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**THE COURT OF APPEAL
CIVIL**

Neutral Citation [2023] IECA 256

Appeal Number: 2023/79

Haughton J.

Pilkington J.

Allen J.

IN THE MATTER OF ORLINGTON COMPANY CLG

**AND IN THE MATTER OF AN APPLICATION BY OSSORY ROAD ENTREPRISE
PARK LIMITED**

BETWEEN

OSSORY ROAD ENTERPRISE PARK LIMITED

APPLICANT/RESPONDENT

AND

ORLINGTON COMPANY CLG, DECLAN ROGERS AND BRID ROGERS

RESPONDENTS/APPELLANTS

JUDGMENT of Mr. Justice Allen delivered on the 27th day of October, 2023.

Introduction

1. This is an appeal by Orlington Company CLG (*“the Company”*) and Mr. Declan Rogers (*“Mr. Rogers”*) against the judgment of the High Court (Stack J.) delivered on 24th January, 2023 ([2023] IEHC 34) and consequent order made on 7th March, 2023 pursuant to ss. 169 and 173 of the Companies Act, 2014 for the rectification of the register of members of the Company so as to record that Ossory Road Enterprise Park Limited (*“OREP”*) is a member of the Company and to remove Mr. Rogers as a member of the Company.

Background

2. Ossory Industrial Estate is an industrial estate of fifteen units at Ossory Road, Dublin
3. The Company is the owner of the estate roads. OREP is the owner of nine of the units and claimed to be entitled, as such, to be a member of the Company. Mr. Rogers, the former owner of those units, is shown on the Company’s register of members as a member of the Company. OREP’s case is that since its purchase of the units, Mr. Rogers was no longer entitled to be a member of the Company.
3. Ossory Industrial Estate appears to have been originally developed in phases between 1979 and 1988. By current standards, the paperwork was unusual. Each of the units was conveyed to the purchaser in fee simple, with a right of way and various wayleaves over the estate roads, and what nowadays would be referred to as the common areas were conveyed by the developer to the Company in 1988. The Company is described as the management company and that appears to have been the intention at the time it was incorporated but – at least in relation to the first two phases – there is no formal management structure. Between 1995 and 1998, Mr. Rogers bought nine of the units and became a member and director of the Company. Mrs. Brid Rogers also became a director.

4. I pause here to say that while Mrs. Rogers was party to the proceedings in the High Court, she is not party to the appeal.
5. On 13th January, 2005 Mr. Rogers mortgaged each of the units to Allied Irish Banks p.l.c. (“AIB”). For some reason – or in error – the mortgages were by way of demise for a term of 10,000 years, less the last three days, rather than by conveyance.
6. At some time prior to 2016 the mortgages fell into arrears and on 26th February, 2016 AIB appointed Mr. Ken Tyrrell as receiver of the rental income from the properties. All the appearances are that notwithstanding the appointment of the receiver Mr. Rogers continued to manage the properties and – directly or indirectly – to receive the rents.
7. By deed of conveyance and assignment dated 17th January, 2020, AIB transferred the loans and security to Everyday Finance Limited (“Everyday”) which novated the appointment of Mr. Tyrrell: but Mr. Rogers continued to collect the rents.
8. In 2021 – in a move which until recent years would have been very unusual but has since been seen more frequently – Everyday decided to sell the mortgaged properties with Mr. Rogers in possession. The properties were advertised for sale as a job lot by online auction by a firm called BidX1. As is the invariable practice of the purchasers of so-called distressed loans, the conditions of sale were so hollowed out by special conditions that the properties were effectively offered for sale “warts and all” for all of the estate, right, title and interest of Everyday, and without vacant possession.
9. On 9th April, 2021 the properties were knocked down to a company called Tigway Limited (“Tigway”) for €1,424,000 but for whatever reason, that sale was not completed.
10. On 13th April, 2021 Mr. Rogers, at that time acting *pro se*, issued a plenary summons under record number 2021 No. 2378P naming as defendants AIB, Everyday and Mr. Tyrrell and on the same day registered the action as a *lis pendens*. Appearances were entered on 26th

April, 2021 and 10th May, 2021 but the action did not progress. That summons was not in the papers before the court but Mr. Mulloy S.C., for the appellants, agreed that whatever the reliefs formally claimed may have been, the object of those proceedings was to impede or prevent the sale.

11. On 13th September, 2021 a plenary summons was issued by Tigway against Everyday claiming specific performance of the contract made on 9th April, 2021, a declaration that a completion notice served by Everyday was null and void, and a declaration that Everyday was not entitled to forfeit Tigway's deposit. That action was registered as a *lis pendens* on 22nd September, 2021. In the meantime, an appearance had been entered on behalf of Everyday on 16th September, 2021. It is not apparent from the papers before the court what became of that action.

12. By a series of conveyances dated 6th December, 2021 the properties were purportedly conveyed to OREP. I say purportedly conveyed because, as I have said, the mortgages to AIB were by demise for 10,000 years – less the last three days – rather than by conveyance, so that by the letter of the law, all that Everyday could have sold was the right to occupy the property for about 9,984 years – less the last three days. The total purchase consideration was €1,251,000.

13. As I will come to, there is a dispute as to the circumstances in which the properties came to be sold to OREP.

14. Having taken the assurances on 6th December, 2021, OREP promptly issued a plenary summons (2021 No. 6816) against Mr. Rogers claiming various injunctions restraining trespass and interference with the collection of the rents and – by leave obtained on 17th December, 2021 – issued a motion on 20th December, 2021 seeking interlocutory orders. OREP's interlocutory motion was case managed in the High Court chancery list and was

heard by the High Court (Stack J.) on 6th April, 2022 . For the reasons given in an *ex tempore* judgment on 8th April, 2022, Stack J. restrained Mr. Rogers from collecting the rents from all but one of the units and directed that the rents should be collected by OREP and lodged to its solicitors' client account.

15. On the hearing of the interlocutory motion it emerged – or at least was suggested – that one of the properties – Unit 1 – had been demised or purportedly demised by Mr. Rogers to a company called Rogers Recycling Limited, which was said to be collecting the rents in respect of that unit. The motion in respect of that unit was adjourned to facilitate the joinder of Rogers Recycling and was heard – with a new motion claiming the same relief against Rogers Recycling – over three days in July, 2022.

16. On 7th October, 2022 for the reasons given in a written judgment ([2022] IEHC 556) the High Court (Stack J.) made an interlocutory order for the preservation of the rents in respect of Unit 1: which, as with the rents in respect of the other units, were to be – and which since have been – collected by OREP and lodged to its solicitors' clients account.

17. The judgment of the High Court on OREP's application for interlocutory relief shows that the motion was argued and decided on the principles applicable to such applications.

18. One of the issues raised by Mr. Rogers was whether – because Everyday had purported to convey properties in which it only had a leasehold interest – OREP had good title to the properties. On what was an application for interlocutory prohibitive orders, all that was required to engage the discretion of the court was that the plaintiff should show that there was a fair question to be tried. Stack J. – referring to s. 76 of the Land and Conveyancing Law Reform Act, 2009, s. 63 of the Conveyancing Act, 1881, and *Thelluson v. Liddard* [1900] 2 Ch. 635 – found that OREP had raised a fair question to be tried that the conveyances carried all the estate, right, title and interest of Everyday. At para. 32 she

observed that if OREP had been required to satisfy the *Maha Lingam* test required for mandatory interlocutory relief – that it had a strong case, likely to succeed at trial – that threshold would also have been met. However, she found that the arguments raised by Mr. Rogers were such as to preclude the application of *Keating v. Jervis Shopping Centre Ltd.* [1997] 1 I.R. 512.

19. To make a long story short, in the plenary proceedings Stack J. left open the question as to the OREP's title.

The application for rectification of the Company's register of members

20. The articles of association of the Company provide that:-

- “3. *The persons whose names are entered in the register of members and any Unit-owner who applies for membership and such other persons as the directors shall admit to membership, shall be members of the Company.*
5. *Those persons whose names are entered in the register of members and who are not Unit owners shall cease to be members as soon as the Unit-owners of all the [U]nits in the estate have become members. A member shall cease to be such on ceasing to be a Unit-owner and on the registration as a member of his successor in title. A member shall have the right at any time to resign his membership of the Company.*”

21. Commencing on 8th December, 2021 OREP, by its solicitors, wrote a number of letters addressed to the secretary of the Company requesting admission to membership, and to Mr. and Mrs. Rogers requesting that they should resign as directors. The Company, by its solicitors, refused to register OREP as a member and by originating notice of motion issued on 24th March, 2022 OREP applied to the High Court for orders pursuant to ss. 169 and 173

of the Companies Act, 2014 for the rectification of the register of members by the addition of OREP and the removal of Mr. Rogers.

22. OREP's application was resisted by Mr. Rogers and the Company – I think that it is fair to say – tooth and nail.

23. Among the grounds of opposition were that the assurance by Everyday to OREP – which was expressed as a conveyance – was ineffective to transfer the leasehold title; that OREP was not privy or party to the articles of association of the Company; that OREP – being only entitled to occupy the properties for the next 10,000 years or so – was not the owner of the units for the purposes of the articles of association; that the articles of association conferred an absolute discretion on the directors as to admission to membership; and that it was in the best interests of the Company that the dispossessed Mr. Rogers should remain a member of the Company rather than that OREP should become a member.

24. The principal objection to the application for rectification was that the High Court ought not determine OREP's Companies Act application until after the determination of the plenary proceedings in which Mr. Rogers, in his defence, had contested OREP's title and in which he had mounted a challenge to the sale of the property by Everyday to OREP, by way of counterclaim.

25. In a careful and comprehensive written judgment, the High Court judge addressed each of the arguments advanced on behalf of the Company and Mr. Rogers in opposition to the application. She rejected all of those arguments. The judge found that OREP was entitled to be registered as a member of the Company and saw no legal basis for further delaying its registration as such.

26. I will return to the High Court judgment insofar as it dealt with the issue the subject of the appeal.

The grounds of appeal

27. By notice of appeal dated 4th April, 2023 The Company and Mr. Rogers appealed against the judgment and order of the High Court. There are no fewer than nineteen numbered paragraphs but they are all directed to the fact that the High Court decided the Companies Act application before Mr. Roger’s counterclaim in the plenary proceedings had been heard.

28. For example, it was said that *“Disputed title to land remains a central issue in these Companies Act proceedings and upon a sequence of discrete issues as to fact fully joined by the directors’ defence and counterclaim of the 22 September 2022 in the related earlier plenary proceedings, 2021 No. 6816P”*; that *“the central issue in the [plenary] proceedings was whether the mortgagee Everyday and its privies after April 2021 actionably conspired with OREP to bargain for sale designedly other than ‘at the best price reasonably obtainable in clear and high-handed breach of s. 103 of the Land and Conveyancing Law Reform Act, 2009”*; that OREP *“well aware that rival bidders were now excluded in this contrived monopsony was never a bona fide purchaser for value*; and that the judge’s observation that the usual remedy in the case of a sale at undervalue was damages did not apply in the case of a purchaser who was *“party to a fraud on the equity of redemption.”*

29. Several of the numbered grounds of appeal are not grounds of appeal at all but statements or assertions of law and a reprise or summary of Mr. Rogers’ defence and counterclaim in the plenary proceedings. It is repeatedly said that the High Court judge acted precipitately in determining the Companies Act application before the plenary action had

been heard but strikingly absent is any suggestion that the judge erred in her construction of OREP's title documents or the Company's articles of association.

30. The written legal submissions filed on behalf of the Company and Mr. Rogers sought to revive some of the other arguments which had been made before the High Court and the written submissions filed on behalf of OREP engaged with those arguments but the sole issue properly before the court – expressed this way and that – was whether the High Court judge erred in deciding the Companies Act application before the conclusion of the plenary proceedings.

The sale to OREP

31. Apart from contesting OREP's title, Mr. Rogers counterclaimed in the plenary proceedings that the sale was at a price which was less than the best price reasonably obtainable. The case made is that the sale to OREP was achieved by an unlawful conspiracy between Everyday, Mr. Tyrrell, OREP and a company called Saybrook Limited (*"Saybrook"*) to deal with OREP to the exclusion of all other potential purchasers, with the result that the properties were sold at undervalue.

32. It is common case that the properties were advertised for sale by BidX1 by online auction on 9th April, 2021 and were then knocked down to Tigway for €1,424,000.

There is no complaint in relation to the marketing of the properties prior to the auction or in relation to the conditions of sale or that the properties were offered for sale with Mr. Rogers in possession. There is no suggestion that the price at which the properties were knocked down to Tigway was less than the best price reasonably obtainable. While the counterclaim asserted that the combined value of the properties was *"likely to be in excess of €3 million"*, it immediately went on to plead that *"The property was also run on an informal cash based system which very significantly affected its value."*

33. It is common case that the sale to Tigway was not completed. It is common case that the properties were later sold to OREP and that the sale and purchase was completed on 6th December, 2021. Variously, Mr. Rogers pleads that the properties were sold at undervalue and that it is not possible to determine what the true price was. I do not understand the assertion that it is not possible to determine the price paid by OREP. Apart from the fact that Mr. Rogers has not advanced any grounds on which the evidence of Mr. Jamie O' Donohoe – a director of OREP – might be doubted, Mr. O'Donohoe exhibited copies of the conveyances all of which show the consideration and bear Stamp Certificates. It appears that at some stage along the way Mr. O'Donohoe referred to a figure of €1.4 million but this was soon explained to include fees and stamp duty.

34. OREP was not a bidder at the April, 2021 auction but the consortium behind OREP was at that time behind Saybrook, which was a bidder. The immediate underbidder at the April, 2021 auction was Mr. Robert Healy, who bid €1,413,000. The last bid by the consortium now behind OREP was €1,183,000.

35. Mr. Roger's case is that after the sale to Tigway failed to complete, Mr. Healy was not approached by Everyday, or Mr. Tyrrell, or BidX1, but that they all decided to deal with OREP (or those behind OREP) to the exclusion of all others. Mr. Rogers has calculated that Mr. Healy's bid of €1,413,000 was €230,000 and 19.4% higher than the consortium's last bid at the April, 2021 auction. The foundation of the asserted conspiracy appears to be the fact that after the sale to Tigway collapsed nobody later contacted Mr. Healy to enquire whether he was still interested.

36. There is no suggestion of any link between Everyday or Mr. Tyrrell and OREP or anyone behind OREP. There is not even a theory posited as to why Everyday might have

accepted less for the properties than could have been achieved and – on Mr. Rogers’ case – was readily and immediately available. The case pleaded is that:-

“For reasons so far obscured Everyday and/or Ken Tyrrell readily gave [OREP] to understand directly or through intermediaries or other parties as yet unknown that [OREP] would be able to effect terms with Everyday as vendor and in particular would be spared competition from all other bidders, and most particularly those with ready proof of funds who had already bid well beyond what [OREP] had previously been prepared to offer.”

37. There was no evidence as to Mr. Rogers’ indebtedness to Everyday but the court was informed by counsel that it greatly exceeded Mr. Healy’s best bid. Mr. Rogers’ equity of redemption, it appears, is as remote as his freehold reversion.

38. Mr. Rogers’ case in the plenary proceedings is that the sale to OREP was so tainted by the alleged conspiracy that it should be set aside. It is of some significance to note that while the relief claimed in the counterclaim is a declaration that the conveyances were void, it was accepted by counsel that the height of Mr. Rogers’ case was that they are voidable.

39. Surprisingly – in a counterclaim alleging that there was a conspiracy – none of the alleged co-conspirators were joined. Startlingly – in an action to set aside the sale – Everyday was not named as a defendant to the counterclaim. On the hearing of the appeal, counsel agreed that the orders sought setting aside the sale could not possibly be made unless Everyday was a party to the proceedings. It was said that the action between OREP and Mr. Rogers (and Rogers Recycling) had progressed to the point that discovery had been made by OREP and that it was the intention to join Everyday – but not when.

40. In its reply and defence to counterclaim – which was delivered after the hearing of the Companies Act application by the High Court – OREP admits the bidding at the April, 2021 online auction and admits that after the sale to Tigway collapsed it was approached twice by a representative of BidX1 to enquire whether the consortium was still interested in buying the properties. However, OREP pleads that terms were not agreed privately and that there were two further online auctions; one on 17th September, 2021 at which there were no bids, and a second (or third) on 24th September, 2021 when, after competitive bidding, the properties were knocked down to it for €1,251,000.

Discussion and decision

41. The central tenet of the appeal is that the High Court judge ought not to have decided the Companies Act application while the plenary proceedings remained unresolved.

42. There are two broad strands the appeal. The first – identified by Mr. Rogers as the central title issue – is whether “*Everyday and its privies actionably conspired with OREP secretly to bargain for sale designedly other than ‘at the best price reasonably obtainable’ in clear and high-handed breach of s. 103 of the Land and Conveyancing Law Reform Act, 2009.*” The second strand is that the “*title issue at interlocutory injunction, heard in June and July 2022, was already ruled on by the learned motion judge in a reserved judgment of 7th October 2022 ‘a fair question of fact and/or law’ for determination only upon full trial, and meanwhile only provisionally so, on settled Campus Oil balance of convenience principles.*”

43. It is common case on the appeal – as it appears to have been in the High Court – that the principles of law by reference to which the jurisdiction conferred by s. 173 of the Companies Act, 2014 is to be exercised are set out in the judgments of Laffoy J. in *Banfi Ltd.*

v. Moran [2006] IEHC 257 and of Baker J. in *Re Park Magic Solutions Ltd.* [2017] IEHC 287.

44. In the judgment under appeal, Stack J., at para. 11, said that the remedy under s. 173 is a discretionary remedy which, because it is exercised on a summary basis, does not permit the resolution of disputed issues of fact. She went on to say that the jurisdiction included the determination of any question relating to the title of any person who is a party to the application to have his or her name entered in or omitted from the register, as well as any other question which is necessary or expedient to be decided for the rectification of the register. Apart from the limitation that conflicts of fact cannot be resolved, the summary jurisdiction is sufficiently wide to resolve disputes as to the interpretation of documents, such as the articles of association and documents of title.

45. As to the second strand to the appeal, it is suggested that the judge “*made precipitate final findings as to title to land although such issues are yet to be resolved by full trial in the [plenary] proceedings*” and “*upon limited affidavit evidence only.*” Strikingly absent from the notice of appeal is any suggestion that the judge’s findings and conclusions on the title issues were wrong. Rather the argument is that because Mr. Rogers’ challenge to the conveyances to OREP was not definitively rejected on the interlocutory motions in the plenary proceedings, the judge ought not to have looked at it again on the Companies Act application.

46. Starting at para. 24, the judge considered Mr. Rogers’ argument that OREP was not a “*Unit-owner*” within the meaning of the articles of association of the Company. She recalled the arguments made on the interlocutory motion in the plenary proceedings in support of the proposition that OREP did not have title to the properties, which on the rectification application were redeployed in support of the proposition that it was not the “*Unit-owner.*”

At para. 33, the judge noted that she had been urged to leave the issues of title over to the plenary proceedings but said that she could not see any reason why she should. The judge had, she said, clear jurisdiction under s. 173 to determine matters of title: which she proceeded to do.

47. The judge saw no reason why she should not summarily determine the title issues, and Mr. Rogers has not pointed to any such reason. While it is now said that the judge's findings on the title issues were precipitate, Mr. Rogers does not identify any question of fact that needed to be resolved before the judge could decide the title issues or any additional evidence that might have made any difference to the outcome. Most of all, as I have said, Mr. Rogers does not even suggest that the judge was wrong in her conclusions that the assurances to OREP carried the unexpired residue of the 10,000 year term created by the mortgage and the beneficial interest in the fee simple reversion.

48. At the time of the commencement of the plenary proceedings the immediate and urgent issue was what was to become of the rents pending the hearing of the action. OREP apprehended that if Mr. Rogers continued to collect the rents the money would be dissipated. Mr. Rogers apprehended that if OREP collected the rents the money would be dissipated. The judgment of 7th October, 2022 shows, at para. 10, that OREP's case in the action was that it had acquired good title from Everyday but, at para. 15, that the interlocutory relief claimed against Rogers Recycling Limited was limited to orders for the preservation of the rent. That being so, it was not then necessary to decide whether there was any legal basis for the challenge to OEP's title. The interlocutory motion against Mr. Rogers in respect of the other units was dealt with extemporarily. If at that stage the relief claimed was not similarly so limited, it is clear that the urgent issue was what was to become of the rents *pendente lite*.

49. It is common case that on the Companies Act application the High Court judge had a discretionary power to decide the title issue. As is evident from para. 57 of the judgment of the High Court, the height of Mr. Rogers' argument was that the judge, in the exercise of her discretion, ought not to have finally decided the title issue. It was not contended that by reason of the disposition of the interlocutory motions in the plenary proceedings the judge had no jurisdiction to do so. In deciding whether she would exercise the discretionary statutory power, the judge took as her starting point the fact that OREP as the holder of the unexpired residue of the 10,000 year term and the beneficial interest in the reversion was entitled to be registered as a member of the Company. By the time of the High Court judgment, OREP had been the owner of the units for upwards of a year and it was not in the interests of any of the unit owners that the governance of the management company should be further interfered with. The judge noted that should Mr. Rogers succeed in having the conveyances set aside, OREP would automatically cease to be a member of the Company and Mr. Rogers would be restored to membership. I find no error in that approach.

50. There was never any suggestion that Mr. Rogers might ever be in a position to redeem the mortgages. On the hearing of the appeal it was acknowledged that if, *arguendo*, the sale to OREP were to be set aside, Everyday would be entitled to immediately put the properties back on the market. Mr. Rogers was determined – if he could – to retain control of the Company but could not say to what end.

51. On the hearing of the appeal Mr. Mulloy apprehended that the judge's determination of the title issues on the Companies Act application would make those issues *res judicata* in the plenary proceedings. Without finally deciding the question, I can easily see why counsel might think that. If by the correct exercise of a jurisdiction to summarily decide the title issues and by reaching correct conclusions of law as to the effect of the conveyances from

Everyday to OREP the judge has forestalled further futile argument, that, it seems to me, would be a good thing.

52. As to the first strand of the notice of appeal, Mr. Mulloy's argument is that there are a number of contested issues of fact in the plenary proceedings that could not be determined summarily in the Companies Act application. Mr. Andrew Fitzpatrick S.C., for OREP, does not disagree but makes the simple point that the determination of the contested issues of fact subtending the counterclaim was not necessary for the determination of the rectification application and that the judge did not do so.

53. Mr. Fitzpatrick focussed on the foundation of the jurisdiction conferred by s. 173 of the Act of 2014 which is, in sub-s. (1)(a) that:-

“(1) If–

(a) The name of any person is, without sufficient cause, entered in the register of members or omitted from it, ...

the person aggrieved ... may apply to the court for rectification of the register.”

54. OREP's case is that the existence of the counterclaim in the plenary proceedings is not sufficient cause for the omission of its name from the register of members or for the continued inclusion of Mr. Rogers' name.

55. On an application under s. 173, the High Court has an express power, in sub-s. (3) to decide any question relating to the title of any person who is a party to the application to have his or her name entered in or omitted from the register. OREP's argument was that it had established its ownership of the properties and thus its right to be registered as a member. Counsel pointed to the definition in art. 1 the articles of association of the Company, which

defines “Unit-owner” as “the owners for the time being of the Industrial units on the Estate.” Whatever the outcome of Mr. Rogers’ counterclaim in the plenary proceedings may be, OREP, he submitted, is the owner “for the time being.” Mr. Rogers’ counterclaim, he said, did not affect OREP’s title to the properties.

56. I accept the submission on behalf of OREP. The High Court judge was entitled to decide the title of OREP to the properties, on which its entitlement to membership of the Company depended. Once it is seen – as was rightly accepted by counsel for Mr. Rogers – that the height of his counterclaim is that the sale to OREP is voidable, it follows that OREP is the owner for the time being of the units. It was not necessary for the judge to determine any issue of fact in relation to the counterclaim and she did not do so. As far as the rectification application was concerned, there was no dispute as to fact. There was a dispute as to the whether OREP was a unit owner but that was a question of law which the judge was entitled to determine summarily.

57. I add for completeness that there was some discussion in argument as to whether, as a matter of law, a conveyance by a mortgagee could in any circumstances be set aside or whether the mortgagor’s remedy, in the case of a sale at undervalue, was in damages only and against the mortgagee only. OREP’s position was that on the case pleaded – which specifically and repeatedly invoked s.103 of the Land and Conveyancing Law Reform Act, 2009 – the issue did not arise but that by s. 105(1) the title of the purchaser was not impeachable on the ground that the power of sale was improperly exercised and the mortgagor’s remedy was a remedy in damages against the mortgagee, only. However, because – it was said – the point did not arise on the pleadings, the issue was not fully argued. Mr. Rogers’ position was that it was beyond contemplation that a purchaser who was complicit to the improper exercise of the power of sale might be allowed to retain the

property. Mr. Mulloy pointed to *Bailey v. Barnes* [1894] 1 Ch. 25, *Lord Waring v. London and Manchester Assurance Co. Ltd.* [1935] Ch. 310 and *Holohan v. Friends Provident and Century Life Office* [1966] I.R. 1 as authority for the proposition that a purchaser who has actual knowledge of any impropriety or irregularity in the exercise of a power of sale does not obtain good title, but the issue was not fully argued and this judgment is not to be understood as expressing a view one way or the other.

Conclusion

58. It was common case on the appeal as it was before the High Court that the judge had a discretionary jurisdiction to decide the title issue.

59. There was no good reason advanced in the High Court as to why the judge ought not to exercise that jurisdiction and there was no good reason advanced on the appeal as to why the High Court judge ought not to have exercised that jurisdiction.

60. There was no argument on the appeal that the judge – having decided to decide the issue – erred in her conclusions.

61. The resolution of the factual issues subtending Mr. Rogers’ counterclaim in the plenary proceedings to set aside the sale – on the basis that it is voidable – was not required in order to determine the application under ss. 169 and 173 of the Companies Act, 2014 for the rectification of the register of members of the Company. That sale, and the consequent assurance to OREP were and remain valid such that OREP is “*for the time being*” the owner of the units will remain so unless and until the court decides otherwise on foot of Mr. Roger’s counterclaim.

62. I would dismiss the appeal and affirm the order of the High Court – including that the costs of the proceedings in that court be paid by Mr. Rogers and that there should be no order as to the Company’s costs.

63. OREP having been entirely successful on the appeal, it seems to me that it is entitled to an order for its costs. While nominally the Company is an appellant, it appears to me that the real protagonist was Mr. Rogers and I propose that it is he who should be ordered to pay the costs.

64. If either party wishes to contend for any other costs order it or he may within fourteen days of the electronic delivery of this judgment file and serve a short written submission – not exceeding 1,000 words – to which the other party may respond within fourteen days, similarly so limited.

65. As this judgment is being delivered electronically, Haughton and Pilkington JJ. have authorised me to say that they agree with it.