Lenders as "*companies with potentially no value and more or less insolvent*". He described Emerald as having a net worth of €1,915, with Lotus' net worth at €300. At para. 39, he repeated his assertion that the Central Bank had confirmed that the Lenders were unauthorised albeit that the Central Bank "*were not in a position to advise on the code of conduct carried out by the lenders at this point in time, as [the Lenders] were unauthorised by the Central Bank...in lending money*". At para. 41, the first defendant referred to his letter to the Lenders' solicitors requesting a copy of the Lenders' "*lending licence/authorisation*" from the Central Bank.

**44.** In his affidavit sworn in response to the Receiver's 29 April 2021 affidavit, the first defendant took issue with the assertion that the matters he had raised were extraneous to the application before the court stating that he was a named party in the two Facilities and

a party to “*verbal indemnities*” given by the Lenders to him, Blakeshaw and Greenwich. He referred to his direct dealings with the Lenders during the currency of both loans. He referred to the fact that Greenwich had been left with no alternative but to institute proceedings in October 2020 against the Lenders for “*breach of contract, deceit and deception*”. The first defendant denied that he was using the within proceedings as a vehicle to argue Greenwich’s case against the Lenders, stating that the Lenders were the “*shadow plaintiffs*” in the within proceedings and were the cause of the proceedings having been issued by reason of their having failed to comply with the June 2019 agreement and the verbal indemnities given to the first defendant. At para. 11, the first defendant repeated his denial that he ever refused the Lenders’ advisors access to the Property. At para. 12, he denied having stated that there was no access to the Property from the public road, rather it was the case that the entrance gates to the Property were on private lands, namely the entrance to the defendants’ family home.

### **The High Court judgment**

**45.** The application for interlocutory relief came on for hearing before Clarke C.J. (hereinafter “*the Judge*”) sitting in the High Court on 8 July 2021. At this juncture, it should be noted that the defendants were represented on the day by their solicitor.

**46.** Judgment was given *ex tempore* on 30 July 2021. The Judge commenced by outlining the nature of the June 2018 Facility which involved the lending of €730,000 to Greenwich for Greenwich then to lend those monies to the defendants for the purposes of discharging a judgment mortgage registered against the first defendant’s interest in the Kilmurray lands. He noted that the defendants had given a guarantee for the loan and that the guarantee had been supported by a mortgage over the Property. He said that there was no dispute but that the monies in issue were lent and had not been repaid. He further noted that the *prima facie* position was, the monies not having been repaid, “*the loan was called*

*in, the guarantee was sought to be executed and the Receiver was appointed as Receiver in furtherance of the terms of the various contractual arrangements to which I have adverted”.*

47. The Judge then turned to the points raised by the defendants suggesting they had a defence to the proceedings. He noted that an argument based on the lands being the defendants’ family home was not pursued “*with any great vigour*” which on the evidence (including that the Property had been previously offered for sale by the defendants) appeared to the Judge to be an approach that was “*quite appropriate*”. What had been pursued with “*some vigour*” was the assertion that the June 2018 Facility and the June 2019 Facility were linked. He noted the defendants’ contention that it was a term of the overall arrangements that €300,000 would be advanced to Greenwich pursuant to the June 2019 Facility and their contention that the failure by the Lenders to provide all of the finance provided for the June 2019 Facility vitiated the June 2018 Facility (and hence the security which the defendants had provided).

48. He noted that Greenwich had commenced proceedings against the Lenders for breach of contract but that those proceedings had been struck out in the recent past “*and are not being pursued*”. He stated that it was necessary to record that there was a connection between the defendants and Greenwich, in that the principal of Greenwich was the defendants’ son. He noted, however, that neither of the defendants was a director of Greenwich albeit on some occasions the first defendant described himself as being either a consultant to or on one occasion a director of Greenwich. As summed up by the Judge, “*the matter relied on by the defendants is what is said to be a breach by the lenders of their obligations under the finance agreement with [Greenwich], which it is argued calls into question the validity of the appointment of the receiver*”. The Judge also noted the

defendants' claim that there was an absence of certain regulatory permissions for the transactions on the part of the Lenders.

**49.** As to the test for the mandatory relief sought by the Receiver, the Judge noted that this was set out in his own decision in *Charleton v. Scriven* [2019] IESC 28. On the authority of that case, the Receiver was required to demonstrate a “*strong case that is likely to succeed at the trial of the action*” (per Finlay J. in *Maha Lingam v. Health Service Executive* [2005] IESC 89) as applied in *Charleton v. Scriven*. The Judge noted that the Receiver accepted that the nature of the relief sought were essentially mandatory in character such that this higher standard applied.

**50.** In *Charleton v. Scriven* Clarke C.J. was of the view that in receivership injunctions there may well be an important distinction to be made between mandatory orders (where the receiver may seek to sell the lands) and prohibitory orders (where, for example, the reliefs are confined to restraining the interference with the collection of rent by the receiver) and that this distinction may be particularly relevant when the court comes to consider the “*least risk of injustice*” at interlocutory stage. He went on to explain when this would arise, stating:

*“6.13. It is important to emphasise that these observations only arise in circumstances where there is an issue of any substance concerning the validity of the appointment and powers of receivers. Where no real case of any substance is made by a defendant which puts forward a credible basis for suggesting either that receivers were not validly appointed or that receivers, although validly appointed, are seeking to exercise powers which they do not have, then it will not matter whether any interlocutory injunctive relief which the relevant receivers seek can properly be characterised as respectively mandatory or prohibitory, for there will be more than adequate basis for suggesting that a strong case has been made out. The*

*potential for a distinction between relief which is essentially mandatory, on the one hand, and that which is prohibitory, on the other, arises where there is at least some significant defence put forward which the Court assesses might arguably provide a basis for suggesting that the receivers might fail at trial. In such circumstances, it will be necessary to assess the strength of the defence put up so as to, in turn, determine whether the receivers' case can be characterised as sufficiently strong to warrant the grant of mandatory relief or whether it may only be possible to say that the receivers' case gives rise to a fair issue to be tried, where only such part of the relief claimed as can properly be described as prohibitory should be granted."*

**51.** In that case Clarke C.J. also emphasised the need for the court on the hearing of an interlocutory application to have regard to the *"underlying principle of attempting to fashion an order which runs the least risk of injustice"*.

**52.** Having duly noted what had been said in *Charleton v. Scriven*, the Judge found that the Receiver in the instant case was required to satisfy the *"higher standard"* having regard to the nature of the reliefs being sought. Whether this high test was met was to be assessed by reference to the grounds of defence asserted by the defendants. The Judge went on to explain how this exercise was to be undertaken. He was not of the view that the test of a strong case could be exactly compared with the low threshold test for granting or refusing summary judgment and allowing a case to go to plenary hearing. There was, he stated, a very practical reason why this was so. He explained:

*"Even if an interlocutory injunction is granted, the case remains alive. It remains open to the defendant to insist on a full trial. And while it may be that certain things happen in the intervening period nonetheless the defendant is not, where an interlocutory injunction is granted, kept out from making whatever case the defendant wishes to make. ...On the other hand, in a motion for summary judgment,*

*the case is over if the motion is granted. Because then the plaintiff has judgment for that amount and the defendant does not have another opportunity to seek to persuade the Court that what the Court perhaps did not consider was an adequate defence at the time of the motion was in fact, on closer explanation, a proper defence. It is for that reason the threshold is very low. Therefore, it is not the same thing, in my view, for a Court to consider that a defence put up would meet the threshold for avoiding summary judgment and requiring that the matter go to plenary hearing, on the one hand, and opposed to a sufficient case to deprive the plaintiff of been able to say that there is a strong case on the other hand. The threshold, which the defendant needs to meet to avoid that, which is otherwise prima facie invalid from being considered to be a strong case is, in my view, somewhat higher than the test for avoiding summary judgment, although it must still be remembered that the plaintiff must establish a strong case and therefore a reasonably strong defence will deprive the plaintiff of been able to meet that threshold.”*

**53.** Accordingly, a reasonably strong defence would deprive the Receiver of being able to meet the threshold of a strong case.

**54.** The question before the High Court was whether the defendants’ defences were such that they impacted sufficiently to deprive the Receiver of a strong case. The Judge found, however, that the defences advanced were insufficient for that purpose.

**55.** It will be recalled that the principal argument advanced by the first defendant in his affidavits was an alleged breach of agreement by the Lenders by the failure to advance the full amount of the June 2019 Facility. The Judge considered that there were a “*number of difficulties*” with the defendants’ argument that the 2018 Facility Agreement was conditional upon the provision of the working capital facilities provided for in the June 2019 Facility. Firstly, there was no stated connection between the transactions in the



documents themselves. There was no mention in the June 2018 Facility Agreement to that loan being conditional on or subject to the finance being provided for the development of the Lee Road property.

**56.** The Judge also found it “*striking*” that a year and a day passed between the June 2018 Facility Agreement (to fund the discharge of the judgment mortgage on the Property) and the 2019 Facility Agreement for the provision of working capital for the Lee Road development. He found that even if the parties contemplated that the June 2018 Facility could be repaid from the sales proceeds from certain of the Lee Road properties, it “*certainly doesn’t follow*” that there was an agreement binding in law connecting the provision of the June 2018 Facility with the working capital facility granted in June 2019. While the defendants had asserted that they had been given certain assurances that working capital would be provided to develop the Lee Road property, “*none of those assurances had found their way into any contemporaneous documentation*”. The Judge considered it “*...surprising if these carefully constructed contractual documents did not contain some cross-reference to the contemplated financing arrangement if it were the case the parties had agreed that those arrangements were to be interlocking in the sense that a failure to comply with the obligations under the financing arrangements was to have a legal effect on the earlier loan and guarantee arrangements.*”

**57.** In these circumstances, and whilst he did not rule out the possibility that such a defence might be successful if pursued by the defendants at trial, the Judge concluded that on the contractual documents, the Receiver had demonstrated a strong case in light of the fact that there was a “*clear entitlement to enforce the 2018 arrangements on a standalone basis*”.

**58.** The Judge went on to address the defendants’ next point of defence, namely the alleged regulatory non-compliance by the Lenders. He concluded as follows:

*“So far as the regulatory matters are concerned, in my view there is a dearth of evidence on the part of the defendants to suggest – to establish that there were regulatory matters, which were binding upon the lenders, which have not been complied with. There are certain suggestions that that may be so. Again, I don’t rule out the possibility that those matters may be capable of being established, but again I have come to the view that they are not such as to deprive the plaintiff of being able to say that there is a strong case.”*

**59.** He next addressed the balance of convenience, namely what was the regime, pending trial, which gave rise to the least risk of injustice. He was satisfied that the balance of convenience or least risk of injustice favoured the grant of the reliefs sought by the Receiver. He found that there was no serious risk of injustice in depriving the defendants of the lands to the rear of Kilmurray House even if the matter was to turn out in favour of the defendants. This was in circumstances where the lands in question had been offered for sale by the defendants and were clearly *“financial in nature rather than amenity in nature in those circumstances, or at least primarily so”*.

**60.** Towards the end of the hearing in the High Court, it had been suggested by the defendants that if they were on the losing side of the Receiver’s application for interlocutory relief and if the lands were then sold, the money would be gone. Accordingly, it was said, if the defendants were ultimately successful at trial, they would suffer a significant injustice of not been able to recover whatever it might be that the court felt that they were entitled to recover.

**61.** The Judge agreed that this was a factor to be considered, and he duly took it into account in making his order.

**62.** Pursuant to the Order of 30 July 2021:

- The defendants were directed to vacate and deliver up possession of the Property to the Receiver.
- The Receiver was permitted to recover possession of the Property.
- The defendants and all persons having notice of the making of the Order were prohibited from impeding and/or obstructing the Receiver from taking possession.
- The defendants, their servants or agents, and all persons having notice of the making of the Order were prohibited from trespassing or entering upon or otherwise interfering with the Property.
- The defendants were directed to deliver up any keys, alarm codes and/or other security and access devices and/or codes in respect of the Property.
- The defendants, their servants or agents and all persons having notice of the making of the Order were prohibited from impeding and/or obstructing the Receiver in efforts to sell or in any way market the Property for sale.
- The Receiver was directed to give the defendants 28 days' notice of any intention to enter into binding legal arrangements for the sale of the Property.

### **The appeal**

**63.** The defendants' notice of appeal advanced some fifteen grounds of appeal. While many of the grounds reprise the arguments they made in the High Court, as is apparent from their notice of appeal, and, more particularly, their written submissions in this Court, the defendants sought to introduce matters on appeal which had not been put on affidavit or addressed in submissions before the High Court. In particular, they:

- (i) asserted that the June 2018 Facility (and the security provided by the defendants on foot of same) was "*strictly*" conditional upon the Lenders

providing a working capital facility of €600,000 for the purposes of building on the Lee Road lands. This assertion had never been made in the High Court.

- (ii) introduced a narrative entirely for the first time to the effect that requests for a “*drawdown*” from a €600,000 loan facility were made in September 2018 despite the fact that no such facility was in place in September 2018, or at any other time.
- (iii) referred to photographs of the Cork site being provided in September/October 2018 to the Lenders together with an assertion of site visits taking place.
- (iv) made assertions concerning correspondence between the Lenders and the first defendant in March 2018 about the “*legal lending structure*” of the Lenders, which never featured in the High Court.
- (v) advanced the argument (at grounds 11 and 12 of the grounds of appeal) that they entered into the agreements without the benefit of legal advice and/or in circumstances of duress and undue influence. There was no factual evidence provided for by the defendants to support these claims.

A further tenet of the defendants’ notice of appeal was that the validity of the Guarantee and/or the Mortgage to which they were parties was undermined by reason of the defendants not being a “*corporate entity*”.

### **Discussion and Decision**

**64.** At the hearing before this Court, the first defendant sought to put a “*Book of Evidence*” before the Court which, he maintained, was evidence of the matters advanced in the grounds of appeal and the defendants’ written submissions. None of this material had been put on affidavit by the first defendant.

**65.** One of the arguments which the first defendant sought to advance for the first time on appeal was that there was an agreement prior to June 2018 whereby the Lenders would lend

some €600,000 to Greenwich to develop the Lee Road lands. He claimed that the June 2018 Facility was dependant on the provision of €600,000 by the Lenders. He stated that in September 2018 Greenwich had looked for a drawdown in respect of the €600,000 proposed lending but that did not happen as the Lenders said they were not extending €600,000 to Greenwich.

**66.** As I have already said that case was not made in the High Court. Rather, the argument made in the court below was that the June 2018 Facility was dependent on the June 2019 Facility which had made provision for the advance of some €300,000 to Greenwich, and that the Lenders had defaulted on the provision of this sum in that they failed to advance the full amount of the June 2019 Facility.

**67.** Thus, what the defendants were asking this Court to do was to consider a chain of events as described by the first defendant in his written submissions including the argument that there was an agreement reached to advance some €600,000 to Greenwich to develop the Lee Road lands and that the Property had been made available by the defendants “strictly on the basis of [€730,000.00] refinancing the land in Cork (*sic*) and the [€600,000.00] work in progress [being] available...”. The first defendant says that this agreement was defaulted on by the Lenders. The other overarching argument sought to be advanced for the first time on appeal was that the Lenders had acted in contravention of their own structures by permitting the defendants (who were non-corporate entities) to provide the Property as security. According to the first defendant, it had been made known to the Lenders by their own solicitors that in order for them to take security from the defendants they had to make the defendants shareholders and directors of Greenwich. Asked by the Court where was the evidence for this in the High Court, the first defendant agreed that that evidence had not been put before the High Court.

**68.** While there is no absolute bar preventing an appellate court from considering matters that were not decided by the High Court, the general position is that a party will not be allowed to raise issues that were not raised in the lower court save in an exceptional case in the interests of justice. The circumstances where a party might be permitted to advance a new point on appeal were examined in *Lough Swilly Shell Fish Growers Co-op Society Limited v. Bradley* [2013] 1 I.R. 227. At p. 245 of his judgment, O'Donnell J. stated: -

*“There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in K D. for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the Court nevertheless retained the power in appropriate cases to permit the argument to be made.”*

**69.** As regards the argument the defendants advanced before this Court of a claimed agreement for the provision by the Lenders of €600,000 to assist in the construction of

buildings on the Lee Road lands and the claim that the Lenders acted in breach of their own rules in permitting the defendants as non-corporate entities to benefit from the €730,000 advance, while these claims have now been included in their defence delivered on 28 March 2022 (it being specifically pleaded that on 26 March 2018, “*continued assurances*” were given to the defendants “*of [€730,000.00] for the refinancing of the land in Cork (sic) and the [€600,000.00] work-in-progress facility...* ”), such arguments were not made by the defendants in the court below for the purposes of meeting the Receiver’s application for interlocutory relief. No explanation was proffered as to why the matters sought to be raised at the appeal hearing had not been contained in the three affidavits the first defendant had sworn in the High Court which ran in total to some 41 pages (excluding exhibits). Nor did the defendants proffer an explanation at the appeal hearing as to why these new matters upon which they sought to rely for the purposes of their appeal had not been placed on affidavit (with the requisite exhibits) for consideration by the Court.

**70.** In the High Court, the defendants were legally represented. Moreover, their solicitor had obtained time from the High Court to consider the defendants’ position, and also to consider whether the second defendant should be separately legally represented. It was thus incomprehensible to the Court that the defendants had not apprised their solicitor of the matters which they sought to advance for the first time on appeal. More fundamentally, the defendants did not establish that the new evidence upon which they sought to rely on appeal (clearly in existence at the time of the hearing of the application for interlocutory relief) could not have been obtained with due diligence for use in the injunction application.

**71.** Furthermore, the claim which the defendants sought to make on appeal, namely that the Lenders had agreed in March 2018 to lend some €600,000 together with the €730,000

sum verged on being “*diametrically opposed*” to the case they sought to advance in the High Court, which was that the failure of the Lenders to provide all of the lending provided for in the June 2019 Facility (the balance of €58,925 of a facility for €300,000) vitiated the June 2018 Facility (and hence the security the defendants had provided).

**72.** In short, the defendants’ late claims in the above regards failed to meet criterion 1 of the test laid down in *Murphy v. Minister for Defence* [1991] 2 I.R. 161 for the admission of new evidence and, moreover, lay at the wrong end of the spectrum identified by O’Donnell J. in *Lough Swilly Shell Fish Growers*.

**73.** Accordingly, the Court was not satisfied that the defendants had put forward any persuasive argument such that the Court should permit them to adduce new arguments that had not been made in the court below, and as advised to the first defendant at the hearing of the appeal, the Court was not amenable to permitting the defendants to advance arguments or introduce a “*Book of Evidence*” that had not been put before the High Court and which had not been put on affidavit for the purposes of the defendants seeking to apply to the Court to adduce new evidence on appeal..

**74.** It of course goes without saying, however, that, given the pleadings in the defence the defendants have delivered, it remains open to the defendants to pursue their new arguments at the trial of the action.

**75.** I turn now to the High Court judgment under appeal.

***Did the High Court err in granting the Receiver interlocutory relief?***

**76.** The first thing to be noted is that the defendants accept that the import of the June 2018 Facility Agreement was that some €730,000 was to be lent to Greenwich in order for Greenwich to lend the monies to the defendants for the purposes of clearing the judgment mortgage on the Property. Furthermore, the defendants do not dispute that the €730,000



lent to Greenwich has not been repaid. Nor is it disputed that the Lenders were entitled to appoint a receiver in the event of non-repayment.

**77.** The defendants also accept that they have had the benefit of the June 2018 Facility in that the judgment mortgage previously registered against the first defendant's interest in the Property has been vacated. Furthermore, they do not dispute that they guaranteed the €730,000 advanced by the Lenders to Greenwich for the purposes of Greenwich lending the defendants that sum in order to clear the judgment mortgage, and it is accepted that the defendants provided security for the said sum by way of a charge on the Property.

**78.** Moreover, when the defendants executed the June 2018 Facility, they had the benefit of a solicitor. The first defendant now says however that when signing the June 2018 Facility the defendants received no advice regarding the complicated nature of the Security, nor in relation to the Central Bank's Rules and Regulations. Clearly, however, it was open to the defendants to seek advice on such matters had they wished to do so. The June 2019 Facility Agreement also shows that the defendants' signatures on that document were witnessed by a solicitor. With regard to the June 2019 Facility, the first defendant claimed (for the first time on appeal) that the signature on the document was not his albeit he acknowledged that he had not made that claim in the High Court. He had no explanation as to why he did not advise the solicitor representing him in the High Court that he had not signed the June 2019 Facility Agreement.

**79.** The defendants' principal assertion in the High Court was that pursuant to the June 2019 Facility, the Lenders agreed to advance €300,000 to Greenwich but that the Lenders stopped extending that Facility before the entirety of the €300,000 sum was drawn down. The first defendant thus contends that the reason the Security on the Property was called upon was in circumstances where the Lenders themselves had not lent Greenwich the money that had been agreed pursuant to the June 2019 Facility (or indeed, as claimed by

the first defendant, what had been agreed prior to that in 2018). This was, the first defendant says, despite Greenwich and the defendants having done everything they were required to do. According to the first defendant, the defendants and Greenwich were left “*high and dry*” by the Lenders. He contends that the Lenders defaulted on the indemnities and assurances they had given him. Specifically, he says that they defaulted in respect of the June 2019 Facility in failing to allow the drawdown of the entire amount and in charging Greenwich interest on monies that were not lent. He contends that the Lenders were attempting to frustrate the contracts into which they had entered. In effect, the case being advanced by the defendants is that the Lenders’ default caused Greenwich to default, with the result being that the Property was then wrongly pursued by the Lenders.

**80.** Insofar as the defendants advanced the foregoing argument before the High Court, the Judge was unconvinced by the claim that the June 2018 Facility was contingent on the June 2019 Facility. He found that the June 2018 Facility was in place almost a year before the June 2019 Facility was executed. The latter Facility provided for the advance of €300,000 to Greenwich for the purposes of the development of the Lee Road lands in Cork. While the Judge observed that it was common case that not all of the €300,000 had been advanced to Greenwich, he found that that fact could not assist the defendants here as it was Greenwich who was the borrower under the June 2019 Facility and not the defendants. Furthermore, albeit Greenwich had commenced proceedings (bearing record number 2020/7556P) against the Lenders seeking, *inter alia*, specific performance “*of the facility agreement made as between the Plaintiff and the Defendants, contained in facility letters dated the 20<sup>th</sup> of June, 2018 and 21<sup>st</sup> of June, 2019...*” and damages for breach of contract in relation to the failure by the Lenders to comply with their contractual obligations and their failure to supply additional finance, those proceedings were struck out and were not pursued by Greenwich. It appears that prior to the proceedings being struck out, the Lenders’ solicitors had written to

Grenwich seeking a statement of claim, which was not forthcoming. That led to the application by the Lenders on 28 June 2021 to dismiss the proceedings. Whilst the first defendant now says that those proceedings were struck out in error and are being resurrected, it is the case that Greenwich allowed the proceedings to be struck out.

**81.** It is also the case that the Judge found that there was an indirect connection between the defendants and Greenwich. However, he noted that at the end of the day, neither of the defendants were shareholders in or directors of that company. No formal connection existed between the defendants and Greenwich. Accordingly, there was no legal basis upon which the defendants could challenge the validity of the Receiver's appointment.

**82.** Thus, having perused the two Facilities, the Judge found no stated connection between the two transactions such as might have dented the strong case established by the Receiver. The Judge's finding in this regard was strengthened by the fact that Greenwich-a party to the June 2019 Facility- had decided, for whatever reason, not to pursue the proceedings they had launched for breach of contract. Moreover, albeit that in his affidavits the first defendant asserted that certain assurances had been given to him by the Lenders, none of these assurances had found their way into the contemporaneous documentation. The Judge found it surprising, if it were the case that the parties had agreed that the two Facilities were to be interlocking in the sense that the failure to comply with obligations under the June 2019 development financing arrangements was to have legal effect on the earlier June 2018 loan and guarantee arrangements, *"that these carefully constructed documents did not contain some cross reference to the financing arrangement"*.

**83.** As the Judge stated, that was not to say that the defendants would be shut out from their ground of defence of the interconnection between the two Facilities at trial. However, the case advanced by the defendants at the interlocutory stage was not such as to deprive

the Receiver of having a strong case “*in light of the fact that on the contractual documents there is a clear entitlement to enforce the 2018 arrangements on a standalone basis and the circumstances permitting the enforcement have clearly occurred*”.

**84.** The Judge’s reasoning cannot be faulted, in my view. As is clear from the June 2018 Facility document, the true nature of the June 2018 Facility is that it was a facility specifically to address the judgment mortgage that had been registered against the first defendant’s interest in the Property. Whilst in his High Court affidavits and in his arguments to this Court, the first defendant maintained that the Guarantee/Security given by the defendants for the €730,000 advanced to Greenwich was by way of a top up only; no support for this contention is found in any of the documents that were before the High Court or indeed this Court. Accordingly, the Judge was entirely correct to find that on the face of the contemporary documentation there was no dependence on or interlocking with the June 2019 Facility, or with any other agreement whether oral or otherwise. Insofar as the defendants make the complaint that Greenwich was charged interest on the whole of the June 2019 Facility in circumstances where not all of the €300,000 was made available for drawdown by Greenwich, in my view, any error in the amount of the demand or any dispute as to the amount due on foot of the 2019 Facility does not go to the validity of the appointment of the Receiver pursuant to the terms of the contractual arrangements relating to June 2018 Facility. I note that in their defence, the defendants plead that the alleged overcharging by the Lenders of Greenwich of €39,587.34 in interest “*has caused serious consequences and loss for Blakeshaw/Greenwich [and the defendants]*”. As the Judge observed, whether the Lenders’ alleged failure to comply with the terms of the 2019 June Facility “*was to have a legal effect on the earlier loan and guarantee arrangements*” is a matter for the defendants to pursue at the trial of the action, if they wish.

**85.** Overall, however, for present purposes, I agree with the Receiver's contention that in order to find that the Judge erred in finding no connection between the two Facilities, the Court would have to do violence to the clear terms of the June 2018 Facility.

**86.** The other principal argument advanced by the first defendant at grounds 7-10 of the grounds of appeal (and which was also made in the court below) was that the Lenders were not entitled to take the Security as they were not authorised or approved to do so by the Central Bank. They further maintained that this had been confirmed to them by the Central Bank. Hence, their claim that the Security was taken illegally.

**87.** The first defendant asserts that at all relevant times in the High Court the defendants made the case that the Security was taken by the Lenders illegally as they were acting in breach of the Central Bank Regulations. He contends that in light of the argument made as to the alleged illegal actions of the Lenders, the Judge should have conducted an investigation into the defendants' allegations.

**88.** Insofar as alleged regulatory breaches were canvassed in the court below, the Judge found a dearth of evidence on the part of the defendants to establish that there were regulatory matters, binding on the Lenders, that had not been complied with. That finding cannot be impugned, in my view.

**89.** It was further sought to be contended (for the first time on appeal) that the Lenders were not entitled to take any security from private individuals or lend money to private individuals. Indeed, the first six grounds of appeal relate to the defendants' contention that in taking security from the defendants in circumstances where the Lenders' Legal Approval Structures required the lending to be to a corporate structure, the Lenders acted in breach of their own procedures. As already stated, the Court ruled at the appeal hearing that the defendants were not entitled to advance arguments that had not been made in the court below and where no attempt had been made by the first defendant to advance such

arguments by way of affidavit evidence before this Court. I would also observe that insofar as the first defendant sought to advance this particular argument, it is entirely unclear as to how such an argument could assist the defendants in circumstances where none of the Lenders' lending was in fact to the defendants.

**90.** Turning again to the Judge's findings and conclusions, in my view, the Judge addressed each of the arguments advanced by the defendants in the High Court and filtered same into the legal test for the grant of a mandatory injunction. He concluded however that a strong case had been established by the Receiver and that the defendants' case on affidavit did not constitute sufficient grounds to displace the strong case made out by the Receiver. The defendants' written or oral submissions to this Court do not say how the Judge got it wrong. Specifically, they have not said how the Judge erred in determining that the Receiver had made out a strong case, or how he erred in finding that the justice of the case favoured the grant of the mandatory relief sought by the Receiver. Nor do the defendants say how the High Court Order as fashioned by the Judge is unjust.

**91.** Notably, the Order made by the Judge took account of the first defendant's contention that the Lenders were insolvent and his ensuing concern that if the Receiver was successful in the interlocutory injunction application and the Property was sold, any monies obtained by the Lenders from the sale might not be available for the defendants in the event that they were successful at trial.

**92.** In my view, that concern has been adequately addressed by the Judge by the way in which the High Court Order is framed. Moreover, the Receiver has given an undertaking as to damages. Indeed, the first defendant accepted that the Judge was very fair in the manner in which he fashioned the High Court Order to take account of the defendants' concerns as to how the Lenders handled their business.

**93.** In the course of the appeal, the Court was faced with a series of shifting positions by the first defendant as to why the Receiver/Lenders' actions ought to be impugned. None of these shifting positions, however, disturbs the rationale of the Judge.

**94.** In my judgment, the Judge's assessment of the issues before him (including as to where the balance of justice lay) is unimpeachable: the first defendant has not advanced any plausible argument as to how the Judge erred in arriving at the conclusions he did.

**95.** For the reasons set out above, I would dismiss the appeal.

### **Costs**

**96.** The defendants have not succeeded in their appeals. It follows that the Receiver should be awarded his costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 21 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 21-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

**97.** As this judgment is being delivered electronically, Costello J. and Allen J. have indicated their agreement therewith and the orders I have proposed.