# APPROVED
# THE COURT OF APPEAL

**Court Of Appeal Record Numbers: 2022/235**
**2022/236**
**Neutral Citation Number [2024] IECA 11**

**Costello J.**
**Faherty J.**
**Binchy J.**

**BETWEEN/**

**BANK OF IRELAND MORTGAGE BANK**

**PLAINTIFF/**
**RESPONDENT**

**- AND –**

**BRIAN MURRAY AND ATTRACTA MURRAY**

**DEFENDANTS/**
**APPELLANTS**

**JUDGMENT of Mr. Justice Binchy delivered on the 19th day of January 2024**

**1.** This appeal raises, *inter alia*, the interesting question as to whether or not a person may be held accountable to repay a loan the proceeds of which were lodged to an account jointly held by that person with another person, notwithstanding that the former person had no hand act or part in the process leading to the advancement of the loan, but from which loan that former person knowingly received a benefit. It also raises the question as to whether or not the Consumer Credit Act 1995 (the "1995 Act") can have any application to the advancement of loan funds by a financial institution to a person in circumstances where there is no agreement relating to the advancement of the loan between the financial institution and the recipient.

**2.** There are two separate appeals, one brought by each appellant, from three judgments of the High Court (Baker J.) delivered on 12th April 2019 (the "principal judgment"), 16th August 2021 and 3rd March 2022, and the orders perfected arising out of those judgment on 23rd August 2022. Pursuant to the latter, Baker J. ordered:

1. That the Bank recover from the first named appellant, Mr. Murray, the sum of €132,355.63;
2. That the Bank recover as against the second named appellant, Mrs. Murray, the sum of €202,233.03, (being the amount due and owing by Mrs. Murray to the Bank in connection with a loan advanced by the Bank to Mrs. Murray pursuant to a Letter of Offer dated 2 May 2007);
3. That the counterclaim of Mr. Murray be dismissed;
4. That there be no order as to costs so far as concerns the proceedings between the Bank and Mr. Murray and
5. That the Bank should recover 50% of its costs incurred against Mrs. Murray, on an undefended scale.

**Background**

**3.** The first named appellant, Mr. Murray, who was born on 17th September 1959, left school aged 15 following upon completion of his intermediate certificate examination. He immediately embarked upon a career in fishing out of Killybegs, Co. Donegal. Soon afterwards he met the second named appellant, Mrs. Murray, and they were married on 20th January 1979. Mr. Murray gave evidence in the court below, which was accepted by the trial judge, that from the time that they married, he entrusted the management of the house, including the management of all of the financial affairs of the household, to Mrs. Murray. This was necessary because of the very long periods of time for which Mr. Murray was away

at sea. When they married first they lived in a house about three miles outside of Killybegs, but subsequently they moved into a new house, which they built for themselves, on a site closer to the town. In the usual way they borrowed money to fund the purchase of the site and the construction of the dwelling house, but by the time of the transactions that are relevant to these proceedings, that loan, which was with AIB bank, had been cleared.

**4.** Up until about 2002 Mr. Murray had his own fishing vessel, which he sold that year for a sum of the order of €500,000. After paying off any relevant expenses, Mr. Murray had a surplus of €40,000 and he and Mrs. Murray decided to put that money towards the purchase of an apartment in Spain which they had identified. The cost price of that apartment was €80,000 and so they needed to borrow an additional €40,000 to fund the purchase. Mr. Murray's evidence, accepted by the trial judge, was that he left it to Mrs. Murray to do whatever was necessary to borrow this sum, excepting only that he claimed that he did not agree to or authorise the creation of any charge over the family home to secure the loan.

**5.** Precisely what happened next was a matter of controversy in the Court below, with the Bank maintaining that on 31st July 2003 it offered a loan of €40,0000 jointly to the appellants (the "2003 loan"), who (on the Bank's case) accepted the loan and granted the Bank a first charge over their family home by way of security. Mr. Murray, however, maintained that not only had he never agreed to provide such security, he had never signed any documentation at all in connection with this loan, and nor had he met any of the Bank's personnel in connection with the same. He also denied ever meeting with the solicitor who purportedly acted on his behalf and on behalf of Mrs. Murray in connection with the transaction, and who attended to the registration of a charge executed in the name of the appellants over their family home (in favour of the Bank) and thereafter provided a certificate of title to the Bank for the purposes of the transaction. Insofar as any of the documentation relied upon by the Bank appeared to bear his signature, it was Mr. Murray's position in the

Court below that his signature had been forged on those documents, and that it was Mrs. Murray who was responsible for those forgeries. The documentation included the deed of charge over the family home of the appellants mentioned above. Mrs. Murray, although present in Court throughout the proceedings in the Court below, choose not to give evidence or make submissions.

**6.** What was not in dispute, however, was that the 2003 loan was drawn down in full and applied towards its intended purposes, i.e. the purchase of an apartment in Spain, which, at least up until the hearing of the proceedings in the High Court, remained in the ownership of the appellants, unencumbered. Following upon the drawdown of the 2003 loan, which Mr. Murray said he at all times understood to be a personal (i.e. unsecured) loan, the appellants met the scheduled repayments due thereon in accordance with the terms of the 2003 loan, up until its redemption from the proceeds of a second loan advanced by the Bank to the appellants in 2007 (the "2007 loan").

**7.** This was a loan in the sum of €200,000, repayable over 20 years and was the subject of a letter of offer from the respondent to the appellants dated 2nd May 2007. In this letter of offer, it was stated that the respondent would rely on its existing first legal charge over the family home to secure the aggregate of the existing borrowings and the new advance. The purpose of the loan was stated to be "to build an investment property". Mr. Murray denied any knowledge of a loan in this amount, discovering its extent only ~~until~~ much later, specifically in June 2011, when he discovered his borrowings were considerably in excess of what he had thought had been borrowed. He made this discovery when he was refused a small loan to purchase a quad bike because of the extent of his other borrowings.

**8.** Mr. Murray maintained that what he and his wife had agreed in was that a further €30,000 would be borrowed from the Bank in order to facilitate the purchase back from their daughter of a site attached to the family home which she did not develop (having purchased

it from her parents) as originally planned. As with the 2003 loan, Mr. Murray claimed that he left it to his wife to make all the necessary arrangements, and he maintained that again the loan would be personal in nature, and unsecured. And again, as with the 2003 loan, Mr. Murray maintained that he did not meet any officials of the Bank in connection with the 2007 loan, nor, he claimed, did he meet with any solicitor, and he denied signing any documentation whatsoever in connection the with 2007 loan.

**9.** The 2007 loan, in the sum of €200,000, was drawn down in four instalments, between June 2007 and October 2009. Repayments were made up until 18th June 2012. The loan proceeds were not applied in the construction of an investment property, but rather across a range of other items, including redemption of the balance of the 2003 loan, payments of income tax, payments into a fisherman's pension fund, the purchase of a field for €12,000 and sundry items of household improvements. Mr. Murray's evidence to the Court below was that when he initially became aware of the full amount borrowed, his reaction was that they should attempt to repay it in full. Subsequently, however, he changed his mind when he discovered the charge over the family home, and re payments ceased in June 2012.

## The Proceedings

**10.** Proceedings were issued by way of plenary summons on 30th April 2013. A statement of claim was delivered on 18th June 2014, by which the Bank claimed the sum of €185,315.52, made up of €184,708.26 in respect of principal, and the balance of €607.26 in respect of interest. The statement of claim refers to the transfer of the liabilities of the appellants to the Governor and Company of the Bank of Ireland to the Bank with effect from 5th July 2004. It refers to the advance of the 2003 loan and the granting of a Deed of Mortgage and Charge over the property of the appellants by way of security in respect of that advance. It then addresses the advance of the 2007 loan, which it is claimed was advanced by three payments of €50,000 each on 26th June 2007, 21st August 2007 and 30th

October 2008, followed by further advances of €30,000 on 16th June 2009 and €20,000 on 4th November 2009. It is pleaded that on 20th October 2008, the balance of €22,070.19 then outstanding on the 2003 loan was repaid by a payment of that amount from the account of the appellants (thereby clearing the 2003 loan).

**11.** It is pleaded that from 15th August 2007 until 15th June 2012, the required repayments on the 2007 loan were all duly made by way of direct debit payments from the joint bank account of the appellants reference 8378-xxxx, but the July 2012 direct debit repayment of €1,399.43 was returned unpaid, and since that date no further repayments of any sort have been made in respect of the 2007 loan.

**12.** By letters of 26th April 2013, the Bank wrote to the appellants advising that notwithstanding previous requests and reminders, they had failed to meet their repayments, and made demand on the appellants for repayment of the entire debt, which the appellants failed to pay.

**13.** Separate defences were filed on behalf of each of the appellants. In his defence, Mr. Murray appears to acknowledge the advance of the 2003 loan, but he denies that the appellants entered into a mortgage loan agreement as referred to in a Letter of Offer of 31st July 2003. I say "appears to acknowledge" the 2003 loan because the pleading is somewhat curiously phrased as follows:

> "*Insofar it is admitted that the first named defendant was aware that in or about August 2003 the second named defendant entered into a loan agreement…. It is denied that on or about 7th August 2003, the Governor and Company of the Bank of Ireland of the one part and the defendants of the other part entered into a mortgage loan agreement…*".

**14.** Mr. Murray then proceeds to deny that he was a signatory to the 2003 loan agreement, or that he consented to that agreement. Without prejudice to that, he pleads that he

understood the 2003 loan as constituting a personal loan facility to Mrs. Murray. He expressly denies that it was a term of the 2003 loan facility that it was to be secured by a first legal mortgage or charge over the property of the appellants.

**15.** Similar pleadings are made by Mr. Murray in relation to the 2007 loan. In this case it is pleaded that Mr. Murray understood that the 2007 loan constituted a further personal loan facility to Mrs. Murray in the amount of approximately €30,000. Mr. Murray denies that on 20th October 2008 the sum of €22,020.19 (being the then balance outstanding on the 2003 loan) was repaid from the joint account of the appellants, and pleads that if such a payment was made, he did not participate in the making of same.

**16.** Mr. Murray pleads that he is a stranger to the payments made from the joint account of the appellants. Without prejudice to that, he pleads that, although he was the main financial earner for the household, it was Mrs. Murray who at all times dealt with and controlled the day-today finances of the household. He pleads that he played no active part in the day-to-day finances of the household. Mr. Murray denies any liability to the Bank in respect of the amount claimed or any part thereof.

**17.** Mr. Murray also advanced a counterclaim in his defence. This was dismissed by the trial judge, and while Mr. Murray appeals against that dismissal in his notice of appeal, that element of his appeal was not pursued.

**18.** While Mr. Murray's defence was filed by solicitors acting on his behalf, the defence of Mrs. Murray appears to have been filed personally, and constitutes a complete traverse of the statement of claim.

## Judgment of the High Court

**19.** Following a five day hearing, and having undertaken a forensic analysis of the evidence, the trial judge concluded that Mr. Murray had not executed any documentation in connection with either the 2003 loan or the 2007 loan. In coming to this conclusion, the trial

judge had regard to evidence given by officials of the Bank, evidence given by the solicitor acting on behalf of the appellants (on the instructions of Mrs. Murray only) in each transaction and evidence given by Mr. Murray himself. As already mentioned, Mrs. Murray did not give evidence. It is unnecessary for present purposes to summarise the evidence in the court below; suffice to say that in coming to the conclusions that Mr. Murray had not executed any of the loan documentation, the trial judge took into account the evidence of all of the witnesses, and for reasons which it is unnecessary to explain here, she concluded that the evidence as to attestation of Mr. Murray's signature on various documents was unreliable. Moreover, Mr. Murray gave evidence, corroborated by logbooks from the fishing vessel of which he was skipper, that he was at sea when all of the relevant documents were signed. In coming to her conclusions that Mr Murray had not executed any of the documentation relating to either loan, the trial judge did not express any view as to whether or not Mrs Murray had forged the signature of her husband, although she did make reference to Mr. Murray's evidence that Mrs. Murray had done so.

**20.** Arising out of those findings of fact, the trial judge drew the following legal conclusions. Firstly, she concluded that the deed of charge created over the family home of the appellants was void and of no effect by reason of s.3 of The Family Home Protection Act 1976. The trial judge noted that since the proceedings involve a claim for debt, the validity of the charge is not strictly in issue, but it has a relevance to arguments advanced regarding the applicability of the the 1995 Act to the 2007 loan, and in particular as to which provisions, if any, of the 1995 Act are applicable to the transaction. The conclusion of the trial judge that the charge is void and of no effect has not been appealed by the Bank.

**21.** The trial judge considered an argument advanced on behalf of the Bank that it is entitled to judgment as against Mr. Murray, by way of restitution or for repayment of money had and received. She stated that in order to succeed with such a claim, what is to be

ascertained is whether the elements of the cause of action in unjust enrichment are met. She noted that the principle against unjust enrichment has been recognised by the Irish courts as far back as *Rochford v. Earl of Belvedere 1770* (1766-1791) Wallis by Lyne 45. She referred to the judgment of Keane J. (as he then was) speaking for the Supreme Court in *Corporation of Dublin v. Building and Allied Trade Union* [1996] 1 IR 468 wherein the learned judge held that the following preconditions must be fulfilled by a plaintiff who claims for unjust enrichment:

(i) The enrichment of the defendant;

(ii) At the plaintiff's expense;

(iii) In circumstances in which the law requires restitution (the 'unjustness' of the enrichment); and

(iv) In the absence of defences or other policies to deny restitution.

**22.** The trial judge then went on to consider whether those preconditions had been met on the facts of this case. She asked the question whether or not Mr. Murray received the benefit of the 2007 loan. She noted that that loan had been paid in four separate tranches between 2007 and 2009, directly into the joint current account of the appellants. She noted that the evidence established that that account was utilised for various day to day purposes and other purposes by the appellants, and she expressed herself to be satisfied that the appellants had each been shown to have had the benefit of the monies advanced by the Bank. The trial judge proceeded to consider specifically each tranche of money received, and other transactions on the joint account of the appellants during the relevant period. This analysis is set out at paras. 161 – 169 of her judgment as follows:

*"161. Immediately prior to the first drawdown of €50,000 on 27 June 2007, the joint account was overdrawn in the sum of €438.98. On 29 June 2007, two days later, a cheque for €15,000 was made out to one of the Murrays' children. Between 27 June*

*2007 and 9 August 2007 there were four payments of Mr Murray's wages into the joint account totalling €6,237.88. On 9 August 2007, a cheque for €13,314 was made payable to the Collector General to discharge Mr Murray's tax bill.*

*162. Immediately prior to the second drawdown of €50,000 on 22 August 2007, the joint account was overdrawn in the sum of €2,237.69. Between 22 August 2007 and 12 October 2007 there were four payments of wages received into the account totalling €8,435.94. On 12 October 2007, another cheque for €15,000 was made out to one of the Murrays' children. Between 12 October 2007 and 29 October 2007 there were two payments to the current account totalling €3,252.32. On 29 October 2007, a cheque for €4,498 was paid to the Collector General.*

*163. Immediately prior to the third drawdown of €50,000 on 14 October 2008, the account balance was €650.39. The lodgement brought the balance on the account up to €50,296.89. There were two debits on that day, totalling €353.50. Between 14 October 2008 and 20 October 2008, there was a single payment of wages to the joint account in the sum of €1,399.25. On 20 October 2008, the sum of €22,070.50 was transferred from the joint account to the 2003 loan account (no. 242763), clearing it. Between 20 and 29 October 2008, there was a single payment of wages to the joint account in the sum of €1,008.99. On 29 October 2008, a cheque for €5,091 was paid to the Collector General.*

*164. Immediately prior to the fourth drawdown of €30,000 on 17 June 2009, the account was in credit in the sum of €2,430.80.*

*165. Immediately prior to the fifth and final drawdown of €20,000 on 5 November 2009, the account was in credit in the sum of €8,965.38. Between 5 November 2009 and 3 December 2009 there were three payments of Mr Murray's wages into the joint account, totalling €2,699.43. On 12 November 2009, a cheque for €1,302.40 was paid to the Department of Family and Social Affairs in relation to a scheme for the benefit of professional fishermen. On 1 December 2009, a cheque for €12,000 was paid to Moya O'Donnell Solicitors, leaving a balance of €13,736.59 in the account on 3 December 2009.*

*166. Mr Murray acknowledged that the money borrowed was lodged to his bank account (Transcripts, day 3, p. 126) and that he did accordingly benefit from the monies. He acknowledged, for example, that some of the 2007 monies were used to pay off the balance of the 2003 loan to his benefit (Transcripts, day 3, p. 129), that the cheque of 12 November 2009 for €1,302.40 to the Department of Family and Social Affairs was payment to a department scheme for his benefit as a professional fishermen (Transcripts, day 3, p. 143), and that the €12,000 cheque to Moya O'Donnell Solicitors was for the purchase of a field by him at the time (Transcripts, day 4, p. 4).*

*167. The evidence, therefore, is that monies entered the joint account and, to borrow the example from Goff & Jones The Law of Unjust Enrichment, at para. 4.28, on multiple occasions, cheques would not have cleared if the sums related to the 2007 loan had not been drawn down into the account.*

*168. I am satisfied that Mr and Mrs Murray received the benefit of the total sum of €200.000 from the 2007 loan at the expense of the Bank. The first two tests in Corporation of Dublin v. Building and Allied Trade Union are satisfied.*

*169. Mr Murray's evidence is that, at the relevant times, he had been earning approximately €50,000 per year and that his income is transferred directly, usually every Friday, by direct debit to his bank account without any tax deduction, as he is self-employed. He says that he never looked at bank statements but was able to guess his monthly/weekly income from the amount of the catch. He could offer no explanation as to how various exceptional expenses were met, especially expensive refurbishments of the family home and the purchase of two sites. Mr Murray showed some degree of financial acumen and I do not believe he was wholly ignorant of the fact that the couple had on occasion made exceptional purchases which might not readily have been met from current income."*

**23.** The trial judge then continued to consider possible defences to a claim of unjust enrichment. Firstly, she considered, and rejected, any possible defence grounded on a change of position. The trial judge did not consider that Mr. Murray could show that he had changed his position or engaged in any expenditure which would make it unfair to him, in all the circumstances, to require him to make restitution in whole or in part.

**24.** The trial judge then proceeded to consider whether or not the defence of "no knowing receipt" could be relied upon by Mr. Murray, as was submitted by his counsel. She considered relevant authorities opened to the court on behalf of Mr. Murray, in particular *Primlake Ltd. (in Liquidation) v. Matthews* [2006] EWHC 1227 (Ch) and *Stanbridge v. Advanced Industrial Technology Corporation Ltd*. [2012] EWHC 1009 (Ch). I will come back in due course to the facts of those cases, but what is important for now is para. 178 of

the judgment of the trial judge, wherein she distinguished those authorities from the instant case, and the conclusions drawn by the trial judge in that paragraph and the following paragraphs are as follows:

> *"178. In my view, Primlake Ltd. v. Matthews and Stanbridge v. Advanced Industrial Technology Corporation Ltd. can readily be distinguished because, unlike Mrs. Matthews, Mr. Murray did benefit from the monies advanced as a matter of fact, and did have knowledge of the manner in which Mrs Murray used the account, albeit it could not be said that he knew the exact amount of the drawings. Mr Murray was 'enriched' by the monies in a real sense: He did receive a benefit and he was aware of the general use to which the monies were put, and it seems to me sufficient that Mr Murray knew and agreed with his wife that they would borrow in 2003 for one purpose and in 2007 for another, and that, in those circumstances, the precise amount of the borrowings is not relevant. Once he had ceded control of the family finances to Mrs Murray and once it was agreed that she would borrow money for those stated purposes, Mr Murray is a 'knowing' recipient of the monies both because he received a benefit from the money, and because he was, in general, aware of the way in which the account was being used, and accepted that it was used for the benefit of the family and the couple in a general way.*
>
> *179. The management of household finances was, firmly and by agreement, in the hands of Mrs Murray and Mr Murray did receive a benefit from the monies and he expressly confirmed this in the course of his oral evidence. He also gave evidence that he was aware, without looking at bank statements, of the amount of his weekly takings from the fishing vessel.*

*180. He must therefore have been aware that the current account was used to make the payments to his pension fund, to carry out refurbishment works to the principal private residence, and to purchase the holiday home in 2007* [sic] *and the other lands in December 2009.*

*181. I am satisfied for these reasons that the necessary elements of the test are met and that Mr Murray has been unjustly enriched by the money advanced by the Bank, and subject to the further arguments raised in defence the money is to be repaid*."

**25.** The trial judge then proceeded to consider possible defences to the claim of unjust enrichment arising by reason of the non compliance of the Bank with certain provisions of the 1995 Act.

**26.** Firstly, the trial judge stated that the 2007 loan could not be characterised as a "housing loan" as defined in s.1 of the 1995 Act because the definition of a "housing loan" is: "an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land." Since she had already found that the charge provided in connection with the 2003 loan was invalid, the trial judge concluded that the 2007 loan could not be considered a "housing loan" for the purposes of the 1995 Act, notwithstanding that the 2007 loan was stated to be advanced on the security (already provided) over the property of the appellants.

**27.** This conclusion led the trial judge to conclude that the 2003 and 2007 loans were, for the purposes of the 1995 Act, "consumer loans", to which Part III of the 1995 Act applied. I pause here to observe that the term "consumer loan" does not actually appear in the 1995 Act, and I think it is likely that the trial judge was intending to refer to a "credit agreement", since part III of the 1995 Act (which runs from sections 29-39 thereof) is under the heading:

"Requirements relating to Credit Agreements and Form and Contents thereof ". The term "credit agreement" is defined in section 2 the 1995 Act as meaning "an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a cash loan or other similar financial accommodation."

**28.** The trial judge proceeded to consider whether or the not the 2003 and 2007 loans had been issued in compliance with ss. 30 and 38 of the 1995 Act. Section 38 of the 1995 Act provides:

> *"38. A creditor shall not be entitled to enforce a credit agreement or any contract of guarantee relating thereto, and no security given by the consumer in respect of money payable under the credit agreement or given by a guarantor in respect of money payable under such contract of guarantee as aforesaid shall be enforceable against the consumer or guarantor by any holder thereof, unless the requirements specified in this Part have been complied with;*
>
> *Provided that if a court is satisfied in any action that a failure to comply with any of the aforesaid requirements, other than section 30, was not deliberate and has not prejudiced the consumer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable*."

**29.** Section 30 sets out the general requirements relating to the contents of credit agreements, and it was Mr. Murray's case that the Bank had not complied with these requirements, because the Bank had treated both the 2003 and 2007 loans as "housing loans" and not "credit agreements" for the purposes of the 1995 Act. However, s.30(4) provides a saving provision which states: "This section does not apply to credit in the form of advances on a current account or on credit card accounts."

**30.** The trial judge concluded that in circumstances where she had concluded that the loan documentation had not been executed by Mr. Murray, and therefore that no security was created, ultimately the 2007 loan came to take the form of a series of advances to the joint current account of the appellants and therefore s.30 of the 1995 Act did not apply, by reason of s.30(4) thereof. Furthermore, the trial judge accepted the arguments advanced on behalf of the Bank that, in circumstances where the evidence established that the failure to comply with Part III of the 1995 Act was not deliberate and did not prejudice the defendants, the Bank was entitled to rely on the proviso in s.38 of the 1995 Act, and that it should not be precluded from the enforcement by reason of non-compliance with Part III of the 1995 Act.

**31.** The trial judge then proceeded to consider an argument advanced on behalf of Mr. Murray that the principles of unjust enrichment may not be used to enforce an otherwise invalid contract. However, the trial judge rejected this argument because s.38 of the 1995 Act expressly allows for recovery if it is just and equitable to dispense with the requirements of the Act. She concluded:

> *"Having regard to the view that I take that the justice of the case requires that Mr Murray be held liable in restitution and for money had and received, I am satisfied that it is just and equitable to dispense with the mandatory statutory requirements. On the level of principle, I agree with the general proposition that the doctrines of restitution may not be used as a means of enforcing an otherwise unlawful or unenforceable contract of loan. But having regard to the case law and the analysis in this judgment, I am satisfied that Mr Murray must be held liable for any capital advanced to him. The claim for interest is not allowed, as I am not satisfied that the Bank has established a basis for this claim or how the applicable rate is to be assessed. That result is also one that may be made in the light of the discretion of the court conferred by the saver provisions of s. 38 of the Consumer Credit Act."*

**32.** Finally, the trial judge then turned to consider the case made against Mrs. Murray. While Mrs. Murray was present in the High Court for the trial, she was not represented, did not give evidence and made no submissions. In circumstances where there was evidence of a valid loan facility in respect of Mrs. Murray, the trial judge entered judgment against her in the full amount claimed.

**Supplemental Judgment of 16th August 2021**

**33.** Subsequent to the delivery of the principal judgment by the trial judge on 12th April 2019, the trial judge agreed to hear further submissions on behalf of Mr. Murray regarding the application of s.30(4) of the 1995 Act to the 2007 loan. This was in circumstances where the trial judge had concluded that that subsection operated to exclude the application of s.30 of the 1995 Act to the 2007 loan, on the basis that the loan proceeds had been drawn down in a series of advances on the *current* account of the appellants. As a matter of fact this was not correct, and the loan proceeds had actually been drawn down in a series of advances to a *mortgage* account of the appellants with the Bank, and were thereafter transferred by the appellants from time to time into their current account. In her supplemental judgment, the trial judge concluded that in the circumstances, her conclusion that the protective provisions of the 1995 Act did not apply to the 2007 loan was incorrect because that conclusion depended upon an incorrect application of s.30(4) of the 1995 Act to the facts.

**34.** Nonetheless, the trial judge remained of the view that her conclusion that Mr. Murray was liable in restitution to the Bank should not be displaced for the reason that her conclusion in the principal judgment was not that the claim was made out in contract (because the Bank had been unable to establish the essential factual elements of a contract), but rather in restitution, because, on the facts, she had been satisfied that Mr. Murray had had the benefit of the monies advanced and was accordingly unjustly enriched.

**35.** It appears that Mrs. Murray did not make submissions to the Court or seek to participate in any way in the hearing that gave rise to the supplemental judgment of August 2021.

**Second supplemental judgment, 3rd March 2022**

**36.** In this judgment, the trial judge addressed the issue of costs, the specific amount of the judgment to be entered against each of the defendants and the claim by the Bank that Mr. Murray's counterclaim should be struck out. She arrived at the following conclusions:

> *"(1) That, so far as the case against Mr. Murray is concerned, each of the Bank and Mr. Murray should bear their own costs, having regard to the degrees of success that each had had in the proceedings;*
>
> *(2) That Mrs. Murray should pay 50% of the costs of the Bank, having regard to the fact that, while the Bank obtained judgment it the full amount claimed against Mrs. Murray, it did not succeed fully against her (insofar as the result also involved a finding that the judgment against her is unsecured);*
>
> *(3) That the counterclaim of Mr. Murray must fail having regard to the trial judge's conclusion that no valid mortgage exists. Therefore, the trial judge dismissed the counterclaim."*

## Notices of Appeal

**Notice of appeal of Mr. Murray**

**37.** Mr. Murray advances two grounds of appeal as follows:

> (1) That the trial judge erred in failing to find that the 2007 loan was unenforceable by reason of the provisions of ss. 30 and 38 of the 1995 Act and finding instead that the Bank was entitled to recover monies from Mr. Murray under the law of restitution despite the breaches of the provisions of ss. 30 and 38 of the 1995 Act.

(2) That the trial judge erred in law and/or in a mixed question of law and fact in finding that Mr. Murray had "knowing receipt" of the proceeds of the 2007 loan as that term has been interpreted by the High Court of England and Wales in *Primlake Ltd. (in Liquidation) v. Matthews* (as affirmed by the English Court of Appeal in *Primlake Ltd. (in Liquidation) v. Matthews Associates & Others* [2006] EWCA Civ 1708).

**Notice of appeal of Mrs. Murray**

**38.** Notwithstanding that she did not participate in the trial of the proceedings, Mrs. Murray has appealed from the judgments and order of the trial judge. In her notice of appeal, Mrs. Murray claims that, having found that the 2007 loan failed to meet the definition of a "housing loan" as defined by s.2 of the 1995 Act, it followed that the loans advanced to the appellants were "consumer loans", and that the provisions of ss. 30 and 38 of the 1995 Act applied, but had not been complied with by the Bank; therefore the 2007 loan is unenforceable as against Mrs. Murray by reason of s.38 of the 1995 Act, and the trial judge erred in failing to so hold.

**Respondents' notices**

**39.** In its respondents' notices, the Bank asserts that the trial judge was correct in her conclusions, save only that the Bank asserts that at all material times the 2007 loan advance was a "housing loan" within the meaning of the 1995 Act, notwithstanding the finding of the trial judge that Mr. Murray was not in fact a party to it. It is claimed that it is not necessary, in order for a credit agreement for a loan advance to be a "housing loan" within the meaning of the 1995 Act, that valid mortgage security as provided for in that credit agreement is in fact put in place; all that is required is that there is an agreement to do so. This claim is framed as an additional ground on which the decision of the trial judge should be affirmed, rather than as a cross appeal.

## Submissions of the parties

### Submissions of Mr. Murray

**40.** It is Mr. Murray's case that the 2007 loan is an unenforceable agreement by reason of s.38 of the 1995 Act. While the trial judge had originally held that the Bank was entitled to rely on the proviso within s.38, this was on the basis that s.30 of the 1995 Act was disapplied by s.30(4). The trial judge had corrected this conclusion when it was drawn to her attention that the loan proceeds had not been advanced on the current account of the appellants. However, Mr. Murray submits that the trial judge then fell into error in further concluding that the 1995 Act had no application to the transaction (as far as Mr. Murray is concerned) on the basis that it only applies to contracts of loan, and since she had concluded that there was no contract as between the Bank and Mr. Murray, the 1995 Act did not apply. It is submitted that this conclusion is at odds with the terms of the 2007 loan agreement which expressly provides that *"This offer letter is regulated by the Consumer Protection Act 1995".*

**41.** Mr. Murray submits that it follows from the conclusion of the trial judge that the Deed of Charge executed over the family home of the appellants is void, that the 2007 loan is not a "housing loan" for the purposes of the 1995 Act. This is so because the 1995 Act provides that the definition of a "housing loan" for the purposes of that Act is "an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land". In the submission of Mr. Murray, the interpretation of the definition of "housing loan" contended for by the Bank – which distinguishes between an "agreement" to grant security and the provision of the security itself is a strained interpretation that ignores the express substantive requirement that the loan being advanced is based upon the "security of a mortgage of a freehold or leasehold estate or interest in land". It is submitted on behalf of Mr. Murray that this strained interpretation fails to apply the ordinary and literal meaning of the definition of "housing loan" as provided for in the 1995 Act. Moreover, Mr. Murray

submitted, the Bank is required to make this argument only because of its own failure to ensure that Mr. Murray both agreed to the provision of a mortgage and gave his consent thereto.

**42.** The trial judge, it is submitted, correctly determined that the loan was not a housing loan for the purposes of the 1995 Act, and that it was instead a "consumer loan" (at para. 187 of the principal judgment). Mr. Murray submits that the result of this conclusion is that the mandatory requirements of the 1995 Act apply, and that since they were not complied with, the Bank is not entitled to enforce the 2007 loan agreement, and it thus follows that it is not entitled to seek ancillary relief against Mr. Murray in restitution. Hence, the conclusion of the trial judge, at para. 9 of her judgment of 16th August 2021 is inconsistent with her earlier and correct determination that as a general proposition, the doctrine of restitution may not be used as a means of enforcing an otherwise unlawful or unenforceable contract of loan (para. 195 of the principal judgment).

**43.** At para. 195 of the principal judgment, the trial judge stated:

> "*On the level of principle, I agree with the general proposition that the doctrine of restitution may not be used as a means of enforcing an otherwise unlawful or unenforceable contract of loan. But having regard to the case-law and the analysis in this judgment, I am satisfied that Mr Murray must be held liable for any capital advanced to him. The claim for interest is not allowed …"*

**44.** Mr. Murray relies on what was said by Clarke J. (as he then was) in the decision of the Supreme Court in *Quinn v. IBRC (In Special Liquidation)* [2015] IESC 29 [2016] 1 IR 1 when he said, at para. 194:

> "*194. The first question to be addressed is as to whether the relevant legislation expressly states that contracts of a particular class or type are to be treated as void or unenforceable. If the legislation so provides, then it is unnecessary to address any*

*further questions other than to determine whether the contract in question in the relevant proceedings comes within the category of contract which is expressly deemed void or unenforceable by the legislation concerned."*

**45.** It is submitted on behalf of Mr. Murray that that is precisely what is prescribed by ss. 30 and 38 of the 1995 Act, which clearly provides that a loan shall be deemed unenforceable on the occurrence of certain requirements or events, and it is not open to the court to circumvent the statutory intention of the Oireachtas through the provision of countermanding common law relief.

**46.** In this regard, Mr. Murray relies upon *Wilson v. Secretary of Trade and Industry* [2003] UKHL 40. In that case, the House of Lords was required to determine the compatibility of s.127(3) of the Consumer Credit Act 1974 in the United Kingdom with the Human Rights Act 1998. The latter was invoked on behalf of the creditor in that case in circumstances where the 1974 Act had provided that an improperly executed consumer credit agreement should be unenforceable by the creditor. At paras. 48-50 of his judgment, Lord Nicholls held:

"48 …. *I am in no doubt that a lender's restitutionary remedy, if he has one, is a matter to be taken into account when considering whether s. 127(3) is compatible with Article 1 of the First Protocol. The adverse consequences of an alleged infringement of a Convention right cannot sensibly be assessed other than in the round. The real position of the claimant is what matters. If in practice a lender can ameliorate the immediate and directly adverse consequence of s. 127(3) by resort to some other right or remedy readily available to him, that is a matter to which the court must have regard. I cannot accept the contrary arguments addressed to the House.*

*49. I consider, however, that there is no relevant restitutionary remedy generally available to a lender in the circumstances now under consideration. The message to*

*be gleaned from sections 65, 106, 113 and 127 of the Consumer Credit Act is that where a court dismisses an application for an enforcement order under s.65 the lender is intended by Parliament to be left without recourse against the borrower in respect of the loan. That being the consequence intended by Parliament, the lender cannot assert at common law that the borrower has been unjustly enriched. That would be inconsistent with the parliamentary intention in rendering the entire agreement unenforceable. True, the Consumer Credit Act does not expressly negative any other remedy available to the lender, nor does it render an improperly executed agreement unlawful. But when legislation renders the entire agreement inoperative, to use a neutral word, for failure to comply with prescribed formalities the legislation itself is the primary source of guidance on what are the legal consequences. Here the intention of Parliament is clear.*

*50. This interpretation of the Consumer Credit Act accords with the approach adopted by the House in Orakpo v Manson Investments Ltd [1978] AC 95, regarding s.6 of the Moneylenders Act 1927 and, more recently, in Dimond v Lovell [2002] 1 AC 384, another case where section 127(3) precluded the making of an enforcement order. In Dimond's case the restitutionary remedy sought was payment of the hire charge for a replacement car used by Mrs Dimond. The House rejected a claim advanced on the basis of unjust enrichment. Lord Hoffmann observed that Parliament contemplated that a debtor might be enriched consequential upon non-enforcement of an agreement pursuant to the statutory provisions. It was not open to the court to say this consequence is unjust and should be reversed by a remedy at common law: [2002] 1 AC 384, 397-398."*

**47.** In this case, it is submitted on behalf of Mr. Murray that to permit the Bank's claim to succeed through the doctrine of restitution, would be to facilitate a collateral attack upon,

and the subversion of, the clear legislative intention of the Oireachtas as expressed in the 1995 Act.

**48.** As to the second ground of appeal, it is submitted that while Mr. Murray had "knowing receipt" of the sum of €30,000, which he had agreed to borrow with Mrs. Murray in 2007, Mr. Murray did not, as a matter of law or fact, have "knowing receipt" of the balance of the loan monies in the sum of €170,000, and that he was not even aware of the latter until late 2011, a fact accepted by the trial judge. Accordingly, if Mr. Murray is to be held liable in restitution to the Bank, he ought to be held liable for no more than €30,000. Alternatively, insofar as the trial judge considered that Mr. Murray had knowing receipt of other sums, she erred in failing to conduct a detailed analysis of the amounts involved, and in holding, at para. 178 of her judgment, that the precise amount of the borrowings was not relevant in the circumstances.

**49.** Reliance is placed upon the decisions of the High Court of England and Wales (Collins J. in *Primlake Ltd. (In liquidation) v. Matthews* [2006] EWHC 1227 and *Stanbridge v. Advanced Industrial Technology Corporation Ltd.* [2012] EWHC 1009 (Ch)).

**50.** *Primlake* involved a complex factual matrix but in simple terms the court was required to consider, *inter alia,* whether or not a wife, Mrs. Matthews, whose husband had improperly arranged for the payment of a sum of money into their joint account could be held liable to make restitution for the monies so transferred. Collins J. held, at paras. 335 and 336:

> "335. *The prevailing view is that there is no separate cause of action for unjust enrichment as such, and that it is necessary for the case to be brought within one of the recognised restitutionary heads, such as money had and received, constructive trust, and resulting trust. In my judgment the authorities would justify the conclusion that Mr Matthews is liable for money had and received (and also, probably, as a*

*trustee on resulting trust) on the basis of an absence of consideration in the sense of no legal basis for the payments…..*

*336. So far as concerns Mrs Matthews, she would be liable, as a volunteer, to make restitution of the money still in her control. But, subject to what is said in paragraph 341 below, she would not be liable for money which went through the joint accounts, but is no longer held by her, except on the basis of dishonest assistance or knowing receipt…"*

**51.** In *Stanbridge*, a Mrs. Stanbridge sought a declaration that a facility letter and a charge over her property upon each of which her husband had forged her signature should be set aside. In circumstances where the court was satisfied that Mrs. Stanbridge knew nothing of the payments into and out of the joint account held by her with her husband, and considered that she had acted in good faith, the court concluded: *"In my judgment it would be unjust to require Mrs. Stanbridge to make restitution by paying to [AITC] a sum equivalent to the advance monies. [AITC] could have protected itself by making direct contact with Mrs. Stanbridge at any stage prior to the drawdown of the advance and ensuring that she was aware of the transaction and checking whether she was a willing participant in it."* The High Court judge in that case (Dight J.) took the view that the authorities to which he had been referred, including *Primlake* established that as a matter of principle, a court may refuse to order restitution by a joint account holder of monies siphoned through her account where she has not benefited from them as a matter of fact and had no knowledge that her account was being used as a conduit by the other joint account holder.

**52.** Mr. Murray further submitted that in the event that the court is satisfied that he was not a party to any contract for loan with the Bank, and that for this reason he is not entitled to avail of the protections afforded under the 1995 Act, nonetheless the Bank should not be entitled to recover by way of restitution from Mr. Murray, having regard to the fact that the

Bank has a contract with Mrs. Murray in relation to the same loan proceeds. Accordingly, its remedy, in relation to any default in repayment of the loan, lies against Mrs. Murray only, and the Bank is not entitled to *"leap frog"* a claim in restitution against Mr. Murray simply because he has obtained a benefit from the contract between the Bank and Mrs. Murray.

**53.** In support of this argument, Mr. Murray relies upon the decision of the Court of Appeal of England and Wales in *Costello & Anor. v. McDonald* [2011] EWCA Civ 930 and also a decision of the House of Lords in *Pan Ocean Shipping Co. Ltd. v. Credit Corp. Ltd. (The Trident Beauty)* [1994] 1 WLR 161. In *Costello*, the appellants (Mr. & Mrs. Costello) entered into discussion with the respondents with a view to carrying out building works on the property of the appellants. The appellants informed the respondents that, for tax reasons, they would use a company – Oakwood Residential Limited (*"Oakwood"*) for the development, and that payments would be made through that company. Mr. & Mrs. Costello were the only shareholders and directors of Oakwood. A contract for the works was in due course made between Oakwood and the respondents, but the site remained in the ownership of the appellants, Mr. & Mrs. Costello.

**54.** A dispute arose in relation to the works. The respondents stopped work and left the site. At the time that they left the site, they were owed £65,038 in unpaid invoices. The respondents issued proceedings against the appellants who defended the proceedings on the basis, *inter alia*, that the correct defendant was Oakwood. The respondents' claim against Mr. & Mrs. Costello was one made in restitution for unjust enrichment, in circumstances where Mr. & Mrs. Costello owned the site upon which the houses were constructed by the respondents and were personally in receipt of the rents from those houses.

**55.** The Court of Appeal accepted that, in restitutionary terms, Mr. & Mrs. Costello had benefited from and been enriched by the work carried out by the respondents. However, following a detailed review of the authorities – including *Pan Ocean Shipping Co. Ltd. v.*

*Credit Corp. Ltd.*, the Court of Appeal concluded that the claim against Mr. & Mrs. Costello should fail because it would, if successful, undermine the contractual arrangements between the parties, that is to say the contract between the respondents and Oakwood and the absence of any absence of any contract between the respondents and Mr. & Mrs. Costello. At para. 30, the Court held:

> "*...Nevertheless, the policy considerations articulated by Lord Goff in Pan Ocean and by the majority of the High Court of Australia in Lumbers, as well as the outcome of all of the cases cited above, clearly support the general policy of refusing restitutionary relief for unjust enrichment against a defendant who has benefited from the plaintiff's services rendered pursuant to a contract to which the defendant was not a party. For the reasons I have given, that is a sound legal policy*."

**56.** In *Pan Ocean*, the background circumstances were that the appellants Pan Ocean Shipping Co. Ltd. – ("Pan Ocean") chartered a vessel by way of a time charter from Trident Shipping Co. Ltd. ("Trident"). Trident had arranged credit facilities from the respondents, Credit Corp. Ltd., who had entered into the facility arrangement on behalf of a group of investors. As part of the arrangement on the same date as the time charter was entered into, Trident assigned to the investors its right to the receivables, including the sums payable for the charter of the vessel. Following the delivery of the vessel under the charter party on 1st May 1991, Pan Ocean duly paid two payments in advance on 3rd May and 17th May 1991. On 21st May, Credit Corp. notified Pan Ocean in writing of the assignment and required all payments due to Trident to be paid directly to them. On 31st May, Pan Ocean made the third payment in advance to Credit Corp to cover the period from that date to 25th June. The vessel, however, had been off hire since 27th May awaiting repairs, and remained off hire during the whole of the third period. By Clause 18 of the Charter Party, all overpaid hire was to be returned at once. On 12th June, the appellants, Pan Ocean, were notified that the

vessel had been withdrawn from Trident by the head owners. Although the repairs were by then completed, the vessel was unable to proceed because Trident had failed to pay for the repairs. On 19th July 1991, Pan Ocean accepted Trident's conduct as a repudiation of the charter party and the charter came to an end. Pan Ocean sought to recover the advance payment that it had made on 31 May on the grounds that it was money paid for a consideration that wholly failed. At first instance, it was held that Credit Corp were liable to repay the whole of the third advance payment as one which had not been earned. This was overturned by the Court of Appeal, and the appeal to the House of Lords was dismissed. In the course of his judgment, Lord Goff held, at p.165:

> *"...as between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate. Of course, if the contract is proved never to have been binding, or if the contract ceases to bind, different considerations may arise, as in the case of frustration (as to which see French Marine v. Compagnie Napolitain D'Eclairage et De Chauffage par le Gaz [1921] 2 AC 494 and now the Law Reform (Frustrated Contracts) Act 1943). With such cases as these, we are not here concerned. Here, it is true, the contract was prematurely determined by the acceptance by Pan Ocean of Trident's repudiation of the contract. But before the date of determination of the contract, Trident's obligation under clause 18 to repay the hire instalment in question had already accrued due; and, accordingly, that is the relevant obligation, as between Pan Ocean and Trident, for the purposes of the present case.*

*It follows that, in the present circumstances and indeed in most other similar circumstances, there is no basis for the charterer recovering overpaid hire from the shipowner in restitution on the ground of total failure of consideration*."

**Submissions of Mrs. Murray**

**57.** In her written submissions, Mrs. Murray submitted that it followed from the conclusion of the trial judge that the 2007 loan was not a "housing loan" as defined in the 1995 Act, ~~,~~ and her related conclusion that it was instead a "consumer loan", that the provisions of part III of the 1995 Act applied; and since the Bank had not complied with those provisions, then it follows that the 2007 loan was unenforceable against Mrs. Murray pursuant to section 38 of the 1995 Act, and the trial judge erred in failing to so find. In advancing this submission, Mrs. Murray relies upon the same facts as found by the Court so far as concerns the execution of the deed of charge by Mr. Murray i.e. that the charge and related loan documentation had not been signed by Mr. Murray, as a result of which the deed of charge was void *ab initio*.

**58.** At the hearing of this appeal, counsel for Mrs. Murray was asked on what basis the Court could entertain any arguments not advanced on behalf of Mrs. Murray in the Court below, having regard to the well established principle that, save in the most exceptional of circumstances, the Supreme Court, and, since its establishment, this Court, "should not hear and determine an issue which has not been tried and decided in the High Court" (per Finlay C.J. in *K.D. (C) v. M.C.* [1985] I.R. 697). Counsel submitted that while Mrs. Murray had not given evidence nor made submissions in the court below, she had been present throughout the hearing, she had entered an appearance and filed the defence with a full denial of liability and there was an understanding that she was adopting the arguments of counsel for Mr. Murray. In so far therefore as the trial judge concluded that the 2007 loan was a "consumer loan", and not a housing loan for the purposes of the 1995 Act, the trial judge needed to

consider the implications of this for Mrs. Murray, in particular in the supplemental judgment of August 2021, and in failing to do so she erred, and Mrs. Murray should be allowed to make submissions in this regard now, as a matter of justice. It was submitted that if the Bank had maintained the same position that it had taken at trial, i.e. that Mr. Murray was a party to the loans, then Mrs. Murray could have relied again on Mr. Murray's submissions, and the need for her to make submissions now arises only because the Bank accepts the findings of the trial judge (that he was not a party to either loan) and has re-formulated its arguments on appeal.

**Submissions of the Bank**

**59.** The Bank makes its submissions under five headings:

**(1) The nature of the loan**.

It is the Bank's contention that, that notwithstanding the conclusion of the trial judge that as a matter of fact there was no agreement between the Bank and Mr. Murray – the 2007 loan is a housing loan as defined in the 1995 Act. It is submitted that the agreement constituted by the 2007 loan offer letter, which was accepted by Mrs. Murray, was a loan which provided for security by means of a mortgage over the property of the appellants. The fact that that security was determined by the trial judge not to be valid, does not mean that the 2007 loan was not a "housing loan" for the purposes of the 1995 Act, or that it was converted into another category of loan, such as a "credit agreement". The definition of "housing loan" in the 1995 Act refers to "an agreement for the provision of credit … on the security of a mortgage …." as distinct from the actual provision of credit on the security of a mortgage. The 1995 Act draws a particular distinction between housing loans and credit agreements

and identifies separate procedures in respect of each. It is submitted that to ignore the distinction would mean that a housing loan supported by a voidable mortgage would, if the mortgage is subsequently declared to be void, cease to be a housing loan and would, retrospectively, be subjected to different preconditions, namely those applicable to credit agreements. This could not be correct.

**60.** So, therefore, it did not follow from the conclusion of the trial judge that the charge over the appellant's family home was void, that the loan itself changed its character from being a housing loan to a credit agreement. Accordingly, it is submitted, the trial judge fell into error in concluding that the 2007 loan was not a housing loan as defined in the 1995 Act, but rather a credit agreement as defined in the same Act.

**61.** The Bank submits that the effect of the conclusion of the trial judge that Mrs. Murray had signed the 2007 loan offer (and related loan documentation) and that Mr. Murray had not, is that:

(i) There is/was a housing loan agreement between the Bank and Mrs. Murray and,

(ii) There was no contractual relationship between the Bank and Mr. Murray.

**62.** It follows from the above that in circumstances where Mr. Murray was not a party to the contractual arrangements between the Bank and Mrs. Murray, or any other contractual arrangement with the Bank, he is not entitled to any of the protections created by the 1995 Act.

**(2) Impact of non-compliance with the 1995 Act**

**63.** The Bank poses the question as to whether or not Mr. Murray can rely on non-compliance with the 1995 Act to resist the Bank's claim for restitution. It is submitted that in circumstances where there was no agreement between the Bank and Mr. Murray, there cannot be any breach of the 1995 Act on the part of the Bank. If Mr. Murray was the only party dealing with the Bank, and monies had been advanced to him in error, there would be

no agreement for the purposes of the 1995 Act, and therefore no bar to restitution. Therefore, the fact that there is another party involved – Mrs. Murray – who does have an agreement with the Bank does not alter or impact upon the entitlement of the Bank to seek restitution from Mr. Murray.

**64.** While Mr. Murray relies upon *Costello & Anor. v. McDonald & Others* and *Pan Ocean Shipping Co. Ltd. v. Credit Corp. Ltd.* as authority for the proposition that the courts will refuse restitutionary relief for unjust enrichment against a defendant who has benefited from the plaintiff's services rendered pursuant to a contract to which that defendant was not a party, the Bank submits that those two cases may readily be distinguished. This is so because in each of those cases the remedies of the plaintiffs were to be found in the contracts entered into by each of those plaintiffs with a different party. So, therefore in *Costello,* the plaintiffs had entered into a building agreement with a limited company, and it could not seek redress from the defendants, who were the only shareholders and directors of that company, simply because they personally received a benefit from those works. Similarly, in *Pan Ocean Shipping Co. Ltd.* the plaintiff was not entitled to recover from the defendant an advance payment for hire of a vessel made to the defendant, as the assignee of the person from whom the vessel had been hired; the plaintiff's remedy lay against the owner of the vessel with whom it had entered into the charterparty. Each of these circumstances, the Bank submits is distinguishable from the circumstances of this case.

**(3) Availability of restitution – "knowing receipt"**

**65.** While Mr. Murray argued on the authority of *Wilson v. Secretary of State for Trade and Industry* that it is not open to the Bank to obtain restitution on the grounds that Mr. Murray has been unjustly enriched in circumstances where the Bank has failed to comply with the 1995 Act, the Bank submits that the facts of this case are distinguishable from *Wilson,* because this is not a case in which Mr. Murray has asserted that he was a party to an

agreement with the Bank, and the Bank has failed to comply with the provisions of the 1995 Act in connection with that agreement. Rather, Mr. Murray has asserted that he was not a party to the 2007 loan at all. Therefore, the Bank submits, Mr. Murray is not entitled to avail of any of the defences that might be available to a party to an improperly executed credit agreement.

**66.** The Bank submits that the trial judge correctly relied upon the decision of the Supreme Court in *Corporation of Dublin v. Building and Allied Trade Union* and the preconditions identified in that case that must be satisfied by a plaintiff claiming unjust enrichment. It is submitted that the trial judge correctly found that Mr. Murray had been enriched, at the expense of the Bank, and that neither of the defences to restitution i.e. "change of position" and "no knowing receipt" applied. In this regard, the Bank maintains that the trial judge was entitled to conclude, on the basis of the evidence, that Mr. Murray did benefit from the monies advanced, and that he was aware that he was receiving benefits.

**67.** It is submitted that the circumstances of this case are very different to those in the cases of *Primlake* and *Stanbridge.* Indeed, unlike in those cases, Mr. Murray has not denied receiving benefits from the loan proceeds.

**(4) The entitlement of Mrs. Murray to make submissions.**

**68.** The Bank submits that, having chosen not to lead any evidence, cross examine witnesses or make any submissions, Mrs. Murray should not now be allowed to advance arguments about the impact of the 1995 Act upon her loan agreement with the Bank, which, in the submission of the Bank, is and always was a housing loan agreement for the purposes of the 1995 Act. It is submitted that it has never been suggested that she was not a party to a loan agreement (unlike in the case of Mr. Murray), and that there is nothing that Mrs. Murray could submit now that she could not have submitted at the trial of the action. Nor has there

been any change of circumstance brought about by the second judgment such as to alter the position as far as Mrs. Murray is concerned.

**69.** In support of these submissions, the Bank relies upon *K.D. v M.C.*, the more recent decision of McMenamin J. in the Supreme Court in *Ennis v AIB,* [2021] IESC 12 and the decision of Clarke J (as he then was) in the Supreme Court in *Koger Inc. v O'Donnell* [2013] IESC 28, wherein he stated, at para. 7.7:

> *"There are very real reasons both of principle and practice why, not least in complex cases, parties should be required to carefully consider whatever case they wish to put forward to their best advantage and stick to it. Trials are not a dry run . Tactical decisions are made by all parties on a regular basis in the context of complex trials. Doubtless, with the benefit of hindsight , many parties might wish to be allowed to revisit some of the tactical decisions which they took. However, allowing parties to do so on appeal is a recipe both for procedural chaos and serious injustice.*"

**(5) The 1995 Act cannot be used as an instrument of fraud.**

**70.** In the submission of the Bank, if the loan is not a "Housing Loan" as defined in the 1995 Act, this is because of the forgeries of Mrs. Murray. At the same time, it is submitted that Mr. Murray seeks to profit from the housing loan advanced to Mrs. Murray. While the Bank accepts that principles of unjust enrichment cannot be used to avoid express statutory provisions, nonetheless it is submitted that there is countervailing public policy engaged, and if Mr. Murray's arguments were to prevail, this would invite or encourage other parties in other transactions to engage in improper conduct, or to attempt to avoid their lawful responsibilities.

**71.** The Bank submits that the 2007 loan was offered by the Bank as a housing loan to both parties, and if it is found that it is not a housing loan so far as Mr. Murray is concerned, he should not be unjustly enriched, at the expense of the Bank, by the housing loan advanced to Mrs. Murray.

## Discussion and Decision

**The Appeal of Mrs. Murray.**

**72.** The trial judge afforded Mrs. Murray several opportunities to give evidence and/or make submissions, and she chose not to do so, as was her entitlement. However, that decision has consequences. Faced with the evidence of the Bank as regards the acceptance of both the 2003 and 2007 loans by Mrs. Murray, and the subsequent drawdown and disbursement of the loan proceeds, and the default in repayment after 2012, the trial judge had no alternative but to grant judgment against Mrs. Murray. If Mrs. Murray wished to resist judgement on *any* grounds then Mrs. Murray needed to make that case at trial, and support it with such evidence as might be appropriate.

**73.** There is no reason at all why Mrs. Murray could not have advanced in the court below the argument that she now wishes to advance to this Court on appeal, i.e. that the 2007 loan was unenforceable against her by reason of the non execution of the deed of charge over the family home by Mr. Murray, which in the view of the trial judge had the result that the 2007 loan was not a "housing loan" but rather was a "consumer loan " to which part III of the 1995 Act applied". This was an issue squarely raised by Mr. Murray during the course of the trial, thereby alerting Mrs. Murray to the point. Moreover, it is self evident that this argument did not arise out of the second judgment of the trial judge.

**74.** Had Mrs. Murray made that argument at the trial, however, then it is very likely that she would have had to address the evidence of Mr. Murray that he did not execute any of the documentation relating to either loan, and that his signature had apparently been forged by

Mrs. Murray herself. In turn, this would, almost inevitably, have required the trial judge to express a concluded view as to whether or not Mrs. Murray did in fact forge Mr. Murray's signature, and, if so, the implications of such a conclusion for Mrs. Murray's purported defence to the proceedings. Specifically, the trial judge would very likely have been required to address the question as to whether or not Mrs. Murray could benefit from her own actions in forging her husband's signature. Most likely, the trial judge would, in such circumstances have invited submissions on the latter issue. However, none of this happened, and so there is no discussion or decision of the trial judge on these important issues.

**75.** As indicated above, I agree with the submissions of the Bank that the second judgment of the trial judge of August 2021 had no impact on any of these considerations. That judgment impacted upon Mr. Murray only. The judgment already given against Mrs. Murray was in no way dependent upon the trial judge's interpretation of s. 30 (4) of the 1995 Act. That said, if Mrs. Murray apprehended that the issue raised by Mr. Murray after the delivery of the principal judgment might have had implications for her too, she could have applied to the trial judge to make submissions on the issue, but she did not do so.

**76.** In *K.D. v M. C.* Finlay C.J. did allow for exceptions to the rule (against permitting new evidence or arguments on appeal) stating: "*to that fundamental principle there may be exceptions, but they must clearly be required in the interest of justice*". This rule has been considered in several more recent cases , including in *Lough Swilly Shellfish Growers Co-Operative Society Ltd. and Atlanafish Ltd. V Danny Bradley and Robert Ivers* [2013] IESC 16, in which O'Donnell J. (as he then was ) said that in applying the rule that a *"certain sensible flexibility is exercised by the Court, depending on the demands of the case*", and in *Ennis v AIB* [2021] IESC 2012, in which McMenamin J. conducted a comprehensive review of the authorities, concluding, *inter alia*, at para. 39:

"39. *Drawing these strands together, it can be said that the general criteria applicable to admitting new arguments in appeals proceedings are as outlined in K. D., but as developed in Emerald meats, Lough Swilly and Ambrose……."*

**77.** In *Promontoria (Arrow) v Mallon & anor* [2021] IECA 130 , Noonan J. In this Court said:

*" ... However, lest it be thought that the Ennis decision has recalibrated the balance in this area of law in any dramatic way, it is fair to note that although McMenamin J. allowed for greater flexibility in non-plenary cases, he said ( at paragraph 15 of his judgment) that the K.D. Principle remained the "general principle" i.e. that it was a fundamental principle that save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried and decided in the High Court. He also said that while there were exceptions, they must be "clearly required in the interests of justice". McMenamin J. viewed the Ennis case as falling within the category of "truly exceptional*".

**78.** Far from demonstrating "exceptional circumstances" Mrs. Murray has failed to advance any persuasive reason as to why the argument that she now wishes to make was not made in the High Court, and why the interests of justice require that she should now be allowed to make that argument. This is particularly so as the failure to raise the argument at first instance deprived the Bank in reply of the opportunity to address the evidence - or lack thereof - in relation to how the documents which had not been signed by Mr Murray were presented to the Bank prior to the trial judge making findings of fact in relation to these matters. More than that, it is impossible to see how it could be plausibly said that the interests of justice require that Mrs. Murray be allowed to make an argument that is grounded upon her own misconduct, and would, if accepted, arguably result in the 1995 Act being used as

an instrument of fraud. For all of the foregoing reasons, I would dismiss the appeal of Mrs. Murray.

**Appeal of Mr. Murray.**

**79.** In his defence to the proceedings, Mr. Murray denies being a signatory to each of the 2003 and 2007 loan agreements and he further denies that he communicated to the Bank his consent, expressly or impliedly, to enter into either of the agreements. In the case of the 2003 loan, he pleaded that he had understood that loan to be a personal loan facility to Mrs. Murray and he denied that that loan was to be secured by way of a first legal mortgage or charge over the family home. In the case of the 2007 loan, he also pleaded that he understood that facility to be a personal loan facility advanced to Mrs. Murray, but in the amount of €30,000 and not in the amount of €200,000. In this instance too, he denied that the facility was to be secured by way of a mortgage or charge.

**80.** His evidence in the court below was consistent with these pleas. In relation to the 2003 loan, he gave evidence that he and Mrs. Murray had agreed that they should borrow €40,000 in order to finance the balance of the purchase price on the apartment in Spain, and he gave evidence that he told Mrs. Murray to *"go and get the €40,000"* and that he thought that what happened subsequently was either that Mrs. Murray obtained a personal loan, or that the loan she obtained might have been a *"joint personal loan"*, but that either way there was not to be a mortgage over the family home.

**81.** In the case of the 2007 loan, he gave evidence that he and Mrs. Murray had agreed to repurchase from their daughter the site adjacent to the family home for the sum of €30,000, and he said that he instructed Mrs. Murray to *"get €30,000 and give it to Lorraine…"*. He said that: *"[Mrs. Murray] got the money and Lorraine was paid and that's as much as I knew then…"*.

**82.** It is clear from all of this that the position taken by Mr. Murray in the court below in relation to each loan was that he and Mrs. Murray agreed to borrow funds for the purposes mentioned above, and that he left it to Mrs. Murray to progress matters. In his formal pleas, he pleads that the funds were advanced to Mrs. Murray by way of a personal loan, but in his evidence to the court he was a little bit more ambiguous as to the identity of the borrowers, at least insofar as the 2003 loan is concerned, when stating that he understood that that loan was a loan personal to Mrs. Murray, or *"a joint personal loan"*. That ambiguity aside, it is clear that at no stage did Mr. Murray contend, whether in his pleadings or in his evidence, that he had an agreement with the Bank, even if that agreement was different in its terms to those contended for on behalf of the Bank. Rather, the stance taken by Mr. Murray was to deny that he was a party to any agreement with the Bank. In this appeal, Mr. Murray submitted that that the trial judge erred in her conclusion that the 1995 Act does not apply to the 2007 loan. He argued that the intention of the Oireachtas is paramount, and that s.38 of the Act constitutes a clear statutory direction that a loan shall be deemed unenforceable on the occurrence of certain specified events, and that it is not open to the Court to circumvent the intention of the Oireachtas as expressed in statute, through the provision of *"countermanding"* common law relief. So therefore, Mr. Murray submitted, the trial judge erred in ordering him to make restitution to the Bank on the ground that he had been unjustly enriched. As noted above, Mr. Murray relies in this regard on *Wilson v. Secretary of State for Trade and Industry*.

**Can Mr. Murray rely upon the 1995 Act?**

**83.** By his first ground of appeal, Mr. Murray relies upon the 1995 Act, and specifically sections 30 and 38 thereof. It goes without saying that in order to rely upon the 1995 Act, Mr. Murray must first establish that it applies to the particular circumstances of the case, and accordingly I will first address the scope of application of the 1995 Act.

**84.** Section 3(1) of the 1995 Act provides:

> *"This Act shall apply to all credit agreements, hire purchase agreements and consumer hire agreements to which a* ***consumer is a party****."*

**85.** The first obvious point of note that flows from s.3(1) is that, for the 1995 Act to apply, the person relying on it must be a "consumer", who must be a party to one of the kinds of agreement referred to in the section. Each of the terms "credit agreement", "hire purchase agreement" and "consumer hire agreement" has a defined meaning in the 1995 Act, as does the word "consumer*"*.

**86.** It is thus clear that the 1995 Act only has application in specified – if very wide-ranging – circumstances which in each case are defined by reference to a particular kind of agreement. It is axiomatic that if there is no agreement, the 1995 Act is of no application. On Mr. Murray's own case, in which he prevailed in the Court below, he had no agreement with the Bank, for the purpose of either the 2003 loan or the 2007 loan; or put another way, within the terminology of s.3(1) of the 1995 Act, he was not a consumer who was a party to any kind of credit agreement with the Bank. It follows that Mr. Murray may not invoke the provisions of the 1995 Act in defence of these proceedings.

**87.** *Wilson*, upon which Mr. Murray relies, may readily be distinguished from the instant case for the very simple reason that in that case, it was not in dispute that Ms. Wilson had entered into a loan agreement with a pawnbroker, but she maintained that the agreement was unenforceable because it did not contain all of the terms prescribed by the relevant legislation then in force in the United Kingdom, being the Consumer Credit Act 1974. Once that is understood, it becomes clear that the passages from Wilson relied upon by Mr. Murray can have no application to the circumstances of this case. The circumstances of this case are more analogous to a situation in which funds are advanced in error to a person's account (and indeed just such a comparison was made on behalf of the Bank) and in those

circumstances, there are neither contractual provisions nor statutory provisions governing the responsibilities of the parties; it is therefore necessary to fall back on the common law to determine the same.

**88.** These conclusions are in no way subversive of the will of the Oireachtas, as the submissions made on behalf of Mr. Murray suggest. Rather the common law will step in where necessary, and based on established principles, to fill what would otherwise be a gap in the legal relations of the parties that is not addressed by the very detailed provisions of the 1995 Act, by reason of the absence of any agreement between the parties.

**89.** Insofar as it was argued on behalf of Mr. Murray that the Bank had not argued in the Court below that there was no agreement between the Bank and Mr. Murray to which the 1995 Act applies (and therefore may not do so on appeal), I do not agree, for the simple reason that this point arises out of the conclusions of the trial judge that Mr. Murray was not a party to either loan. Whilst the Bank has not appealed from these conclusions, and it must however be entitled to advance, on appeal, whatever arguments it considers appropriate arising out of those conclusions in aid of its argument that the decision of the trial judge should be affirmed.

**90.** To conclude, on this ground of appeal, the trial judge was correct in holding, as she did, at para. 10 of her judgment of 16th August 2021 that: *"By reason of the fact that the principal judgment concluded that a contractual arrangement did not exist between Mr. Murray and the bank, that provisions of the Consumer Credit Act have no application as they apply to contracts of loan"*. Accordingly, the first ground of appeal, which is grounded upon sections 30 and 38 of 1995 Act, must be dismissed.

## Unjust Enrichment

**91.** This brings us to the analysis and conclusions of the trial judge of the Bank's claim for restitution on the grounds of unjust enrichment. At the outset of her discussion on this issue, the trial judge quoted from para. 4.64 of the ninth edition of *Goff and Jones', The Law of Unjust Enrichment*, wherein the authors discuss cases in which payment is made into a joint bank account and state that in such cases: "*the law generally holds that all the defendants are jointly and severally enriched, with the result that a claim for the whole amount of the enrichment may lie as against any or all of them."*

**92.** As has already been mentioned above, in conducting her analysis of the Bank's claim for restitution, the trial judge referred to the judgment of the Supreme Court in *Corporation of Dublin v. Building & Allied Trade Union* [1996] 1 IR 468 where, at p. 493, Keane J. (as he then was) identified the preconditions that must be fulfilled by a plaintiff who claims for unjust enrichment (see para. 83 above).

**93.** There was no disagreement as to the application of these preconditions. Nor did Mr. Murray appear to cavil with the conclusions of the trial judge that he had been enriched at the expense of the Bank, or put another way, that he had received certain benefits at the expense of the Bank. In the course of his evidence, Mr. Murray acknowledged having received a benefit from certain payments made by Mrs. Murray from the proceeds of the 2007 loan. Indeed, amongst the arguments advanced on his behalf at the hearing of this appeal was that the trial judge erred in failing to conduct a sufficiently detailed analysis of the benefits of which Mr. Murray had acknowledged. There was, however, strong disagreement between the parties regarding the conclusions of the trial judge that in the circumstances of this case, the law requires restitution and the trial judge's conclusion that Mr. Murray could not avail of the defence of *"no knowing receipt"*.

**No Knowing Receipt**

**94.** The key conclusions of the trial judge in relation to this issue are to be found at paras.178-181 of her judgment which, for convenience I will set out again here:

*"178……It seems to me sufficient that Mr Murray knew and agreed with his wife that they would borrow in 2003 for one purpose and in 2007 for another, and that, in those circumstances, the precise amount of the borrowings is not relevant. Once he had ceded control of the family finances to Mrs Murray and once it was agreed that she would borrow money for those stated purposes, Mr Murray is a 'knowing' recipient of the monies both because he received a benefit from the money, and because he was, in general, aware of the way in which the account was being used, and accepted that it was used for the benefit of the family and the couple in a general way.*

*179. The management of household finances was, firmly and by agreement, in the hands of Mrs Murray and Mr Murray did receive a benefit from the monies and he expressly confirmed this in the course of his oral evidence. He also gave evidence that he was aware, without looking at bank statements, of the amount of his weekly takings from the fishing vessel.*

*180. He must therefore have been aware that the current account was used to make the payments to his pension fund, to carry out refurbishment works to the principal private residence, and to purchase the holiday home in 2007* [sic] *and the other lands in December 2009.*

*181. I am satisfied for these reasons that the necessary elements of the test are met and that Mr Murray has been unjustly enriched by the money advanced by the Bank, and subject to the further arguments raised in defence the money is to be repaid* " .

**95.** In the course of the hearing of this appeal, counsel for Mr. Murray accepted that Mr. Murray was aware that the joint current account of Mr and Mrs. Murray was used for the purposes described in para. 180 above. This knowledge, in the view of the trial judge, distinguished the circumstances of this case from those in *Primlake Ltd. v. Matthews* because, unlike Mrs. Matthews, Mr. Murray did benefit from the monies advanced as a matter of fact, and did have knowledge of the manner in which Mrs. Murray used the account, even if it could not be said that he knew the exact amount of the drawings.

**96.** It was submitted on behalf of Mr. Murray that this conclusion is inconsistent with the earlier conclusion of the trial judge that Mr. Murray only became aware of the *actual* amount of the money due on foot of the 2007 loan in late 2011. However, it is immediately apparent that these conclusions are not inconsistent with each other, because the trial judge arrived at her conclusion that Mr. Murray was a *"knowing recipient"* not because he knew the exact amount of the 2007 loan prior to 2011, but rather because, as the trial judge had held earlier at para. 169: "*He could offer no explanation as to how various exceptional expenses were met, especially expensive refurbishments of the family home. Mr. Murray showed some degree of financial acumen and I do not believe he was wholly ignorant of the fact that the couple had on occasion made exceptional purchases which might not readily have been met from current income*." Perhaps the most obvious example of such expenditure was the purchase of a field for €12,000 in October 2009, a matter about which it is clear from the transcript of the proceedings in the Court below Mr. Murray was aware of at the time. If the Murrays needed to borrow €30,000 to purchase a site from their daughter in 2007, then it is unclear how they could afford this purchase two years later without additional borrowings, as Mr. Murray's income remained reasonably constant throughout the period.

**97.** While the appellant accepted that he was aware of the payments referred to by the trial judge in para.180 of her judgment, and that he benefitted from those payments, he draws a

distinction between that knowledge and knowledge of the full amount of the loan which he did not have until late 2011, by which time the loan proceeds had been fully spent and were not available for return to the Bank. In these circumstances, Mr. Murray argues that it is unfair to hold him accountable to repay the 2007 loan. While not putting it in exactly these terms, I interpret this argument as meaning that, for the purposes of the law of restitution, Mr. Murray did not have knowing receipt of the loan proceeds at the relevant time, when the proceeds of the loan (or a part thereof) might have been available for return to the Bank.

**98.** However, in circumstances where Mr. Murray has acknowledged that the proceeds of the loan were used to make certain payments from which he received a benefit, and the trial judge separately concluded, at para. 169 that "*the couple had on occasion made exceptional purchases which might not readily have been met from current income",* the contention that he should not be liable to make restitution because he did not know the exact amount of the loan until 2011 is self-serving and unpersuasive. Once he knew that certain payments had been made, from which he received a direct benefit, and that those payments might not readily be met from current income, Mr. Murray was duty bound to make inquiries as to the source of the funds, and not simply turn a blind eye, and rely on his delegation of the family finances to Mrs. Murray to avoid liability. The defence of "No Knowing Receipt" could not possibly be available in these circumstances, and, as the trial judge said, the precise amount borrowed was not relevant. I can see no error in the analysis and conclusions of the trial judge in this regard, which is supported by the passage quoted by the trial judge from the ninth edition of *Goff and Jones*, to which I referred at para. 91 above.

**99.** Moreover, I do not accept that it is unfair to hold Mr. Murray accountable for the full amount of the loan in the absence of a detailed analysis of the benefits that he received. If Mr. Murray had, timeously, raised concerns about the provenance of the funds used by Mrs. Murray to make payments on his behalf, and then taken steps to prevent further payments

using the loan proceeds, then he might reasonably complain about the fairness of being held accountable before he could possibly have done anything about the disbursements. But it is apparent that Mr. Murray did nothing at all to inquire into the source of the payments from which he received a benefit and of which he was aware before 2011. He cannot therefore be heard to cry "foul" when he is later held to be accountable for the full amount of the loan.

**No "Leapfrogging"**

**100.** On the authority of *Costello* and *Pan Ocean,* it is submitted that the Bank cannot be permitted to "leapfrog" its claim over Mrs. Murray to advance a claim against Mr. Murray. Mr. Murray submits that the Bank has a loan agreement with Mrs. Murray, which is the agreement that governs the 2007 loan, including its repayment, and the Court may not substitute another enforcement mechanism for that chosen by the parties, notwithstanding the benefits received by Mr. Murray. This, it is submitted, is apparent from both *Costello* and *Pan Ocean*, in which, in each case, the defendant had received a benefit from the transaction, but nonetheless, in each case, the Court held that this was not relevant. In each case the Court held that the correct defendant was another party with whom the plaintiff had, in each case, entered into an agreement expressly governing the relevant transaction, and which agreement provided the plaintiffs with their remedies for the default. It was not therefore open to the plaintiffs to pursue the defendants, with whom they had no agreement, simply on the basis of the benefits taken by the defendants as a result of the agreements entered into with third parties. It is submitted that the Bank, having failed to put an agreement in place with Mr. Murray, cannot now correct that error by pursuing a claim in restitution against him in circumstances where it has a remedy available through its agreement with Mrs. Murray.

**101.** At para. 3-64 of the tenth edition of *Goff and Jones on Unjust Enrichment*, under the heading *"No Absolute Rule against Leapfrogging",* the authors state*;*

*"*3-64. *Some academic accounts suggest that there is a rule against "leapfrogging", such that C, who confers a benefit on D under a valid contract between C and X, may never "leapfrog" his immediate counterparty, X, and bring a claim in unjust enrichment against D. However, no case clearly establishes that there is any such broad-brush rule, and the better view is that there are rather several overlapping considerations arising out of the contract between C and X , which will often lead the courts to deny C's claim, but will not invariably do so* ."

**102.** The authors then proceed to consider the decision of the English Court of Appeal in *Costello*. At para 3-68, they state:

"3-68. *One concern was that C should not generally be permitted to recover from D where this will be inconsistent with the terms of C's contract with X. To put it another way, the question is whether the contract between C and X establishes a "regime" in which there is no room for a restitutionary claim. In practice, the question whether this bar should apply depends on the legal validity of C and X's contract, and the proper construction of its terms. In construing the terms of C's contract with X, it is always necessary to take into account the wider history of the dealings between all 3 parties, which might lead to the conclusion that C and X were indeed contracting on the basis that C would not sue D*."

**103.** The authors then proceed to consider a concern that a claimant should not be afforded a claim in unjust enrichment if to do so would undermine the way in which the parties chose to allocate the risks involved in the transaction, and in what circumstances this objection might be displaced. At para 3-71, they state:

"3-71. *Note that a difficult question inevitably arises as to what facts might displace this objection. For example, could C avoid it by proving that his decision to*

*contract with X and/or his decision to benefit D pursuant to the contract, was materially impaired, for example by some causative mistake*?".

**104.** The authors then proceed to consider some examples where this may arise, but on any view of matters it seems to me that what occurred in this case was a "causative mistake" that resulted in the benefits taken by Mr. Murray. The Bank obviously thought that it was dealing with both Mr. and Mrs. Murray, and in circumstances where repayment of the 2007 loan was entirely dependent upon the income of Mr. Murray, it is inconceivable that the Bank would have agreed to advance the loan had it known that it was contracting with Mrs. Murray only. The result of the mistake - that the Bank had a loan agreement with Mrs. Murray only - was not the way in which the parties choose to allocate the risks involved in the transaction, and it was quite obviously never the case that the Bank contracted with Mrs. Murray on the basis that it would never pursue Mr. Murray in the event of default in repayment of the 2007 loan. It follows therefore that affording the Bank a claim in unjust enrichment against Mr Murray does not "*undermine… the way in which the parties choose to allocate the risks involved in the transaction*" and that such a remedy is not precluded by the so-called rule against leapfrogging and which, as the authors of *Goff and Jones* make clear, is not an absolute rule.

**105.** In conclusion therefore, I would dismiss the appeal of Mr. Murray because-

(1) Having no agreement of any kind with the Bank, he cannot rely on the 1995 Act;

(2) Mr. Murray is not entitled to avail of the defence of "no knowing receipt" for the reasons explained by the trial judge and

(3) The claim of the Bank against Mr. Murray is not precluded on the basis that the Bank has a loan agreement with Mrs. Murray.

**106.** Since the Bank has been entirely successful in this appeal, my preliminary view is that it is entitled to an order for its costs incurred in connection with this appeal as against each appellant. If the appellants (or either of them) wish to contend for a different order then they

may, within 14 days from the date of delivery of this judgment, request the registrar to schedule a brief hearing, not to exceed 30 minutes (15 minutes to each side), for the purpose of making submissions as to why the court should make a different costs order. However, in that event, should the appellants be unsuccessful in persuading the court to depart from the order indicated above, then they may be held responsible for the costs of the additional hearing.

**107.** Since this judgment is being delivered remotely, Costello J. and Faherty J. have authorised me to indicate their agreement with it.