THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 25
Court of Appeal Record No. 2020/67
High Court Record No. 2019/16

Costello J.
Donnelly J.
Murray J.

BETWEEN:

CHARLES MCGUINNESS

APPELLANT

- AND -

THE PROPERTY REGISTRATION AUTHORITY OF IRELAND AND ULSTER BANK IRELAND DESIGNATED ACTIVITY COMPANY

RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 5th day of February 2021

1. This is an appeal against the refusal by the High Court of Mr. McGuinness' application for orders directing the first named respondent ('the PRAI') to cancel entries of judgment mortgages registered on the application of the second named respondent ('the Bank') on six

folios in Counties Monaghan, Cavan and Mayo. That application was made on three grounds. The first was that the deponent of the affidavit on the basis of which registration was effected did not come within the categories of persons authorised by law to swear such an affidavit. The second was that that person had failed to sufficiently evidence his authority to do so and/or that he had no such authority. The third was to the effect that only a person registered with the Companies Registration Office in accordance with the provisions of the European Communities (Companies) Regulations 1973 could swear such an affidavit. O'Regan J. rejected each of these arguments. It is my view that she was correct in doing so.

2. The background can be shortly stated. On November 1 2010 judgment was granted by the High Court in favour of the Bank and against Mr. McGuinness in the sum of €12,000,000. On November 22 of that year, judgment was granted in the same set of proceedings against Mr. McGuinness in the sum of €1,651,948. On December 20 2010 the first judgment was registered as a judgment mortgage on five folios - three in County Cavan and two in County Monaghan. On 18 April 2011 both judgments were registered as judgment mortgages on a folio of the Register County Mayo.

3. Registration was effected on foot of affidavits sworn by a Ted Mahon on the 11 November 2010 and the 24 March 2011. In both affidavits, he described himself as follows:

> '*I, Ted Mahon, aged 18 years and upwards, of Ulster Bank Ireland Limited having its registered office at Ulster Bank Group Centre, George's Quay, Dublin 2, the creditor within the meaning of Section 115 of the Land and Conveyancing Law Reform Act 2009, make oath and say as follows : -*'

4. On 9 February 2015, Mr. McGuinness made an application to the PRAI under Rule 113 of the Land Registration Rules 2012 ('the 2012 Rules') for the cancellation of these judgment mortgages from each Folio by reason of invalidity. In an accompanying letter, the

applicant expressed the view that Mr. Mahon was not a '*creditor'* within the meaning of s. 115 of the Land and Conveyancing Law Reform Act 2009 ('the 2009 Act). On July 1 2015, an employee of the PRAI advised the applicant that he had a letter from Gartlan Furey on behalf of the Bank objecting to the applicant's request and recording its view of the legal position. The letter from the PRAI of that date advised Mr. McGuinness of, and summarised, the Bank's stance (although it did not forward the letter from Gartlan Furey). On July 21 2015 the applicant replied setting out his response.

5. Then, on 30 January 2019 the applicant was sent a copy of an affidavit sworn by a Michael McNaughton on 4 September 2015. In that affidavit, Mr. McNaughton stated that Mr. Mahon was authorised by the Bank to swear the affidavits used in the application to register the judgment mortgage. That affidavit described Mr. McNaughton as a director of the Bank, a description which the applicant has disputed. The PRAI said in its letter of January 30, the following :

> '*The Authority notes that a dispute has arisen in that there is a clear conflict between the averments of the applicant and those of the judgment creditor. It is not the function of the Authority to decide between the merits of the claims of both parties and the judgment mortgages will only be cancelled with the consent of the judgment creditor or on foot of a Court Order.*
>
> '*In these circumstances the Authority is not satisfied that the applicant is entitled to the registration sought and the application may have to be refused. Such a refusal could then be appealed to Court pursuant to Section 19(1) of the Registration of Title Act 1964'*.

6. After Mr. McGuinness (by letter dated 9 March 2019) indicated that he did not wish to withdraw his application and that he sought a formal refusal from PRAI, the latter issued a

ruling on 12 April 2019 rejecting his application. The stated basis for the decision was as follows:

> '*due to conflicts between the said applicant and averments made by Michael McNaughton, the Property Registration Authority is not satisfied that the applicant has established his right to the registration sought'*.

7. This appeal against that decision was brought pursuant to s. 19(1) of the Registration of Title Act 1964 ('the 1964 Act') and was initiated by notice of motion on 9 July 2019. Section 19(1) states that any person aggrieved by an order or decision of the Registrar may appeal to the court and the court may annul or confirm, with or without modification, the order or decision. The application was grounded on an affidavit of Mr. McGuinness in which he exhibited the relevant correspondence, and *inter alia* recorded his contention that Mr. Mahon was not a '*creditor'* of the applicant within the meaning of s. 115, that there was no evidence to prove that he was an authorised agent of the Bank or that he was registered with the Companies Registration Office as '*a registered person with authority to bind a company'*. In consequence, he said, PRAI should not have refused his application but should have referred the matter to the Court.

8. An affidavit having been delivered in reply by John O'Shea of the PRAI which, essentially, outlined the relevant chronology and explained the decision of PRAI by reference to the relevant legislation and affidavit of Mr. McNaughton, Mr. McGuinness concluded the exchange of evidence with a short replying affidavit sworn on 24 October 2019. There, he questioned Mr. O'Shea's authority and means of knowledge, dismissed some of his averments as hearsay, and tendered evidence from a hearing before the High Court in other proceedings where the Bank acknowledged that Mr. McNaughton was not a

director of the Bank. The exhibited transcript records counsel for the Bank as saying of Mr. McNaughton:

> '*Director unfortunately is an employment - related term within the bank, so I'm not in a position to say he's a director in the corporate sense or the company law sense'*

9. Section 116(1) of the 2009 Act provides as follows:

> '*A creditor who has obtained a judgment against a person may apply to the Property Registration Authority to register a judgment mortgage against that person's estate or interest in land'*.

10. The term '*creditor'* as used in this provision is defined in s. 115(a) as follows:

> *'"creditor" includes –*
>
> *An authorised agent and any person authorised by the court to register a judgment mortgage on behalf of a judgement creditor'*

11. Mr. McGuinness' arguments were simple and were presented by him with clarity and by reference to an impressive array of legal authority. He starts with the relationship between the 2009 Act and the provisions of the Judgment Mortgages (Ireland) Act 1858 ('the 1858 Act'), contending that ss. 115 and 116 of the former should be interpreted as having the same essential effect as s. 3 of the latter. Because (he says) the requirements imposed by the 1858 Act were not complied with in the affidavit used to ground the application to register the judgment mortgages in issue here, he contends that the registration is invalid.

12. Section 3 of the 1858 Act included the following:

'*the word "creditor" shall mean and include … all joint-stock banking and other companies and corporate bodies; and every affidavit or oath necessary to be made by any creditor may be made by … the public officer authorized to sue or be sued or to make oaths on behalf of such joint-stock company, or by the secretary, deputy secretary or law agent of any corporate body ….'*

13. Clearly, the effect of the 1858 Act was that in respect of a company and absent an authorised public officer or Court order (for which provision was made later in s. 3) the affidavit by which it was sought to have registered a judgment mortgage could be sworn by the secretary, deputy secretary or law agent of that entity. As Mr. Mahon occupied none of these positions, the applicant says, he was not permitted by law to swear the affidavit used to that end by the Bank, and the registration is thus invalid.

14. In support of his claim that these requirements were carried over into the 2009 Act, Mr. McGuinness relies upon comments in Wylie '*The Land and Conveyancing Law Reform Acts: Annotations and Commentary'* (2nd Ed. 2017). There (at p. 323) Professor Wylie states that s. 115 of the 2009 Act '*re-enacts provisions in ss. 3 and 4 of the Judgment Mortgages (Ireland) Act 1858'* further stating (*id*.) that s. 115(a):

'*retains the existing law previously in the 1858 Act that a judgment mortgage can be registered by an agent or other person authorised by the court'*.

15. Mr. McGuinness further refers to Wylie '*Irish Land Law'* (5th Ed. 2013) where (at para. 15.09) the authors say :

'*The general rule is that the affidavit relating to the judgment had to be sworn by the judgment creditor and this still applies to the new application forms for registration …. Where more than one creditor obtains the judgment, any one of them may swear*

> *the affidavit or application form. If the judgment creditor is a company it may be made by its secretary or law agent. This is a long-established practice and in O'Connor and Son Ltd. v. Whelan it was held by Denham J. that the absence of a 'means of knowledge' clause did not invalidate a judgment mortgage: it was to be inferred that the company secretary knew the company business from his own knowledge.'*

16. The applicant highlights the provisions of s. 26(2)(e) of the Interpretation Act 2005. This provides that where an enactment (the 'former enactment') is repealed and re-enacted, with or without modification, by another enactment (the 'new enactment'):

> '*to the extent that the provisions of the new enactment express the same idea in a different form of words but are in substance the same as those of the former enactment, the idea in the new enactment shall not be taken to be different merely because a different form of words is used.'*

17. From there, Mr McGuinness refers to the judgment of O'Donnell J. in *People (DPP) v. Doherty* [2020] IESC 45. In that case, the question before the Court (O'Donnell, MacMenamin, Charlton, O'Malley and Baker JJ.) was whether it was open to a jury to conclude that certain conduct of which the appellant was accused constituted an offence under s. 10 of the Non-Fatal Offences Against the Person Act 1997. The offence was that of harassment, and it is defined in the relevant provision as including watching, besetting or communicating. Although the Court unanimously determined that the answer to that question was in the affirmative, three judgments were delivered (O'Donnell, Charlton and O'Malley JJ.). In addressing in the course of his judgment the meaning of the term '*besetting'*, O'Donnell J. considered the implications of the fact that in another offence in the same Act (s. 9) the word '*besetting'* was used and that that provision was almost identical

to an offence in s. 7 of the Conspiracy and Protection of Property Act 1875. It was in that connection that he made the comments relied upon by Mr. McGuinness here (para. 4 of his judgment):

> '*The clear similarity in language and structure between s. 9 of the 1997 Act and the repealed provisions of s. 7 of the 1875 Act suggests strongly that s. 9 is, in effect, a re-enactment of the previous section and is to be interpreted in the same way as the 1875 Act was prior to 1997'.*

18. The argument as thus formulated by Mr. McGuinness reflects the case made by him in the High Court. In her *ex tempore* judgment delivered at the conclusion of legal argument on January 31 2020, O'Regan J. said that '*the whole system of judgment mortgages has been modified and simplified by virtue of the 2009 Act'* and thus the provisions of that Act no longer governed in the manner contended for by Mr. McGuinness. I agree with that statement and the conclusion drawn by the learned High Court Judge from it.

19. It is certainly the case that where a statute that has replaced a previous legislative code contains language that is similar to that appearing in its predecessor, the courts will incline to attribute to the former the same construction as has been afforded to the latter. This follows from a number of principles of statutory construction, not least of all the presumption against unclear changes in the law. However – as indeed the judgment of O'Donnell J. in *People (DPP) v. Doherty* makes clear – this is merely one aspect of the proper approach to the interpretation of the Act. The object of that exercise in interpretation is to determine the legislative intent viewed in the light of the statute as a whole. Legislation repealed and replaced by a similarly worded Act should be approached on the basis that had the Oireachtas intended to depart from the principles and policies put in place by the earlier legislation, it

would have done so with clarity. However, that is only one of many features of the legislation that have to be taken into account in determining its proper meaning.

20. Another point of reference – and the most important – is the language actually used by the Oireachtas in the provision being construed. In the case of ss. 115 and 116 of the 2009 Act, this is clear, unequivocal and unqualified. It also deviates in structure and approach from the earlier provisions to such an extent that the 1858 Act is, in my view, of little assistance in interpreting these provisions.

21. Under the 1858 Act the affidavit on behalf of a creditor making an application for registration of a judgment mortgage could be made by one of a number of identified agents. While s.3 of the 1858 Act was concerned with *inter alia* identifying who could swear affidavits for the purposes of the legislation, ss. 115 and 116 are concerned with specifying the persons who could make application for registration. Thus, application under the 2009 Act to the PRAI to '*register a judgment mortgage against'* a person's estate or interest in land may be made by '*a creditor who has obtained a judgment against'* that person. That part of the 1858 Act relied upon by the applicant here, and these sections in the 2009 Act, accordingly share subject matter and object but do not address either in the same way.

22. Moreover, a '*creditor'* under s.115 of the 2009 Act '*includes'* an *'authorised agent'*. Therefore, '*an authorised agent'* <u>may</u> apply for registration, in which event they do so as '*creditor'* under this statutory construct. '*Authorised agent'* is not defined in the 2009 Act and, accordingly, it presumptively bears its ordinary meaning - that is an agent who has been duly authorised to undertake the course of action in question. Nothing in the Act suggests that the Oireachtas intended that the general words '*authorised agent'* should be read down to the limited categories of person specified in s. 3 of the 1858 legislation. Assuming that the 1858 Act exhaustively defined the agents who could swear such an affidavit (and it is

not necessary for this application to decide if this was in fact the case) if anything, the fact that the earlier Act may have confined the class of agents who could swear such an affidavit while the 2009 Act did not, points more convincingly to the conclusion that that class was being expanded (as the language of the 2009 Act suggests) rather than being impliedly limited (as its predecessor is said to have done).

23. I do not believe the authorities cited by Mr. McGuinness support the reading down of the definition of '*creditor'* or of *'agent'* as they appear in s. 115 of the 2009 Act in the manner suggested by this submission. While I note the view expressed by Professor Wylie in his Annotation to the 2009 Act, it is my view that Mr. McGuinness has overinterpreted the language used by Professor Wylie. Section 6 of the 1858 Act was described in one authority as '*a lengthy, detailed and poorly drafted statutory provision'* (see Maddox, '*Mortgages Law and Practice'* (2nd Ed. 2017) at para. 11-23). Indeed, Wylie notes in his annotation that the object of the provisions of the 2009 Act was to replace '*the much criticised and often confusing'* provisions of the 1850 and 1858 Acts (both of which were repealed by the 2009 legislation). The intention of ss. 115 and 116 was to change that process using a simpler, clearer and more streamlined procedure. Necessarily in doing so the Oireachtas stripped that procedure of some of the linguistic complexity attending its predecessor. It certainly did maintain the essential concept enabled by the nineteenth century legislation – a procedure for the registration of judgments against interests in land by or on behalf of the judgment creditor – but on no version could the language used in ss. 115 and 116 be viewed as re-enacting the detail of the older Acts. On the contrary there is a clear and obvious reversal of that aspect of the old legislation relevant to this application. The Oireachtas has expressly moved from a defined category of authorised agent who could swear the affidavit (s. 3 of the 1858 Act), to the otherwise unqualified requirement that the agent who can apply for registration be '*authorised*' (s. 115 of the 2009 Act). When

Professor Wylie says that s. 115 '*re-enacts provisions in ss. 3 and 4'* of the 1858 Act he means that the section re-enacts some features of those sections, not that the sections themselves in all of their detail have been absorbed by default into the new legislation. His description of the effect of the Act as thus understood mirrors that of Baker J. in *Barrett v. Leahy* [2015] IEHC 734 at para. 14:

> '*The Judgment Mortgage (Ireland) Acts 1850 and 1858 were repealed and replaced by the* ***new simplified statutory provisions*** *contained in Part II of the Land and Conveyancing Law Reform Act 2009 …* ***which make no alteration in substance to the nature of the Judgment Mortgage'***.
>
> (Emphasis added).

24. As to the other authorities relied upon by Mr. McGuinness, the passage from Professor Wylie's text '*Irish Land Law'* to which he refers does not actually state that it is only the secretary or Law Agent of the company who may swear the affidavit: instead it confirms the long-standing practice that they *could* do so. Section 26(2)(e) of the Interpretation Act 2005 operates where, and only where, the new enactment expresses '*the same idea'* in a form of words that are '*in substance'* the same as the former enactment. The language in ss. 115 and 116 does not '*in substance'* comprise the words used in the 1858 Act. As is clear from what I have said earlier, the language and structure are quite different.

25. Further – as is too often overlooked – the Interpretation Act presents not a set of rules applicable to the construction of all legislation, but a body of presumptions that can be expressly or impliedly displaced by the terms or intent, of any Act. Section 4(1) provides :

> *'A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made.'*

26. In considering whether '*a contrary intention appears'* for this purpose, it is appropriate '*to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole*', (*Blue Metal Industries Ltd. v. Dilley* [1970] AC 827, 846-848, per Lord Morris). Viewing the 2009 Act in that light, it seems clear to me that the purpose of s.115 insofar as relevant here is to enable the application to be made by any duly authorised agent and, to that extent, it cannot be said to be consistent with the continued operation, by default, of any restrictions arising under the older legislation. Even if the terms of s.26(2)(e) were engaged (and for the reasons I have explained I do not believe that they are), I do not see that it can operate to achieve the construction urged by Mr. McGuinness.

27. The next point made by Mr. McGuinness is directed to the claim that Mr. Mahon did not have or did not sufficient aver to or otherwise establish, authority to swear the affidavit. He points to comments in the report of the decision in *Munster Bank v. Maher* (1885) 16 LR Ir. 165 which referred to a judgment mortgage affidavit sworn on behalf of a company in the following terms:

> '*It should appear on the face of the affidavit that the person making it had the power to do so'*.

28. Because, as he contends, it did not appear on the face of Mr. Mahon's affidavit that he had the power to swear the judgment mortgage giving rise to the registration in this case, he argues that the registration is invalid. Mr. McGuinness stresses in that regard that a judgment mortgage affidavit which breached any requirement of section 6 of the Judgment Mortgage

(Ireland) Act 1850 was viewed as being void, citing the Law Reform Commission consultation paper on judgment mortgages (LRC CP 30-2004) and the decision in *Murphy v. McCormack* [1931] IR 322.

29. In my view, this argument is misplaced, and the legal authorities cited in support of it do not advance Mr. McGuinness' contention. *Munster Bank v. Maher* was concerned with the 1858 Act. As I have noted earlier, under s. 3 of that Act where it was sought to register such a mortgage on behalf of a body corporate, the affidavit could be sworn by *inter alia* the '*secretary, deputy secretary or law agent'* of the entity in question. In *Munster Bank v. Maher*, the affidavit was sworn by a solicitor in the firm representing the plaintiff. The two points taken in respect of the affidavit related not to whether the person swearing the solicitor's affidavit had authority so to do, but to whether it had been proven that the plaintiff was a corporation and whether the statement in the affidavit as to the interest in the property was in sufficient compliance with the Act (both questions were answered in the affirmative). The remark upon which Mr. McGuinness relies was made not by the Court, but by counsel in the course of his submissions to the Court ; May CJ in fact specifically observed that there was no objection taken that there was no evidence that the defendant was not a member of the firm in question or that the firm were the Bank's law agents. He clearly felt that such an objection (had it been taken) would have been stronger than those that actually were, but hastily added that any such deficiency could, in any event, have been rectified (correction of affidavits used to ground registration being then, in certain circumstances, permissible under the 1858 Act).

30. Section 71 of the 1964 Act provides that application for registration of a judgment mortgage under s. 116 of the 2009 Act shall, in the case of registered land, be in such form and in such manner as may be prescribed. Rule 118(1) of the Land Registration Rules 1972

S.I. No. 30 1972 was amended by Rule 18 of the Land Registration (No. 2) Rules, S.I No. 456/2009 ('the 2009 Rules') by the substitution of a new Rule 118. This was the provision in force at the time of the application in issue here, the relevant regulations having been made pursuant to the provisions of s .72 of the Registration of Deeds and Title Act 2006. It provides that an application for registration of a judgment mortgage as a burden on registered property pursuant to s. 116 of the 2009 Act *shall* be made in Form 112. That Form, in turn, requires that the affidavit record as follows:

> '*I, AB aged 18 years and upwards of _____ the creditor within the meaning of Section 115 of the Land and Conveyancing Law Reform Act 2009 make oath and say as follows …'*

31. This was the form closely followed by Mr. Mahon in his affidavit and it was not open to him to adopt another form of words. Despite the fact that the language is prescribed in the form, the papers disclose some confusion on the part of the PRAI as to what, exactly, this meant. In its written submissions to the High Court, the PRAI submitted that '*it is quite clear when one reads the entirety of the Affidavit that "the creditor" refers in fact to "Ulster Bank Ireland Limited" and not to Ted Mahon himself.'* The PRAI's notice in response to the appeal states that the learned trial Judge was correct '*in finding that Ted Mahon was a 'creditor' within the meaning of section 115 of the Land and Conveyancing Law Reform Act 2009'*. In oral argument in this Court, the position adopted was that Mr. Mahon was swearing as creditor as that term is defined in s. 115, which includes an authorised agent of a creditor. The position initially adopted may have arisen from Form 60 to the 2012 Land Registration Rules (applied by Rule 110 of that instrument) which uses a different formulation to that in place at the time the registration in issue here occurred - *'I, (insert name of deponent) of the creditor within the meaning of Section 115 …. make oath ..'*. By

placing '*of the creditor´* immediately after the deponent's name the sense of the affidavit appears to have been changed, presumably deliberately.

32. While I do not believe it makes any difference at the end of the day in this case, it seems to me that the position under the 2009 Rules was that the individual who swore the affidavit did not do so '*on behalf*' of the creditor in those terms, but instead as '*the creditor'* as that word is defined in s. 115. This was, it must be immediately noticed and as I have previously described it, an artificial construct: where the creditor is a body corporate the person swearing the affidavit will not themselves be the creditor as that term is ordinarily understood. Instead, they are the creditor as defined in s. 115, which includes an authorised agent of the person in whose favour the relevant judgment has been entered. The point is, however, that by averring that he is '*the creditor'* and doing so in a context in which the judgment is in favour of a body corporate he is necessarily averring as to his authority as such. Whatever may be suggested in *Munster Bank v. Maher*, the legislative framework in place at the time the registration in issue in this case took place did not envisage any specific evidence of that authority being either averred to or exhibited, and I see no basis on which it can, or should, be interpreted as having done so.

33. In that context it should be stressed that it is critically important that parties registering applications for judgment mortgages are aware of the precise contents of any such affidavit, and that they can be confident that by complying with clearly prescribed criteria they will avoid any subsequent challenge to that registration. The Rules seek to achieve this by identifying precisely what must be averred to in such an affidavit. Those making such applications are entitled to operate on the basis that if they comply materially with the strict requirements of the applicable Rules, and if the information they provide in so complying is

accurate and complete, their application will not be rendered invalid because of some additional requirement which is in some way found to be implicit in the relevant provisions.

34. I think that this was – at least in part - why the Court decided *S. O'Connor and Sons Limited v. Whelan* (Unreported, High Court, 26 July 1991, Denham J.) as it did. There, the issue was whether an affidavit sworn to register a judgment mortgage was invalid because the deponent did not set out her means of knowledge. In affidavits sworn for the purposes of proceedings in Court, a requirement to this effect is imposed by Order 40 Rule 4 Rules of the Superior Courts. However Denham J. (as she then was) rejected the contention that the omission of such a clause from an affidavit used to register a judgment mortgage rendered the registration void because there was no requirement to this effect imposed by the Act or relevant forms, and because the affidavit was (as Denham J. described it) a '*specialised affidavit required by statute whose content is set out in the statutes and the persons who can depose to the said affidavits also being set out in the said statutes'*. She was, it should also be said, influenced by the fact that presumptively the company secretary would be aware of the company business by virtue of their knowledge as secretary, but I do not think this affects the essential point.

35. Here, the affidavit as sworn was in compliance with the relevant Form and statute, and I can see neither reason to conclude nor basis for concluding, that it is invalid for want of an averment extraneous to that Form. This mirrors the case law dealing with errors in the description of matters that *are* required by the legislation, which now inclines to a purposive approach, refusing to declare registration invalid where misstatements do not mislead (see *Irish Bank of Commerce v. O'Hara* (Unreported, Supreme Court, 7 April 1992) and *Ulster Bank v. Crawford* [1999] IEHC 70).

36. In this regard, I should state that even if all of the foregoing were wrong and if Mr. Mahon was required, and had failed, to state and/or provide evidence of his authority to swear the affidavit used for the purposes of registration of the judgement mortgage, this would not in my view invalidate the registration. As I have noted already, and as recorded in Wylie '*Irish Land Law'* at para. 15-09 the better view today is that non-compliance with the relevant requirements should only invalidate the registration where that non-compliance defeats one of the purposes of the Acts, as would arise where there had been a failure which rendered it impossible to identify clearly the parties or lands affected. The omission alleged here does not come within this principle.

37. I have noted already that Mr. McGuinness also claims that in fact, Mr. Mahon did not have the requisite authority to swear the affidavit. Clearly, in making that case it was a matter for Mr. McGuinness to establish it. He has not done so. He has adduced no evidence to this effect. In contrast, the PRAI had before it the affidavit of Mr. Mahon himself, the affidavit of Mr. McNaughton, and the circumstance that Mr. Mahon had sworn the affidavits on behalf of the Bank grounding the applications for judgment in the first place. Mr. McGuiness has certainly established that McNaughton was not a '*director'* of the Bank, but a person does not have to be director to confirm the authority of another agent, and no authority was adduced that so suggested.

38. This leads to the third point made by Mr. McGuinness. It arises from the First Company Law Directive (68/151/EEC) as codified with effect from 21 October 2009 by Directive 2009/101/EC ('the 2009 Directive') (the provisions of which now appear in Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017). Essentially, Mr. McGuinness argues that the effect of these provisions is that where an agent is representing a company in legal proceedings, that agent must be registered with the

Companies Registration Office and that the fact that Mr. Mahon was not so registered means that the Bank could not lawfully rely upon his affidavit for the purposes of the registration of the judgment mortgages in question.

39. Article 2(1)(d) of the First Company Law Directive (68/151/EEC) imposed an obligation on Member States to take the measures required to ensure '*compulsory disclosure by companies'* of *inter alia*:

> '*The appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body:*
>
> *Are authorised to represent the company in dealings with third parties and in legal proceedings'*

40. The documents and particulars so required were to be kept in the company's file to which public access was to be granted, and disclosure of those documents and particulars were to be made in a national gazette appointed for that purpose (Article 3(1), (2), (3) and (4)). However, it is clear that failure to comply with these provisions did not automatically invalidate transactions effected by persons whose authorisation ought to have been but was not disclosed in accordance therewith. Article 3(5) provided that the documents and particulars in question could be relied upon only if published '*unless the company proves that the third parties had knowledge thereof'* while Article 3(7) stated that third parties could always rely on any documents in respect of which the disclosure formalities had not been completed '*save where non-disclosure causes them not to have effect'.* Article 8 made it clear that the failure to comply with these disclosure requirements was envisaged as being limited:

> '*Completion of the formalities of disclosure of the particulars concerning the persons who, as an organ of the company, are authorised to represent it shall constitute a bar to any irregularity in their appointment being relied upon as against third parties unless the company proves that such third parties had knowledge thereof*'.

41. These provisions were implemented shortly after Ireland's accession to the European Community by the European Communities (Companies) Regulations 1973, S.I No. 163/1973 ('the 1973 Regulations'). These Regulations comprised the applicable implementing measure at the time of the registration of the judgment mortgages in issue here, being replaced by the European Communities (Companies) Regulations 2014, S.I No. 306 of 2014 and, latterly, ss. 33, 39 and 40 of the Companies Act 2014.

42. Regulation 4 of the 1973 Regulation required the delivery of certain documents and particulars to the Companies Registration Office, including '*any return relating to the persons, other than the board of directors, authorised to enter into transactions binding the company'* (Regulation 4(1)(f)). Limitations on the authority of persons so notified were deemed to be within the capacity of the company and could not be relied upon against any person dealing with the company in good faith (Regulation 6(1)).

43. The introduction of the domestic implementing measures was followed by the decision of the Court of Justice in *Friedrich Haaga Gmbh* Case 32/74 [1975] CMLR 124 to which Mr. McGuinness also referred. There, the Second Civil Senate of the *Bundesgerichtshof* referred pursuant to Article 177 of the Treaty to the Court a question directed to ascertaining whether, where a company comprised a representative body of only one director, it was necessary to disclose the fact that that director represented the company alone even though his authority was clear from national law. In answering that question in the affirmative, the Court stressed the objective underlying the Directive:

> '*it is important that any person wishing to establish and develop trading relations with companies situated in other Member States should be able easily to obtain essential information relating to the constitution of trading companies and to the powers of persons authorised to represent them'.*

44. However, I think the manner in which the Court described how that objective was achieved within the Directive suggests (as does its text) that it is concerned with the registration of only certain agents. It said (at p. 1208) that Article 2(1)(d):

> '*must be interpreted as meaning that where the body authorized to represent a company may consist of one or of several members, disclosure must be made not only of the provisions as to representation applicable in the event of the appointment of several directors, but also, in the event of the appointment of a single director, of the fact that the latter represents the company alone, even if his authority to do so clearly flows from national law.'*

45. I do not believe that these provisions either afford Mr. McGuinness a basis for relief in this case, or present a legal issue lacking clarity that in this case requires to be determined by the Court of Justice. There is nothing in any of the provisions to suggest that even if registration were mandatory and even if Irish law were non-compliant with that obligation, this invalidated the entry of a judgment mortgage or that the Directive mandated any such conclusion. The purpose of the provisions is to protect third parties, not to invalidate *ab initio* transactions entered into with persons who ought to be (but are not) registered in accordance with its terms. As explained in Keane, '*Company Law',* (5th Ed. 2016)) the Directive provides for registration so that third parties dealing with the company will be spared the complication and expense of having to inquire as to the requisite authority, resolutions and provisions of the company's constitution so as to validate the authority of

those purporting to act on its behalf. Nothing in the Directive requires that the legal actions of an agent who is not registered are rendered invalid in the manner suggested by Mr. McGuinness. If that is so, there is no issue of European law that requires a reference in this case.

46. I say all of this without addressing the distinct issue raised at the hearing resulting from the apparent limitation of Article 2(1)(d) by the phrase '*the persons who either as a body constituted pursuant to law or as members of any such body'*. I have noted earlier how this terminology was reflected in the judgment of the Court in *Haaga.* The case law suggests that the Article is directed to directors and liquidators, individuals in the company that benefit from the company's legal personality, individuals who are hidden behind the corporate veil and members of the company organs (see the Opinion of Advocate General Bot in C-398/15 *Camera di Commercio,Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni* ECLI:EU:C:2017:197 at paras 53, 71, 73, 74 and 85). It is not immediately obvious how an employee such as Mr. Mahon fall within these terms. Whether this is correct or not, for the reasons I have explained, it is not necessary to address this issue.

47. In particular, Mr. McGuinness' emphasis upon the obligation of the State pursuant to European Law and of the supremacy of European law, is of no avail to him. He is concerned here not with a provision of the European Treaties or a Regulation which is directly effective, but with a Directive which is addressed to the Member States. He has identified no basis on which it can be said that the Directive generally confers rights on him that are directly enforceable under European law, no basis on which it could be said that it confers a right to assert the invalidity for which he contends, and therefore no basis on which the Directive avails him in these proceedings in any way. It follows – for the same reason – that there is no basis for the making of a reference to the CJEU as Mr. McGuiness has also sought.

48. It is accordingly my view that this appeal should be dismissed. As PRAI has been entirely successful in its defence of the appeal it is my provisional view that it is entitled to its costs of this appeal. If Mr. McGuinness wishes to dispute this provisional view he should, within five days of this judgment, lodge with the Court of Appeal office a letter stating in no more than 1000 words why he disagrees with the proposal in relation to costs, in which event the Court shall determine how to proceed.

49. Costello J. and Donnelly J. are in agreement with this judgment and the order I propose.