COURT OF APPEAL

UNAPPROVED
Neutral Citation: [2023] IECA 212
Appeal Number: 2020/110

Woulfe J.
Murray J.
Whelan J.

BETWEEN/

GERARD REIDY (NEXT FRIEND OF EITHNE RYAN)

PLAINTIFF/APPELLANT

- AND –

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANT/RESPONDENT

AND BETWEEN:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

COUNTERCLAIMANT

- AND –

EITHNE RYAN

FIRST DEFENDANT TO COUNTERCLAIM

- AND –

BRYAN RYAN

SECOND DEFENDANT TO THE COUNTERCLAIM

JUDGMENT of Ms. Justice Máire Whelan delivered on the 8th day of August 2023

Introduction

1. This is an appeal against a High Court judgment delivered on the 17th January, 2020 and consequential order of the 5th February, 2020, perfected on the 1st May. The appellant (hereinafter the widow), being the plaintiff and the first defendant to the counterclaim at first instance, is the widowed mother of the second defendant to the counterclaim (hereinafter the registered owner). The registered owner was so registered as owner of the lands in Folio … in 2006 under the terms of his late father's will, the latter having died in 2003. Registration was effected subject to rights of residence, maintenance and support in favour of the widow. The registered owner created a charge in favour of the respondent, Bank of Ireland, (hereinafter the Bank), the defendant and counterclaimant at first instance, over the said lands in 2010.

2. The widow, through her next friend, seeks to set aside part only of the said order declaring that a judgment obtained by the widow on 19 October 2016 does not attach to or form part of a burden for maintenance and support in favour of the widow registered at entry number 4 in Part 3 of the Folio, declaring that the entire burden binds only part of the said Folio as comprises the dwelling house and ordering costs against the widow. In lieu thereof the widow seeks declaratory relief in her favour of in the terms of a statement of claim delivered in the within proceedings.

3. In particular, the widow seeks to set aside the following orders:

(i) A declaration that a judgment obtained by the widow in proceedings, record no. 2015/3781P, on 19th October, 2016, in the sum of €779,225 does not attach to or form part of the burden in favour of the widow at Number 4 in Part 3 of the Folio.

(ii) As against the widow and the registered owner, defendants to the counterclaim before the High Court, a declaration that the burden registered at Number 4 in Part 3 of Folio … in respect of the widow's right of residence, support and maintenance

pertains to and binds only that part of the land comprised of the dwelling house in the Folio.

(iii) An order refusing the reliefs sought by the widow.

(iv) An order striking out the widow's claim as against the respondent Bank.

(v) An order for the costs of the Bank as defendant and counterclaimant in respect of defending the claim and maintaining the counterclaim to include any reserved and discovery costs, and the costs of a stenographer, to be adjudicated in default of agreement.

Background

4. The widow is now of advanced years, aged circa 98 years. Her late husband died testate on the 29th July, 2003 and a grant of probate issued forth of the Probate Registry in November, 2004 to the executor, her son, the only child of the deceased and the widow, being the registered owner to whom I have earlier referred. The net value of the estate of the deceased was expressed on the face of the grant to be €2,843,353.69.

5. There was a specific devise and bequest within the Will in favour of the widow:

"Devise and bequest to widow

I give, devise and bequeath my dwelling house at Bunker Hill, Cratloe, County Clare to my son the said Bryan Ryan for his own use and benefit absolutely subject to a right of residence, support and maintenance in favour of my wife Eithne Ryan for the duration of her life. It is my express wish that Eithne Ryan would be maintained and supported to the standard which she has been used to."

Otherwise there was a pecuniary bequest in the sum of €20,000 to the widow *"for her own use and benefit absolutely"*.

6. In light of same there accrued to the widow the right of election pursuant to s. 115(1) of the Succession Act, 1965 as amended entitling her to choose as between her legal right share

pursuant to s. 111(2) of the Succession Act, 1965 to take an absolute share of one third of the net estate of her late husband and a potential entitlement to appropriate the dwelling house in and towards satisfaction of her legal right under s.56 or in the alternative, to take the devise or bequest provided for under the terms of the Will.

7. It appears to be contended that in electing to take the gift pursuant to the terms of her late husband's Will, mainly a right of residence, support and maintenance for her life and €20,000 rather than her legal right share, the widow relied on advice from a solicitor. The contents and representations in a letter of 22 August 2003 from the executor's solicitor to the widow are relied on as the basis for the widow electing not to take her legal right share. Thereby the widow gave up her rights to a valuable right worth one third of the entire estate which vested instead in her son the executor, who came thereby to be registered as full owner of the entire Folio. Valuable consideration was given by the widow for the burdens registered in her favour.

Letter of the 22nd August, 2003

8. Of note is a letter written to the widow following the death of her spouse by the solicitor who appears to have acted for the executor in the due administration of the estate of the deceased. The deceased had died in July, 2003. The letter therefore was written less than four weeks following the death of the testator. The widow was aged about 78 years at the date of the said letter. In the context of advising with regard to her legal right share the letter stated (p.2): -

> *"It is the duty of the personal representative or the executor, …, to advise you of these rights and we are writing to you on his behalf to advise you of the rights."* (emphasis added)

This is a communication and a representation on behalf of the executor and the estate in the context of informing the widow with regard to her right to elect and the consequences of election pursuant to the Succession Act, 1965. It refers to "*our recent meeting in this regard*."

The letter states: -

> "*You will note that pursuant to the will your son … is the beneficiary of all of your husband's assets but a right of residence, maintenance and support has been retained in favour of you for the duration of your life. These rights will be registered as a burden on the title and therefore the property* ***cannot*** *be sold with (sic) your consent. In addition the sum of €20,000 has been bequeathed to you for your own use and benefit absolutely and it may comprise of such savings, investments and personal as may be chosen by you*." (emphasis in original)

9. The letter continues: -

> "*I note from our recent meeting that you have indicated that you intend to accept the terms of the will and that it is not your intention to exercise your legal right share or to appropriate the family home. In this regard, however, we will need to have you independently advised and in due course you will need to have you sign a form whereby you are acknowledging that you were advised of your entitlements and that you decided to waive your entitlement to the legal right share*."

10. No assent has been found relating to registration of the widow's burden, it having apparently been lost in the Land Registry. The letter of the 22nd of August, 2003, written on behalf of the executor to the widow embodies a clear representation that if she elected to take under the terms of the Will rather than exercise her legal right share pursuant to s. 111(2), her rights would be registered on the Folio and the land couldn't be sold without her prior consent.

11. On the 3rd February, 2006 the right of residence and the right of the widow to *"be suitably supported and maintained"* were registered as a burden on Part 3 of the Folio. The Folio comprises 53.3834 hectares which approximates to circa 132 acres statute measure, and includes a dwelling house. Parties dealing with the said Folio thereafter from and after registration of same were fixed with notice of the burden.

12. Almost four years after registration of the widow's burden on Part 3 of the Folio, a charge for present and future advances in favour of the Bank was registered on the 6th January, 2010.

13. On the 6th January, 2010 when the Bank registered a charge over the subject Folio it was fixed with notice of the prior registered burden in favour of the widow. Any search effected on or after the 3rd February, 2006 against the Folio would have disclosed the burdens.

14. Fixed with notice of the burden in favour of the widow, standard options available to the Bank in January 2010 included seeking that the widow would execute deed of postponement subordinating the benefit of her burden to that of the Bank's and thereby altering the priorities *inter se*. An alternative option available was a partial deed of postponement, such that the distinctive rights of the widow in respect of:

(a) her right of residence, and

(b) her right to be "suitably supported and maintained"

could be registered over some part of the Folio rendering the balance unaffected and thereby enabling priority for the Bank's charge over that part. Neither step was taken prior to registration of the Bank's charge. The consequences of same are central to this appeal. The evidence before the High Court on 3 April 2019 (p.34 line 6-9) indicate that the Bank first received a copy of the Will of the deceased under cover of a letter dated 29 April 2012, some years after it had registered its charge as a burden on the Folio.

The Bank's subsequent efforts to secure postponement of the widow's burden

15. Part of the material put before this court in the context of the appeal pertains to "*An extract from Data Request re Bryan Ryan*" provided by the Bank and appearing in to post-date the creation of the Bank's charge and the registration of same on the 6th January, 2010. Same appeared to be confined to the years 2010 to 2012 in particular. An entry, for instance, of the 30th November, 2010 records that the debt of the debtor stood at circa €1.8m with AIB. In an

extract entitled "Probably 2010/2011" - around time of creation of the Bank's charge - the following entry appears : -

> "*There is about 260 acres further in the lane leading up to BRs [clearly referring to Bryan Ryan] original family home known as Ballymorris House, but referred to on BRs SOA as 'Bunker Hill'. This is a period house that looks to be in reasonable condition (wasn't inside). BRs mother Eithne lives there and has rights of residence and support from the full folio (130 acres) charged to BoI."*

An entry on the 16th January 2011, a year after registration of the charge in an internal memo of Bank of Ireland it is observed: -

> "*… provided Mrs. ... Snr agrees to moving, that we will advance €15K to allow the BoIMB charged property ('The Lodge') to be refurbished."*

An entry of the 13th April, 2011 prepared by the relationship manager of the Bank notes: -

> "*Our principal item of security (130 acres) has the full rights & privileges of BRs elderly mother registered over the entire holding, and not just the house."*

16. A document dated the 18th August, 2011 submitted by a bank relationship manager Nigel Larke contains the following observations in relation to the burden in favour of the widow at p. 3: -

> "*Mrs. ... senior is 86 and lives in a house on the 130 acres. A burden is registered on the entire folio that reads "the right of ... to reside in the dwelling house and be suitably supported and maintained therein during her lifetime" LSU confirms that this stands over the entire folio and not just the house."* (emphasis in original)

It would appear as of November 2011 the Bank's proposal was that the registered owner (and his wife) would: -

> "*..sell 106 acres of land from the 130 charged to BoI with the detached period house and outbuildings thereon.*

Sale price €1.35m.

Full proceeds to be lodged with in Full & Final settlement of all BoI liability (i.e. incl. all BoIMB exposure)

In exchange for this, we get a co-operative, voluntary sale and Mrs. … Snr. (who has right of residence and maintenance … [blacked out]) will co-operate.

For this, BoI will have to advance €15k towards the refurbishment of a property charged to BoIMB to allow Mrs. … Snr. reside there." (emphasis in original)

17. In a report dated the 15th March, 2012 the Bank appears to note *"[h]owever; we will not be able to force sell without the postponement of Mrs. …Snrs (sic) right of residence*". Further at p. 2 of that document in regard to the Bank's strategy it notes: -

"*However; that we were prepared to advance +€15k to improve the BoIMB secured property for Mrs….Snr. and agree not to take any further enforcement proceedings to 30th June while they sold the property."*

It is elsewhere noted: -

"*The Financial Adviser reverted to advise that this was not sufficient assurance for his clients [apparently the borrower and his wife] to proceed to sell. They claim they need an assurance from BoI in order to allow them (sic) reach agreement with AIB for their exposure there (c. €1.8m) and to allow them persuade (sic) Mrs. … Snr. to move to the reduced accommodation they want to offer her."*

A final note dated the 27th August, 2012 notes: -

"*Mrs. … Snr flatly refused to consider moving house in order to allow the agreed proposal go ahead (sic)*".

The 2015 proceedings

18. On 14th May, 2015 the widow instituted proceedings against the registered owner in the High Court, record number 2015/3781P. She sought an order restraining him from

"*pressurising or influencing"* her to *"give up or rescind her right of residence for the remainder of her life at the dwellinghouse known as… comprised in Folio …*". She further sought two distinct positive orders requiring the registered owner to support and maintain her in accordance with the obligation specified in the burden and separately to carry out "*all necessary works or repair and maintenance on the Plaintiff's residence in accordance with the obligation upon him*". Issues concerning repair and maintenance are not part of this appeal, which is confined to the issue as to whether the burden on the Folio in favour of the widow to maintenance and support insofar as quantified by the High Court is enforceable in priority to the Bank's charge. The statement of claim pleads the continuous failure and neglect of the registered owner of the lands to support and maintain her in accordance with his obligations. It was pleaded that she had been required to expend "*her own personal resources on her maintenance*". It was estimated that her annual requirements for support and maintenance "*are in the region of €28,000 per annum*". It was pleaded that the dwelling house had been allowed to fall into a state of significant disrepair and significant works of repair and maintenance were required to be executed as a matter of urgency. It was pleaded that the registered owner had incurred significant debts and had sought to "*make arrangements with his creditors in respect of same*". It was pleaded that "*the Defendant has sought to place unreasonable and/or illegitimate pressure and influence on the Plaintiff to forgo her life interest and rights to support and maintenance in favour of the Defendant and/or his creditors. The Plaintiff has made clear her intention to reside for the remainder of her life at Bunker Hill where she has resided since 1951".*

In addition to an order restraining the registered owner from "*pressuring or influencing*" her to give up or rescind her right of residence at the dwelling she sought an order requiring him *"to support and maintain the Plaintiff for the rest of her life in accordance with the obligation upon him contained in the Will of… "* Further, she sought a "*[d]eclaration for all necessary accounts*

and enquiries to determine the monetary value of the Plaintiff's right to maintenance and support."

The proceedings were served on the registered owner on 19th May, 2015. The registered owner was written to on the 18th August, 2015 by registered post enclosing the statement of claim and requesting that he nominate a solicitor to accept service. It is significant in the context of this appeal that both the plenary summons and the statement of claim expressly sought a declaration of the court "*to determine the monetary value of the Plaintiff's right to maintenance and support"*. At the time of the institution of the 2015 proceedings the widow was in occupation and possession and residing in the dwelling and thereby exercising her right of residence therein. Issues concerning the latter are not engaged in this appeal.

19. The registered owner did not enter an appearance. On the 7th December, 2015 in default of appearance it was: -

> "*ORDERED AND ADJUDGED that the Plaintiff do recover against the Defendant such amount as the Court may assess in respect of the Plaintiff's claim herein for damages and the costs of suit on taxation such costs to include the costs of this Motion and of the assessment and that such assessment be had before a Judge without a jury and be set down for hearing accordingly*."

20. The Bank was put on notice of the proceedings and served with same and were aware of the widow's claim but did not seek to engage with or oppose same. It is noteworthy that the specific sum sought in the statement of claim based on the widow's estimate of her annual requirements for "*support and maintenance*" aggregated at €326,660 in respect of the years 2003 (part of) to May 2015. The notice of motion which issued on the 16th November, 2015 for judgment in default sought, mirroring the statement of claim and the writ, *inter alia,* all necessary accounts and enquiries *"to determine the monetary value of the Plaintiff's right to maintenance and support*". The widow in her grounding affidavit sworn on the 3rd November,

2015 in support of her application for judgment particularised her claim and same reflected the sums claimed in the pleadings for maintenance and support. She deposed she had resided in the dwelling house since 1951. A notice of trial was served on the 16th December, 2015.

Hearing of 2015 Proceedings before Mr. Justice O'Connor 19th October, 2016

21. The hearing proceeded on the 19th October, 2016. A Transcript of same has been provided. The judge observes at p. 1 lines 17-19 "… *There was a right of residence to be exercised and it was registered on the Folio. I know that there were communications between your instructing solicitor and Messrs. Harrison O'Dowd*". Messrs. Harrison O'Dowd are solicitors for the Bank. The High Court was satisfied that the Bank was on notice of the proceedings. The position before the High Court on the 19th October, 2016 was that the Bank had no "*no comment to make*" in regard to the litigation and it was further asserted *"that it was not recognised in July that your client has any prior ranking interest to its charge*." This stance was maintained although the widow's burden had been registered 3 years and 11 months prior to the Bank's charge. An expert witness gave evidence in relation to "*the value of the rights of maintenance and support*" and a different expert gave evidence concerning "*the value of repairs to the property*." Thus it was clear in accordance with the pleadings that the claim was conducted based on separate calculations and evidence concerning the two distinct aspects to the claim, each quantified with a particularity. The court was informed that the widow "*felt* …[the registered owner] *was putting unfair and undue pressure on her in relation to vacating the property*". This speaks to the relationship between those parties which had precipitated the litigation in the first instance. The engineer gave evidence directed towards the dwelling house works of repair and maintenance, an aspect which is not engaged in this litigation. The court was informed that the widow was 90 years old. The court heard evidence from Richard Maguire, a Chartered Accountant, on foot of a report he had prepared in relation to the valuation of the rights of maintenance and support from the date of death of the deceased in July 2003

up to date of hearing. The base figure identified was €30,000 per annum, this sum having been available to the deceased and the widow prior to his death. A clear and rigorous approach had been adopted by the accountant, including adjustments in regard to the sum in light of the death of the testator. Nothing had ever been paid to the widow by way of maintenance and support under the burden.

22. Page 5 of the Transcript evidences the approach adopted by the Court in order to separately quantify the precise sum outstanding for unpaid maintenance and support. The judge observes;

> "*So then your total calculation in relation to the value of the right and maintenance and support which hadn't been provided from 2003 to date is?*
>
> *Answer: <u>The current value will be €428,225</u>*" (Lines 18-20) (emphasis added)

23. The judge having heard the evidence, including the interjection from the widow herself who informed him *"I hunt with County …Harriers and the … Hounds*", noted at p. 8, line 31:-

> "*All she was left with was €20,000 from the Will, together with the rights of support and maintenance and residence in the property. So the value as claimed by the evidence is €60,000 in respect of the roof, €281,000 in respect of the general property and €428,225 in respect of the right of residence and maintenance."*

Counsel confirmed to the court that the sum referable to the right of maintenance and support was €428,225, p. 9, line 13. It was a constituent element of the entire judgment of €779,225.10. The case was presented in accordance with the pleadings disaggregating the aspect that pursued defalcation of the widow's right of maintenance and support from the balance of the claim. Each aspect was conducted separately with different witnesses. Her loss in respect of the failure to maintain and support her in accordance with the terms of the burden at entry no. 3 of the Folio was throughout quantified at €428,225 which formed an integral distinct and

identifiable element of the award and order made. The order of the High Court was perfected on the 9th March, 2017.

24. The Bank contends that the said judgment is merely for damages and vests no right in the widow to attach all or some of the award to her burden so as to rank in priority to the Bank's charge.

2017 proceedings

25. On the 19th October, 2017 the within proceedings were instituted by the widow against the Bank seeking, *inter alia,* to enforce her 2016 judgment in priority to the Bank's charge. Ultimately same were the subject of a joinder application whereby the Bank as counterclaimant sued the widow and the registered owner. A notice of motion issued on the 7th March, 2019 whereby the Bank sought judgment against the registered owner in default of appearance. The grounding affidavit of Michael Fitzgibbon sworn on behalf of the Bank on the 7th March, 2019 deposes:-

> "*The Bank's Counterclaim in these proceedings has been brought as a consequence of the claim of the Plaintiff (who is also the first named Defendant to the Counterclaim) concerning her entitlement to a right of residence, support and maintenance under the Will of her late husband …*"

At paragraph 6 it states: -

> "*The Bank contends that the Plaintiff has wrongfully and unlawfully claimed, both in the above entitled proceedings and elsewhere, that the right of residence, support and maintenance to which she is entitled under the Will, together with a judgment said to have been obtained by her against Mr. .. in respect thereof, affects the entirety of the lands comprised in Folio … and that she is entitled to a burden registered on that Folio and/or a charge for the amount of the alleged judgment against Mr…, which takes*

priority over the Charge. The Bank further contends that the said claims have no basis in law or in fact in circumstances where the provisions of the Will directed that the right of residence, support and maintenance to which the Plaintiff was entitled pertained to the Deceased's dwelling house at …only."

The affidavit continues –

7. *It is the Bank's case that the aforesaid claims have been made for the purpose and/or have had the effect of impeding it in the enforcement of its rights under the Charge. …*"

26. The statement of claim in these proceedings relies on the burden registered in favour of the widow on Part 3 of the Folio. It alleges that the registered owner of the land, the second defendant "*.. failed refused and/or neglected to support and maintain the Plaintiff in accordance with the obligations on him pursuant to the Will of the Deceased*." It pleads the order of the High Court 19th October, 2016 as having *"[quantified] the total sum due in respect of unpaid maintenance (including compound interest) at €428, 225…*" At 12(b) a declaration is sought "*that the Judgement (sic) in the sum of €779,225.10 obtained by the Plaintiff against [the second Defendant] in proceedings bearing Record No. … ranks as a first charge in priority to the Defendant's charge over the lands comprised in Folio …".* A declaration is sought that *"[the widow's] registered right of residence, support and maintenance for the duration of her life granted to her by the late …. is a burden over the entirety of the lands and property comprised in Folio … County of ….*"

27. The defence delivered by the Bank pleads at para. 5 admitting registration of the burden in favour of the widow but denying that the said burden "*is in respect of the entire Folio … whether as registered or at all*" and further at para. 5(c):-

"*If the Burden is in respect of the entire Folio … (which is denied), the registration thereof was in error and/or not consistent with the entitlement of the Plaintiff under the Will as pleaded in paragraph 2(d) above. If necessary, the Defendant will seek*

rectification of the Register pursuant to section 31 and/or section 32 of the Registration of Title Act 1964 (as amended)."

The defence denies that the judgment obtained by the widow has priority over the Bank's charge or that the widow's right of residence "*or any burden pertaining thereto registered on Folio … has priority over the Charge …*" It is further pleaded that if the right of residence "*or any burden pertaining thereto … has priority over the charge (which is denied), such priority is confined to the dwelling house …*"

28. In its counterclaim the Bank pleaded that the widow had;

> "*wrongfully and unlawfully claimed … that the right of residence, support and maintenance to which she is entitled under the Will, together with a judgment … in respect thereof, affects the entirety of the lands comprised in Folio … and that she is entitled to a burden registered on that Folio and/or a charge for the amount of the alleged judgment … which takes priority over the Charge. The said claims have no basis in law or in fact in circumstances where the provisions of the Will directed that the right of residence, support and maintenance to which the Plaintiff was entitled pertained to the Deceased's dwellinghouse …"* .

Amongst the reliefs sought was a declaration that the widow's burden - which as stated above was registered some 3 years and 11 months prior to the Bank's charge - "… *and or any charge pertaining thereto does not take priority over the burden registered at number 5 on Part 3 of Folio … in respect of the defendant's charge*."

Paragraph 6 of the widow's reply and defence to counterclaim delivered in April 2018 states:-

> *"…The registered rights and entitlement of the first Defendant to the Counterclaim pre-date and have priority over the Counterclaimant's charge. At all material times, and in particular prior to extending credit to the second Defendant to the Counterclaim and taking the charge now relied on, the Counterclaimant was on actual notice of the*

registered rights and entitlements of the first Defendant to the counterclaim in Folio … Further in circumstances where the Counterclaimant failed to procure a Deed of Postponement from the first Defendant to the Counterclaimant prior to advancing monies to the second Defendant to the Counterclaim, the Counterclaimant is estopped from seeking rectification of the register in the manner now sought."

The rejoinder and reply to defence to counterclaim specifically denies that the widow ever had any registered rights or entitlement in respect of the entirety of the lands comprised in the Folio *"… that predate or have priority over [the bank's] charge*."

It is pleaded that the Bank did not have notice of any registered rights or entitlements of the widow in respect of the entire Folio prior to extending credit to the registered owner. It is denied that it was incumbent on the Bank to procure a deed of postponement or that the Bank was estopped from seeking rectification of the Register.

29. The stance of the widow in the course of the hearing before the High Court distilled down to a few key issues as is evident from the outline legal submissions filed on her behalf dated the 4th April 2019: -

"*The Plaintiff maintains firstly that her monetised right of maintenance and support ranks as a burden in priority to the Defendant's charge. Secondly, that the Register is conclusive and that even if there were a "mistake" (which is denied), that the Defendant lacks locus standi to challenge the conclusiveness of the Register on grounds of mistake. Finally, it is contended that the Defendant is estopped from challenging the conclusiveness of the Register in circumstances where it had actual notice of the existence of the Plaintiff's burden and elected not to require the Plaintiff to execute a Deed of Postponement prior to advancing loan facilities to the Plaintiff's son and taking security in the form of a charge ranking behind the Plaintiff's burden.*"

Hearing in the High Court – the Experts

30. Central to the evidence before the High Court was the testimony of two solicitors tendered as experts, both of whom had prepared expert reports which they formally proved to the court. Each gave evidence in relation to same. The expert called on behalf of the widow in his report outlined that registration of the widow's burden on the Folio was "*pursuant to an assent and executed by [the executor] in his capacity as Personal Representative* …" (para 7).

> "8. *It was never the case that an assent had to reflect the terms of a will. Until 1959, if the terms of the will were being varied, the relevant documentation had to be furnished to the Land Registry and the registrar had to be satisfied as to the correctness of the registration. Since 1959, it is no longer the role of the registrar to do this. Therefore, the Land Registry would not have required production of any agreement between the parties.*
>
> 9. *If I was advising a bank, I would have advised them that the charge registered on the Folio in favour of [the widow] covered the entire property. If the bank wished to get a First Charge, then they needed a Deed of Postponement from [the widow]. (This Deed of Postponement could have been in respect of all the Folio, or in respect of part of the Folio)."*

His report which was dated the 2nd April, 2019 continues: -

> "*10. While it is a matter for Counsel to deal with the law, section 31(1) of the Registration of Title Act, 1964 provides for the conclusiveness of the register (subject to the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake to make an order directing the register be rectified). I see from the Pleadings that the Bank were arguing that the same section entitled them to argue for the amendment of the Charge."*

The report concluded –

"*An assent does not have to reflect the terms of a will. A mortgagee should deal with charges on the Folio on the basis of what is written on the Folio and not on the basis of an earlier will.*"

31. The expert report furnished on behalf of the Bank states at its conclusion: -

"54. *In my opinion at the time the security was being taken these issues were foreseeable and the solicitor acting for the Bank should have addressed them before the Bank made the loan or loans available …*"

32. To the extent that the said report is directed towards omissions or missteps by any parties other than those who are litigants in these proceedings, it is not appropriate to give any consideration to same and those observations fall to be disregarded as extraneous. At para. 11 of the report which was formally proved to the court he notes: -

"*A burden noting the right of the Plaintiff to reside in the dwellinghouse and be suitably supported and maintained therein during her life was registered in her favour on Folio … on … 3 February 2006.*

12. *The Bank made loans to … and a sum in excess of €1,000,000 is now outstanding on foot of the said advances. The Bank's loan was secured by way of a charge over the house and lands comprised in Folio … except for an area of 1.733 acres/0.701 hectares shown on a map attached to the charge, and this charge was registered at Entry No. 4, Part 3 of Folio … on 6 January 2010.*

13. *The Plaintiff claims that a judgment obtained by her against [the registered owner] in respect of his failure to comply with the provisions of the support and maintenance obligation ranks in priority to the Bank's charge.*"

The report considers an excerpt from the Will of the testator, noting that –

"[The testator] *in his will dictated what the charge was to be in the following words … I GIVE, DEVISE AND BEQUEATH my dwellinghouse .. to my son … for his own use*

and benefit absolutely, subject to a right of residence, support and maintenance in favour of my wife, … for the duration of her life. It is my express wish that … would be maintained and supported to the standard which she has been used to."

The report continues –

"25. That clause has to be read in the context of the quite separate provision dealing with the … Stud.

26. The Property Registration Authority entry No. 4 at part 3 of Folio … provides as follows:

> *'The right of … to reside in the dwellinghouse and be suitably supported and maintained therein during her life*.'

27. *Presumably the wording of the burden followed the wording of the Assent which followed the wording of the bequest in the will … i.e. '….right of residence, support and maintenance in favour of my wife, … for the duration of her life …'*

28. It is clear from the folio that the Property Registration did not think it necessary to have what the dwellinghouse consisted of defined on a map."

33. The report then goes on: -

"*The nub of this case is the correct interpretation of the meaning and effect of the will of the late … This of course is a matter for the Court to decide and in my opinion is not a matter for expert evidence."*

Paragraph 31 observes: -

"*…A charge for a right of residence and maintenance is usually a problem for a lender … If the working farm (as distinct from the farm residence) is charged most lenders will seek to have the charge subordinated to any charge to it."*

"32. The issue of whether to charge a right of maintenance on a working farm would be raised by any solicitor experienced in these matters when making a will which gives

a farm to a son while reserving a right of residence and maintenance to a spouse. If the son needed to borrow in the ordinary course of running the farm and the farm is charged with the right of residence and maintenance a lender would in my opinion inevitably ask to have the charge for a right of residence and maintenance over the farm subordinated to its charge."

The Bank's expert report continues –

"*33. A solicitor advising a person transferring a farm or making a will in such a situation will in the course of any discussion on the issues above inevitably advise a donor or testator about any risk that the son taking over the farm will not be able to afford to maintain the spouse of the testator or donor in the standard to which she was used to or for that matter to a reasonable standard. This is an issue in deciding what the covenant for maintenance should be charged*."

Para. 38 opines that the charge "*.. for her right of residence and maintenance in the Dwellinghouse has priority over the charge of the Bank in relation to the Dwellinghouse.* In the next paragraph, the expert says:

"39. The Court may of course decide that it has priority over the charge of the Bank on the entire Folio … but my view is that it does not and I am proceeding on the basis that my opinion on this issue is correct."

34. A series of problems and issues are identified by the Bank's expert, including the extent of the lands to be attributed to the dwelling house if he was correct that, in light of the Will, the charge affected the residence only. The question was raised as to the extent of the lands to be attributed to the dwelling house. *"This would also be an issue even if the Plaintiff accepted the Bank's claim that the Plaintiff's charge for maintenance was confined to the Dwellinghouse."*

35. At para. 41 of the Bank's expert's report it is stated *"it is an unsatisfactory position for a Bank if it cannot readily realise its security during the life of the Plaintiff without the agreement of the Plaintiff or having the issue of the extent of the Dwellinghouse determined by a Court. The solicitor taking security for the Bank should not have allowed this to happen."* Paragraph 42 states: -

> "*If I had acted in taking security for the Bank I would have asked for a deed from the Plaintiff subordinating her right of residence and maintenance to the Bank's charge. The Plaintiff would have had to be independently advised in that regard and this advice may well be not to subordinate her charge to that of the Bank. This situation arises from time to time and while the person entitled to the right of residence and maintenance sometimes should not agree to subordinating their charge. In my experience they almost always do. It is of course one thing to subordinate one's charge for maintenance and support to raise working capital for running a farm but quite a different matter to raise money on the strength of a farm for some other speculative investment. In the latter case the only prudent advice for an independent solicitor to give to the person entitled to the right of residence and maintenance is not to subordinate the right of residence and maintenance.*
>
> *43. If the Plaintiff was asked to subordinate her right of residence and maintenance to the Bank but refused I would then have to advise the Bank to consider how to proceed if it wished to continue to make the loan and negotiate the terms on which this would be done.*
>
> *44. One solution would be to require … [the mortgagor] to separate the dwelling house over which the right of residence and maintenance was charged from the land comprising the … Stud. Doing this involves two issues.*

45. The first matter to resolve is whether it was practicable to separate the Dwellinghouse from the buildings which would be essential for the running of the … Stud. On reviewing the collection of buildings on the map of Folio … and on Google Maps in all probability the house is located in a collection of farm outbuildings. If it could be separated without too much difficulty then I would require [the mortgagor] the borrower to seek to have the curtilage of the Dwellinghouse on which the right of residence and maintenance was granted and on which this right was charged to find in a map and agreed in writing by the Plaintiff. I would also require an application be made by the Plaintiff and [the mortgagor] to the Property Registration Authority to limit the charge in favour of the Plaintiff for her right of residence and maintenance to the Dwellinghouse as defined on this map. The objective of doing this would be to define and agree precisely what area of land comprised what the late … described in his will as 'my dwellinghouse at … County …'.

46. As already mentioned I have no way of knowing whether it is practicable to separate the house … from the stud farm and the outbuildings it needs to carry on its business. …

47. If it was practicable to separate the dwelling house from the … Stud then the next issue would be that of valuation so as to consider the viability of proceeding with the loan.

48. In my opinion to decide on this the Bank would first need a valuation of the Dwellinghouse on the agreed separate site with the right of residence and maintenance in place for a lady who at that time was aged circa 78.

49. Secondly it would need a valuation of … Stud (less the plot of land excluded from the Bank's charge).

50. It will be a commercial matter for the Bank to review the valuations and decide whether to proceed to lend or not.

51. If the Bank elected to proceed I would have advised the Bank to seek to charge the dwelling house as defined on the map in one deed of charge and the … Stud (less the plot of ground excluded from the charge to the bank) in another.

52. In summary even if the Court holds that the Plaintiff's charge for maintenance does not apply to the … Stud the Bank has a problem in relation to what exactly it can enforce its security on without the Plaintiff's agreement because it is not clear what exactly the Dwellinghouse so described in the will of the late … comprises.

53. If it was not practicable to separate the house … from the Stud Farm then in my opinion the only way that the Bank could proceed and have proper security would be if the Plaintiff completed a deed of subordination of her right of residence and maintenance having had the benefit of independent legal advice."

It is evident that the views of the Bank's expert as to the import of the burden were based primarily on his construction of the Will. He was also of the clear opinion that the Bank ought to have secured subordination of the widow's burden to its charge prior to advancing monies to the registered owner of the Folio.

<u>The Hearing - April 2019</u>

36. On day one of the hearing, p. 110 *et sequitur* the court distilled down the contention of the widow as follows: -

"*So the Will exists now in history. We look simply at the assent, the registration of that document, and the conclusiveness of the Register …* (lines 17 – 21 *per* the judge)."

Counsel for the widow stated: "*Yes*"

The Judge: "*That may or may not be right, but that is your case*."

Counsel: "*Yes. Exactly. And how that assent arose*." (p. 111, lines 17-26 inclusive)

The widow's expert, Mr. Binchy, Solicitor, proved his report and gave evidence: -

> "*I take the view that the charge registered in the Folio affected the entire property, in that, if it affected something less the Land Registry would have identified what it affected. That it can't not affect. So Mr. O'Donnell disagrees with that.*
>
> *I think Mr. O'Donnell was also taking the view that an interpretation of the charge, that the Will could be used to interpret the charge. I don't agree with that …*" [Direct examination] (Day 2 at p. 46)

In cross-examination Counsel on behalf of the Bank stated: -

> "*Our position in this case is that it is confined to the dwelling house, and the registration of the burden in the Folio is consistent with that*."

Mr. Binchy responded (p. 53, line 13): -

> "*Yes, I disagree with that. If I was administering this estate and I saw that clause I would require the executor and Mrs… to agree with what the term 'dwelling house' meant. They would have to be separately represented etc. And if they couldn't agree it would be a matter for a court to determine what it meant. And on their agreement I would have registered a charge over the land which they agreed or a court determined that the right affected*."

With regard to the use of the word "*therein*" in the wording of the widow's burden on the Folio Mr. Binchy indicated at p. 53 lines 27-54, line 5: -

> "*And in fact it is a word I would use in practice doing family transfers to make it clear that the right of support in maintenance did not extend to a nursing home. That the word "therein" .. it is that the support and … the "therein" relates to where the person is to be supported and maintained as opposed to supported and maintained in a nursing home*."

Mr. Binchy in cross-examination agreed that the burden was consistent with paragraph 3 of the Will "*but it extends in my view to the entire Folio*".

37. The Bank's expert Mr. O'Donnell gave evidence proving his report and was cross-examined. He agreed that in his opinion he had considered that *"the nub of the case is the correct interpretation of the meaning and effect of the Will of the late Lawrence Ryan. This is a matter for the court to decide and my opinion is not a matter for expert evidence."* The expert at p. 70, day 2, lines 1-7 inclusive states: -

> "*Insofar as the wording of a burden is, the purpose of a burden is to put people on notice and that's why it's on the Folio. The wording of it in this case to me draws attention to the fact that it applies to the dwelling house and therefore I don't see any basis for it applying to the whole Folio."*

In response to a query as to what he had stated in his report he responded, "*well I think it's a matter for the court to decide the interpretation of what the burden is. I am saying to me as a matter of practice what's on the wording of the burden is what you work from*." (p. 70, lines 10-13) He confirmed his own view that the burden in favour of the widow was limited to the dwelling house and was not over the entire Folio subject to the caveat that the issue was a matter for the court to decide. He expressed the view "*a purchaser is protected by an assent, doesn't have to go behind an assent. A purchaser or a lender is protected as a matter of law*." (p. 72, lines 24-26). At p. 73 he stated, "*I agree that since 1959 that you look at the Register and you are protected if you are a purchaser*." (lines 9-10). Critically. this witness clarified that he based his view on the limitation of the burden based on his interpretation of the Will at p. 74 indicating that in doing so he had an entitlement to look behind the Folio. He outlined his approach thus at p. 74, lines 12-17: -

> "*I'm looking at it and I look at the wording of the burden and then I look and see is there anything to clarify if there is any doubt about the burden, I then look at the Will*

and to me it clarifies it in favour of my opinion which is that it's limited to the dwelling house."

In response to a query "*so we agree that the only basis you can reach that conclusion is based on your interpretation of the Will; would you agree that*?" (at p. 74, line 21 – 23) "*No I would have started off thinking it only affected the dwelling house and then looked at the Will would have confirmed that.*" In response to the question "*So it's not based on the Will at all"* the expert responded "*Well I think that the actual entry number 4 is clear that it affects the dwelling house. If I had anyone created any doubt about it and if you wanted to be sure I'd have to look at the Will and I thought, I think that the wording of the Will satisfied me that it confirmed my reading of the burden*."

"75. *Question; You needed the Will to confirm what you thought the limitation was?*

Answer: Well it confirmed what my interpretation was."

38. At page 75 of the Transcript the Bank's expert was invited to comment on para. 31 of his expert report in the context of the right of maintenance and was asked *"... what you're saying there is that you would accept this that just a charge on the residence itself won't do anything for the right of support and maintenance, isn't that right just for a residence*?" (Day 2, p. 75, lines 25-29). He responded (p. 76, lines 1-4): -

"Well it depends on the residence, <u>but normally speaking a farmhouse isn't going to provide support. It will provide somewhere to live but it won't necessarily provide support</u>. (emphasis added)

Question: If the charge is going to have any meaning it would have to cover the working farm so there could be something to fall back on in the event there isn't …"

To which the Mr. Binchy responded –

"*In my report, Judge, I have tried to explain the different issues that arise for the people in relation to the thinking they have to do and decisions they've got to make. Some of*

these are difficult. Sometimes people subordinate their right of residence and maintenance to a bank charge probably when they should but I mean I have set that out in a good deal of detail."

39. At page 77, day 2, lines to 25-27 Mr. O'Donnell emphasised: -

"*I think the difference between myself and Mr. Binchy is he says it applies to the whole Folio and I say it doesn't."*

He outlines his approach and the basis for his view at p. 78, lines 1-3: -

"*I got there from the entry of the burden, of the charge in favour of Mrs. Ryan. I confirmed it by looking at the Will."* (emphasis added)

When it was put to him that in his report at para. 9 he ought to have said that "*the nub of the case was the correct interpretation of the meaning and effect of the Folio*" rather than "*the meaning and effect of the Will*". He acknowledged at line 18, p. 78, day 2 "*Perhaps I should"*. At p. 84 he stated: -

"*I would say, I have set it out in my report and I do say a deed of postponement may have been the only completely safe way of dealing with this. Either a deed of postponement or to define what the dwelling house was*." (Lines 9-13)

40. In response to a query from the court concerning the word "therein" Mr. O'Donnell stated: -

"*Well, 'therein' I think has grown up because of the point made by Mr. Binchy about maintenance and nursing homes and elsewhere. I think that practice has grown up because of that and the cost of nursing homes. Does that answer your question?"*

The judge asked –

"*The word 'therein' is in your view referable to what?*

Answer: To the dwelling house." (P. 86, lines 1-19)

The Judgment of the High Court

41. At paragraph 22 of the judgment the court characterises the widow's claim as follows:-

(a) The widow claims she has a right of residence, maintenance and support over the entire of the Folio "*which is reflected in the manner of its registration as a burden*".

(b) *"The 2016 judgment sum now forms part of the burden in respect of the plaintiff's interest. Accordingly, the burden now comprises a right of residence, maintenance and support over the entire folio together with a (presently) monetarised figure in respect of the plaintiff's right of residence, maintenance and support pursuant to the order of O'Connor J.*"

(c) *"This 2016 judgment sum ranks in priority over the defendant's charge over the lands as it forms part of the burden registered over these lands in respect of the plaintiff's right of residence, maintenance and support."*

(d) *"Counsel for the plaintiff drew an analogy to "an all sums due clause" in a mortgage, to the effect that any monies found to be applicable to the entitlement of this plaintiff to a right of residence and support thereafter "attached to" that burden on the register. Accordingly, it could not be discounted that an additional sum from the date of the 2016 judgment sum of O'Connor J. onwards might be sought*."

42. At para. 23 the claim of the Bank was distilled by the judge as follows: -

(a) *"On a proper construction of the deceased's last will and testament and/or the wording of the burden on the folio itself, the right of residence, maintenance and support is restricted to the dwelling house only and not the totality of the lands. To the extent that may be necessary an order seeking rectification of the register is sought to reflect this."*

(b) & (c) That the 2016 judgment sum is an amount sounding in damages only. It is to be dealt with by the registration of a judgment mortgage against the Folio. The widow has no entitlement to "attach" the judgment sum to the burden registration on the Folio so as to afford it priority over the burden registered in favour of the Bank.

(d) The Bank contended that as of that date the debt due by the registered owner was in the order of €1.4m "*and it was not beyond the bounds of possibility that the sum ultimately "attached" as representing the plaintiff's right to maintenance and support would effectively be equivalent to or be utilised to cancel out the Bank's ability to recover on foot of its indebtedness."*

43. The court then considered the registrability of the burden pursuant to s. 69(1) (q) of the Registration of Title Act, 1964 and noted the conclusiveness of the Register as provided by s. 31(1) of the said Act.

The court referred to the judgment of Baker J. in *Tanager Designated Activity Company v Kane and Ors.* [2018] IECA 352 concerning the conclusiveness of the Register and noted at para. 33 that the Bank was contending pursuant to s. 31(1) of the 1964 Act: -

"…that there is in fact a mistake in the registration to the extent that it is to be construed as the right of residence, maintenance and support over the entire of the folio and that this is a mistake/error. In the alternative, it contends that upon a proper construction of the terms of the registration of the burden itself that the burden in fact does only extend to the dwelling house. The expert retained by the defendant Bank, … supports the latter contention."

44. At para. 34 "*The plaintiff … contends that as a matter of logic and law, the burden extends over the entirety of the folio*." The judge noted;

> "*The reference to logic arises from the submission that there would be no entity or lands capable of sustaining or dealing with the right of maintenance and support unless the plaintiff was entitled to her interest being registered as a burden over the entirety of the folio lands – in short, her right of residence in the dwelling and the rights of maintenance and support over the farmlands annexed thereto*."

The court noted the evidence of the widow's expert: -

> "*… if advising the defendant bank, he would have advised that the charge registered on the Folio covered the entirety of the property and he sets out various steps that bank could or perhaps should have taken on foot of that opinion*."

The court noted the initial report of the expert conveyancer who gave evidence on behalf of the Bank to the effect "*… that a charge for a right of residence is usually a problem for any lender*." and further "*… that if a working farm (as opposed to the residence) is charged, most lenders would seek to have that charge subordinated to any charge in its favour*." The court also noted the difficulties identified by the Bank's expert arising from there "*being no clear or, indeed, any delineation as to what area of land comprises the dwelling house and what area the farm*." The court noted that a degree of criticism had been extended to the Bank by its own expert for "*… not anticipating and dealing with potential issues that arise in cases of this type in advance of the registration of the charge*." The judge however noted "*that is not the issue upon which I am required to adjudicate*" (para. 36).

45. The court noted the views of the Bank's expert that the charge affected the dwelling house only and his view that *"it was reasonable based on good conveyancing practice for the Bank of Ireland to believe that the charge at entry 4 at Part 3 of folio … related only to the dwelling house and as such that it acquired a first charge on the remainder of the land in that folio*". The court noted that the original assent had been lost.

"41. *Accordingly, we have the version of the grant of a right of residence, maintenance and support appearing in the deceased's last will and testament, within what appears to be the draft Assent and finally the version registered as a burden on folio … . Each are subtly different in their terms. However, there is a missing document and that is the Assent and in my view its absence is of concern in light of the matters I am required to determine*."

46. The court considered s. 81 of the Registration of Title Act, 1964 and the registrability of a right of residence as a burden on a relevant Folio being required pursuant to s. 69(1)(q) of the said Act in light of the decision of Laffoy J. in *Tynan v County Registrar of Kilkenny* [2011] IEHC 250: -

"45. *S. 81 of the 1964 Act is a right personal to the individual beneficially entitled to it and not creating any equitable estate in land. Whilst all may agree that attempting to pin down a precise definition and more importantly the legal implications of a right of residence can be difficult, nevertheless, its practical effect is well known and well recognised. Historically it arose a means of ensuring that potentially vulnerable persons (not otherwise protected by rules of inheritance) had an interest in their family home protected, together with some form of support within that home*."

The court considered the jurisprudence particularly *Bracken v Byrne & Anor* [2005] IEHC 80 (*Bracken)* and *Johnston & Anor v Horace* [1993] ILRM 594. The court noted that in both cases the right of residence and/or maintenance and support in question could no longer be availed of and the claimants in both cases had sought damages arising from that fact. The judge considered that "*This is a significant factual distinction*", noting that the widow: -

"*…resides within the property, the subject matter of the right of residence. Indeed, she has emphatically asserted she has lived there since 1951 and has no wish or desire to reside elsewhere. Accordingly, her interest (being an entitlement to a right of residence*

in the dwelling house) remains and continues to be utilised. No-one has sought to deny her this legal right."

47. At paragraph 51 the judge observed concerning the *Bracken* decision: -

"*On the facts of that case, it is noteworthy, from the phraseology of the grant of the right of residence quoted above, that the judge assumed there was a right of residence in the house and a right of maintenance and support from the lands*."

Clarke J. (as he then was) had cited with approval from the judgment of Lavan J. in *Johnston v Horace* who observed "*I have no doubt but that there are circumstances in which a court could enter by agreement with the parties into evaluation of their respective interests. There are also circumstances where a court might compel such evaluation in the general interests of the administration of justice or under its equitable jurisdiction*." The court noted that Clarke J. in *Bracken* had observed that neither case law nor statute clarified whether the holder of such rights ".. *can insist on the right being converted into monies worth*". At para. 53 the High Court judge observed; *"It is noteworthy that the word used is 'converted'* <u>not</u> *in addition to existing rights*." (emphasis added) Distinguishing *Bracken* the judge commented: -

"57. *On the facts of Bracken the court had to consider and analyse whether the nature of the dispute made the enforceability of injunctive relief in respect of the right of residence a realistic option. That does not arise on the facts of this case…"*

"58. It was only following a determination as to whether there has been a breakdown in the relationship, that Clarke J., proceeded to consider alternative remedies…."

"59. Based upon these tests the court in Bracken determined that the plaintiff had established an entitlement to have the rights converted into money."

"60. It is noteworthy that in this case the plaintiff has neither established nor passed any threshold test of the type set out in Bracken. Moreover, and in my view more

importantly, this is not a case where the right of residence cannot (for whatever reason) be exercised…"

48. The court noted that in *Bracken* "*in the ultimate calculation, the court valued the right of residence to date, the future value of the right of residence, the value of maintenance and support to date and also into the future."* (para. 61 of judgment) and the judge then observed:-

"*I note from the Transcript of the application before O'Connor J. that the basis of the computation was in an assessment as to damages, which is an entirely different basis to Bracken. In my view it was a different cause of action*."

The judge concluded concerning *Bracken*: -

"65. *Bracken is clearly based upon the premise that the right of residence, maintenance and support no longer exists or is no longer capable of enforcement (for whatever reason). It is only thereafter that the court considered whether, in such circumstances, there might be an exercise in quantifying the right so as to "compensate" by a monetary award the person entitled to its benefit."*

49. The judge observed at para. 66: -

"…*The issue arises in the attempt of this plaintiff to seek to add or 'tack on' this monetary amount to the burden registered in favour of this plaintiff on the 3rd February 2006, so as to now afford the 2016 judgment sum priority, when in reality it was obtained after the registration of the subsequent charge in favour of the defendant."*

…

"68. Whatever about the difficulty in defining or pinning down a precise legal definition of a right of residence, all agreed that it is a right personal (and s.81 confirms this) to this plaintiff. I, therefore, have difficulty in understanding how any amount of money could be effectively charged with that burden, in priority to the charge registered

to the Bank in circumstances where all rights registered within this burden are personal to this plaintiff and do not survive her decease."

"69. *In my view it is contrary to the express terms of the 1964 Act quoted above, to suggest that such monies can be attached to this registerable interest in the form contended for by the plaintiff … . This is the protection of a defined interest, which is personal in nature to the plaintiff. Whilst that interest binds the owners of the folio for the duration of the lifetime of this plaintiff, the right is personal to her and, therefore, the interests held pursuant to the registration of that burden do not survive her."*

50. The court considered that the Bank was not entitled to have the terms of the last will and testament of the deceased construed. (para. 71): -

"*Following the death of the registered owner of land an Assent is the means by which the deceased's interest in that land (in this case registered land) is vested in a beneficiary on death (see generally section 52 of the Succession Act, 1965). Accordingly, it follows that a will is no longer in any circumstances a document of title to registered land. The Registrar of Title has no responsibility or power to examine the will of a deceased owner in order to identify or satisfy himself that his terms are being properly interpreted and implemented. The Assent or the transfer accompanying an application is treated as conclusive (see s. 54(2)(c) Succession Act, 1965)."* (para. 72)

The court continues –

"*… the Bank perceives the attempt to register any amounts obtained pursuant to the 2016 judgment sum or otherwise as an attempt to ensure that there are no funds available to deal with the Bank's charge. That of course is not a matter for this court but throughout this matter I have been puzzled as to what benefit this ninety-three-year-old plaintiff (suing through a next friend) can achieve pursuant to any potential outcome of this litigation."* (para. 74)

51. At para. 77 the judge observed: -

> "*Whilst I understand the submission of counsel for the plaintiff that, as a matter of logic, it makes no sense to attach the right of residence, maintenance and support to a dwelling house which is wholly incapable of providing any maintenance and support to this plaintiff. However, the legal documents must be strictly construed even if their interpretation is perhaps at odds with what is submitted to be the logic of the situation…*"
>
> 78. "*This defendant was fully satisfied, arising from its enquiries, that the burden extended to the dwelling house only. In part, that was because of the assurances received, the Bank contends, for [the registered owner]. However, the Bank's internal enquiries are not in my view a matter for this Court*."

The identity and extent of the "*legal documents*" under consideration in para. 77 is not clarified. The court noted at para. 79 of the judgment that the Bank's expert had expressed a view that "*the wording of the burden itself on the folio lands is to be construed as vesting a right of residence in the dwelling house simpliciter."* The judge continued:

> "80. *The registration at entry Number 4 on folio … of the burden in favour of this plaintiff … as a right of residence is not a 'monetised burden' as contended for by the plaintiff. This is regardless of the ultimate construction or definition of this registered interest. The 2016 judgment sum or any other monetary sum does not form part of or is not 'attached to' this burden on the folio. The burden is a registered interest in land and is not held pursuant to or in respect of any monetised sum. Any such argument is directly contrary to the method of protection of a right of residence as provided pursuant to the terms of the 1964 Act and in particular section 81 and section 69(1)(q) as non-assignable interest, not creating any equitable estate in land, registered in this case in favour of the plaintiff for her lifetime. In my view the case law is clear that any*

monetary value might be apportioned when the court adjudicates that, for whatever reason, it is no longer realistic or appropriate, to enforce the right of residence (maintenance and support).”

The court noted that *“[t]he plaintiff’s existing rights as registered take priority over those of the Bank. No financial amount attaches to that interest pursuant to the 2016 judgment sum.”* (para. 81) With regard to the Bank’s application for rectification the court noted “*..if the Bank has an issue with its security or the nature of the charge or any representations made on foot of it then, in my view, it must potentially look elsewhere*.” The court concluded that the award on foot of the 2016 order of O’Connor J. “*is not in any sense a monetised burden as contended for by the plaintiff*”. Registration of the 2016 judgment “*would be registered in the normal way and would not have any priority affecting its registration and the facts of this case. Its priority would, as in the case of the other burdens, date from its registration*.” (Para 85)

52. The court considered the non-joinder of the registered owner in the proceedings;

“… reinforces the position that this case does not concern a right of residence simpliciter, but rather the nature of the burdens capable of registration in respect of that interest.”

The court noted at para. 87 *“The failure to properly provide for her right of support and maintenance lies squarely with the second named counterclaimant, her son.”* The court concluded at para. 89 that “*..the Bank is not entitled to bring or seek a construction suit or to have any terms construed in respect of the last will and testament of [the testator].”*

“*90. In my view, given the absence of the Assent, I can do no more than seek to construe the wording within folio … itself. Mr. O’Donnell, with all his conveyancing experience, interprets that as being a burden that binds the dwelling house only. It is fair to say that the plaintiff’s expert Mr. Binchy is less certain. In my view, upon a fair interpretation of the wording of the entry as quoted above, the burden in question is to*

extend as a burden over the dwelling house only. Given that I interpret the entry in that manner, there is, therefore, no necessity to go on to consider any application by the Bank for rectification of the register as the interpretation for which they contend is the one I accept as being correct in all the circumstances."

The court made consequential orders, including those outlined at para. 2 above under appeal.

The notice of appeal

53. The notice of appeal identifies approximately 27 grounds alleging that the judge erred or misdirected herself: -

(1) In determining that the widow had failed to take any steps to enforce the judgment against the registered owner and by failing to have regard to the fact that the widow's right of maintenance and support was denied to her and could not be availed of. (Referring to para. 86 of the judgment)

(2) In distilling the widow's claim to be that the burden registered in her favour on the Folio "*consists of a presently monetised figure in respect of the Plaintiff's right of residence, maintenance and support pursuant to the Order of O'Connor J. when in fact such claim was limited to the monetised value of the right of maintenance and support only." "In so doing she wrongly conflated the question of a right of residence which was being exercised and was therefore not required to be quantified in damages with the Plaintiff's right of maintenance and support which was denied to her and which was or could be quantified so as to be payable out of the lands in Folio … charged thereby."*

(3) The judge erred in failing to have due regard to the fact that the Bank has failed or neglected to require the widow to postpone her registered burden so that it ranked as a secondary burden after the Bank's charge.

(4) The judge erred in failing to have due regard to the fact that the Bank had failed/neglected to require the widow to execute a deed of postponement in respect of her burden.

(5) The judge erred in fact and law and as a matter of construction of the burden in determining that the nature and extent of the widow's registered burden extended to the dwelling house only and not to the entirety of the Folio.

(6) The judge erred in failing to have due regard to the fact that at the time of registration of the widow's burden, the Property Registration Authority "*evinced no requirement to delineate on separate plan on folio ... the extent of the land affected by the burden prior to registering the burden on the entire folio".*

(7) The judge erred in failing to have regard to the fact that the part of the widow's registered burden referring to support and maintenance was also to be satisfied out of the income from the farm forming part of the Folio "*having regard to the manner and standard of maintenance and support which the Plaintiff was used to."*

(8) The judge misdirected herself in failing to apply/have due regard to the provisions of s. 31(1) of the Registration of Title Act, 1964.

(9) The judge erred in determining that the fact that the widow's right of residence could be exercised was determinative of the issue of monetising her right of maintenance in support which was being denied to her and could not be availed of.

(10) The judge misdirected herself in determining the nature of a threshold test in order to establish an entitlement to convert the widow's right to maintenance and support into money.

(11) The judge misdirected herself in determining that the widow had neither established nor passed a threshold test in order to establish an entitlement to convert her right to maintenance and support into money.

(12) The judge misdirected herself in finding that the widow's ability to exercise her right of residence precluded a court from converting her right to maintenance and support into money and/or that in finding that the good relationship between the widow and the registered owner precluded the widow from enforcing a charge for the monetised value of unpaid maintenance and support in priority to the Bank's charge.

(13) The judge erred in determining that the widow could not attach or "tack on" the monetary amount of the judgment in her favour against the registered owner in respect of his failure to meet his obligations of maintenance and support.

(14) The judge misdirected herself in determining that the widow did not seek to calculate or attach her right to maintenance and support separately to her right of residence.

(15) The judge misdirected herself in determining that the widow sought to attach or "tack on" her right to maintenance and support in previous proceedings before O'Connor J. and in not distinguishing between the €428,225 that related to the monetised value of the unpaid maintenance and support and the sum of €341,000 being the balance of the sum of €779,225 judgement which related to house repairs and that the sum of €428,225 represented the monetised value of the arrears of maintenance and support as determined by O'Connor J. "… *in circumstances where the defendant was aware that the case taken by the plaintiff was proceeding and the defendant was given an opportunity to participate in the proceedings and chose not to do so*".

(16) The judge misdirected herself in determining that the express terms of the Registration of Title Act, 1964 prohibit the widow from seeking to attach the

quantum of the judgment previously obtained in respect of the failure of the registered owner to perform obligations of maintenance and support.

(17) The judge erred in having regard to the perceived absence of benefit to the widow in pursuing the litigation, which benefit consists of the ability of the widow to realise a money amount (for her own benefit or for that of the beneficiaries under her Will) and in particular to have regard to the fact that the widow's age of 93 has a bearing in law on the priority of a monetised charge for unpaid maintenance and support to the charge held by the Bank.

(18) The judge misdirected herself in so narrowly construing the legal documents upon which she based her decision as to determine that "*a house subject to a right of residence and generating no income was the sole asset on which the Plaintiff's right of maintenance and support was charged*."

(19) The judge misdirected herself in looking behind the fact that the registration of the burden extended to the entire Folio and having regard to the Will with no evidence that the registration was to follow the Will.

(20) The judge misdirected herself in having regard to the decision of the widow as advised by her then solicitors not to exercise her legal right share but failing to have regard to the fact that the said solicitors advised her that *"these rights will be registered as a burden on the title and therefore the property cannot be sold without your consent."*

(21) The judge erred in determining that the registration of the burden at Part 3, entry no. 4 on the Folio "*was not a monetised burden".*

(22) The judge erred in determining that the 2016 judgment does not form part of or is not attached to the burden registered at no. 4 on the Folio.

(23) The judge erred in determining that the relevant case law requires that any monetary value might be apportioned only when the court determines that it is no longer realistic or appropriate to enforce the right of residence (maintenance and support).

(24) The judge erred in determining any registration of the 2016 judgment against the registered owner would not have any priority affecting its registration.

(25) The judge erred in determining that "title document" is the missing assent as opposed to it being the entry of the charge on the entire of the Folio.

(26) The judge erred in determining "*without evidence, that the Defendant had not intimated proceedings in circumstances in which the Plaintiff's replies to particulars were to the effect that the defendant pressurised the second Defendant to the Counterclaim to get the Plaintiff out of the property*."

(27) The judge erred in determining that the monetised value of the right of maintenance and support ranks after the Bank's charge.

The Bank

54. The Bank in its response contests each ground of appeal asserting in respect of each assertion that the judge was correct in her determinations and had not misdirected herself, nor did she fall into any error in any respect and in particular in the sundry manners contended for by the widow. In response to Ground of Appeal 6 the Bank asserted: -

"*Furthermore and without prejudice to the foregoing, there was no evidence before the Learned Trial Judge as to what the PRA did or not believe or require and accordingly this purported ground of appeal is entirely improper*."

With regard to Ground 7 it is specifically contended: -

"*..it was not a fact that, and there was no finding that, the support and maintenance was to be satisfied out of the income of the farm forming part of Folio …*"

With regard to Ground 12 the Bank asserts: -

> *"For the avoidance of doubt, the Learned Trial Judge correctly held that there was no charge for the monetised value of unpaid maintenance and support whether with or without priority over the Respondent's registered charge."*

With regard to the 2015 proceedings culminating in the judgment of O'Connor J. at Ground 15, in its response the Bank asserts: -

> "*The Respondent was not a party to those proceedings, the Appellant chose not to make the Respondent such a party and accordingly what transpired in those proceedings was not binding upon the Respondent and did not give the Appellant rights as against the Respondent."*

In response to Ground 19 the Bank asserts: -

> "*The burden as properly construed does not extend to the entirety of the subject matter of the Folio and accordingly the learned trial judge did not look behind any such registration or have regard to the Will of Laurence Ryan in order to do so. For the avoidance of doubt, this is entirely without prejudice to the Respondent's position that the Learned Trial Judge would have been entitled to have regard to the Will of … but she declined to do so."*

With regard to Ground 25 the Bank asserts: -

> *"The Learned Trial Judge correctly found that the Appellant's burden (which is not a charge as claimed) did not affect the entirety of the subject matter of Folio …"*

Concerning Ground 26 which pertains to the absence of intimidation the Bank asserts: -

> "*Without prejudice to the foregoing, the Learned Trial Judge's comments on the absence of such an intimation was immaterial to the reasoning that led to the Judgment and Order from which the Appellant appeals*."

At Ground 27, the Bank responds that: -

"The Learned Trial Judge correctly found and had regard to the fact that the 2016 judgment was obtained after registration of the Respondent's charge."

55. Additional grounds on which the decision ought to be affirmed were identified by the Bank as firstly that the decision of the judge was supported by the terms of the Will of the 8th January, 2003 which provided for the right of residence, support and maintenance asserted by the plaintiff and ultimately registered as a burden on the Folio and secondly *"if and insofar as the burden registered at Number 4 on Folio … is not to be interpreted as binding only the dwellinghouse (which the Respondent disputes) the said Folio should be rectified so that it provides that it is confined to the dwellinghouse (the Learned Trial Judge having found that it was unnecessary to consider rectification in the light of her decision that the said burden was to be interpreted as applying only to the dwellinghouse*)." The Bank did not cross-appeal the High Court's refusal (at para. 82 of High Court judgment) to grant it rectification.

Key arguments advanced on behalf of the Bank

56. The Bank emphasises the characterisation of the award in favour of the widow in satisfaction of her rights of maintenance and support as constituting "*damages*". In regard to the within proceedings it is suggested that her claim *"is largely premised on ignoring and/or re-inventing the nature of the pecuniary remedy expressly provided for in the 2016 Order."* (para 2.6, respondent's outline legal submissions). It is contended that the order is *"simply an award of damages against* [the mortgagor] *personally."* (para. 3.1). In particular it is contended that as regards the nature and effect of the 2016 order that *"It is not a proper evaluation."* It is contended that the jurisdiction exercised by Clarke J. in *Bracken v. Byrne* is *"entirely irrelevant to the issues in this appeal""*. It is contended that the rights of the widow and her burden had not been *"converted into money, whether on the basis that it was no longer exercisable… or otherwise."* It is argued that the 2016 order *"says nothing about the amount awarded being interposed as a charge on anything, let alone a charge on Folio…that would*

displace or downgrade the Bank's Charge." The Bank contends that the burden is not monetised and the trial judge did not determine that the right to maintenance and support was, in fact, monetised in the 2016 judgment of O'Connor J.

57. The Bank distinguishes *Bracken,* suggesting that the basis of computation in that case was materially different to the basis of computation engaged in in the instant case by the High Court in 2016. It is further contended that attaching the 2016 Order to the widow's burden on the Folio *"in the hope that it would require appropriation of part of the value of the House and the Lands in priority to the Bank's Charge and even after the death of* [the widow] *was misconceived because rights of residence, support and maintenance are personal, non-assignable and immediately defeasible on death."* Issue is taken with an element in the widow's submissions to this court which suggest that even if the High Court judge had not been satisfied with the quantum of the award to be registered over the Folio, *"…it would not have been correct to refuse simpliciter the judgment. The Court could have, in its place, monetised the burden in an alternative manner or asked the parties to adduce further evidence at a separate or later hearing. It was not, however, correct for the High Court to refuse to make the order.*" The Bank suggests that this measure ought to have been taken within the 2015 proceedings which culminated in the 2016 Order and is evidently an application brought in light of the decision in *Bracken v. Byrne*. The Bank further asserts that it is material that the only defendant in the 2015 proceedings was the registered owner and the main beneficiary under the Will. It is emphasised that the Bank was not named as a party. It is not denied that the Bank was on notice and had been served with all the relevant papers in connection with the 2015 proceedings. The Bank asserts that the widow *"did not pursue any claim against him [the beneficiary] in the 2017 proceedings",* yet it would appear from the transcript that she did. With regard to the word *"therein"* in the burden, it is asserted that *"…the burden itself identifies the portion of the registered land that is affected."*, it being contended that the

widow's burden is confined in its entirety both in regard to the right of residence and the right of maintenance and support to the dwelling alone. There is no engagement with the very clear evidence giving of a material contrary view by the expert witnesses at the trial who were unanimous on the issue of the import of the word "*therein*". The Bank further seeks rectification, if necessary, it being contended that the widow *"should not be entitled to garner any benefit or ability to impede the Bank that would flow from what would be an obvious dissonance with the Will"* of her late husband. In substance, it is further contended that the court should construe the Will in determining the rights of the widow pursuant to the burdens registered in her favour.

58. In large measure, it is evident from the manner in which this appeal was conducted that the key issues distil down to the rights arising in connection with the burden registered in favour of the widow - which concerns support and maintenance - and whether the quantified and unsatisfied value of same as determined by O'Connor J. as at 19 October 2016 to be €428,225 in the manner outlined in his judgment can be enforced against the Folio with priority over the Bank's subsequently registered charge.

59. It was not in dispute that the right of residence aspect of the burden was availed of by the widow and was being exercised by her. The focus accordingly fell on the construction of the widow's burden providing for her maintenance and support as specified on the Folio. It is necessary to observe that there are two distinct burdens combined within the widow's burden. The first is the right of residence in the dwelling house and the second is the right to be suitably supported and maintained therein during the widow's lifetime.

The Law

Succession Act rights of widow

60. To properly contextualise the legal of position of the widow in 2003 it is necessary to consider briefly the circumstances that led to the registration of her burden at entry no. 4, Part

3 on the Folio on the 3rd February, 2006. On the death of her husband in July 2003 three key provisions of the Succession Act were engaged from the perspective of the widow. Firstly, she had a statutory entitlement to her one third legal right share in the estate pursuant to s. 111(2) of the Act. Having regard to the terms of the bequests and devises contained in the Will in her favour, she was entitled to elect between her one-third legal right share on the one hand or to take under the terms of the Will by virtue of s. 115(1). Additionally, the widow had a potential right pursuant to s. 56 of the Succession Act to require the dwelling house, together with the household chattels to be appropriated in and towards satisfaction of her legal right share. The latter right is subject to, *inter alia,* s. 56(5)(b).

August 2003 Letter from executor's solicitor to widow

61. It is clear from the letter written by the solicitor who acted in the administration of the estate on behalf of the executor that some assurances were provided in writing to the widow as to the benefits for her if she elected not to exercise her legal right share under the Act.

Conclusiveness of the Register

62. The practice of the Land Registry with regard to the treatment of burdens providing for a right of residence and or support and maintenance on land for an identified person or persons is long established. Such burdens from 1st January, 1892 fell within s. 45(1)(k) of the Local Registration of Title (Ireland) Act, 1891 which provided: -

> "*There may be registered as affecting registered land any of the following burdens, namely: -*
>
> *...*
>
> *(k) Any covenant or condition relating to the use or enjoyment of the land or of any specified portion thereof."*

A separate provision, arguably, equally capable of accommodating such burdens was to be found in s. 45(1)(m) of the said Act which pertained to "*any such other matter as may be prescribed*".

Browning and Glover, *Registration of Title in Ireland* (2nd ed., E. Ponsonby, 1912) notates as follows concerning s. 45(1)(k): -

> "*Where a covenant provides for the support of certain persons, which support is not otherwise charged on the land, and also for a right of residence on the land for the same persons, it is the practice to enter the whole covenant as a burden in the Register. This practice was adopted in the application of Michael and Ellen Kelly, number 2548*."

With regard to s. 45(1)(m) the said authors observe: -

> "*In addition to the burdens mentioned in this section the registering authority may register as burdens such other matters as appear to him properly to charge or affect the land (O. 1V, r.20, p. 245)*."

63. Brendan Fitzgerald, *Land Registry Practice*, (2nd edn., Round Hall, 1995) notes: -

> "*The attraction of the Registration of Title system is that the Folio of lands, and the title to which has been examined by the Land Registry, either on first registration or on a post-registration dealing, is conclusive and guaranteed by the State as to the ownership and all rights, privileges, appurtenances or burdens appearing thereon. Section 31(1) of the Act sets this out in clear terms.*
>
> *The title of such owner, in the absence of actual fraud, is conclusive even if the owner had notice of any deed, document or matter relating to such land. Registration of title is not, therefore, affected by the doctrine of notice as applies so extensively to unregistered land … The non-application of the doctrine of notice to registered land means that the integrity of the Register is clearly established, and there is no necessity to go behind the Register. This claim as to conclusiveness applies primarily to a Folio*

with an absolute title and where the registered owner is a purchaser for value. He then is in an unassailable position, provided he remains in occupation." (p. 11)

That statement was adopted and approved by Baker J. in this Court in *Tanager DAC v Kane* (*supra*).

64. Section 31 of the Registration of Title Act, 1964, as substituted with effect from the 4th November, 2006 by s. 4(2) of the Registration of Deeds and Title Act, 2006 (12/2006, and S.I. No. 511 of 2006) provides: -

"(1) *The Register shall be conclusive evidence of the title of the owner to the land as appearing on the Register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the Register to be rectified in such manner and on such terms as it thinks just.*

This provision echoes s. 34(1) of the Local Registration of Title (Ireland) Act, 1891. The Folio at issue in this appeal thus was governed by s. 31(1) of the Registration of Title Act, 1964 in regard to its conclusiveness.

The effect of Register to substitute deeds and instruments

65. It is noteworthy that the conclusiveness of the Register has been repeatedly acknowledged in this jurisdiction by the courts including, for instance, in *Re Keogh v Kettle* [1896] 1 IR 285 where Madden J. observed of the 1891 Act at p. 294: -

"*That Act was designed to relieve the smaller holders in fee from the ruinous expense of a system of Land Transfer and Registry of Assurances … But it was also intended to remedy a mischief of a different character. Public money, to a large and increasing*

extent, has been advanced on the security of holdings, and it became a matter of public and financial importance that the title to those holdings should be kept clear from doubt or complication."

Thus, the basic principle operative in this jurisdiction and underlying all registration of title is to substitute the Register for the deeds, instruments or assent underlying registration.

66. It is worth recalling that Lord Watson observed in *Gibbs v Messer* [1891] AC 248: -

"*That end is accomplished by providing that every one who purchases, bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title*."

67. In a decision of the Privy Council on appeal from New Zealand the Judicial Committee in *Frazer v Walker* [1967] 1 AC 569 observed at 580 ".. *registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise … It is in fact the registration and not its antecedents which vests and divests title*". In *Frazer v Walker* the Privy Council emphasised the probative effect of statutory provisions concerning conclusiveness of the Register. The Privy Council noted at p. 585: -

"*…their Lordships have accepted the general principle, that registration … confers upon a registered proprietor a title to the interests in respect of which he is registered which is … immune from adverse claims, other than those specifically accepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant.*

…

Their Lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted."

***Tanager DAC v Kane & Ors.* [2018] IECA 352**

68. *Tanager* draws together the statutory and jurisprudential strands underpinning the central principle as to the conclusiveness of the register as provided by statute and adumbrated in the authorities. The decision is for that reason of central importance to key issues in this appeal including conclusiveness of the register, priorities, and the general preclusion of a subsequent encumbrancer who purchases with notice of a prior encumbrance seeking to delimit the priority of the latter inconsistently with s.74 of the Registration of Title Act, 1964.

69. In large measure the outcome of this appeal turns on the application of *Tanager* and s.31(1) to the facts of the case. The most comprehensive and detailed analysis of the jurisprudence concerning s. 31(1) and the operation of the principles governing the conclusiveness of the Register thereby legislated for is the decision of Ms. Justice Baker in that case. It succinctly traces the system of registration of title to land in this jurisdiction from the coming into operation of the Local Registration of Title (Ireland) Act, 1891 and considers all of the key decisions and textbooks on the issue. It offers a clear and extensive exposition on the issue of the conclusiveness of the Register. It is necessary to consider the salient aspects of that judgment in some detail in the context of this appeal.

Having cited the 1891 Act and Glover, *A Treatise on the Registration of Ownership of Land in Ireland* (Falconer, 1933) Baker J. in *Tanager* observes:

'25. *The establishment of the Register was intended to simplify and regulate the record of ownership and the means by which title to land could be passed. At p. 18, Glover explains that, unlike with the system that operates in unregistered conveyancing, the entries in the Register 'are not registrations of documents, but of the effect of*

> *documents*'. *What is registered is the ownership or encumbrance created by a document, and thereafter, the document* '*ceases to be the evidence of title, and the Register becomes the evidence of the ownership and the encumbrance on it.*'"
>
> *26. For that reason, and deriving precisely from that distinction, the Register is, by statute, declared to be conclusive evidence of title*."

Baker J. observes at para. 27 "*The conclusiveness of the Register has been a cornerstone of the system of registration."* Citing s. 34 of the 1891 Act and s. 31(1) of the 1964 Act she observes:-

> "*29. The Register is, therefore, evidence of the title of the owner of the land, and evidence of the title of any charge that is registered against that title as a burden. Section 31(1) of the 1964 Act, in particular, provides that such title shall not be in any way affected 'in consequence of such owner having notice of any deed, document or matter relating to the land'."*

She cites with approval the observation of McAllister in his text *Registration of Title in Ireland* (Incorporated Council of Law Reporting for Ireland, 1973) wherein he said that s. 31(1) of the 1964 Act "*establishes the Register as an 'iron curtain' behind which it is neither appropriate nor necessary to penetrate.*" She notes McAllister quoting from the judgment of the Privy Council in an appeal from the Supreme Court of Victoria, Australia *Gibbs v Messer (supra)* where at issue was the operation of the Australian Torrens Registration System. In *Gibbs*, as Baker J. cites from McAllister's text, Lord Watson had observed that the object of the registration system in question was to save purchasers *"..from the trouble and expense of going behind the register, in order to investigate the history of their title, and to satisfy themselves of its validity."*

Baker J. also cites with approval from the text *Registration of Deeds and Title in Ireland* by John Deeney (1st ed., Bloomsbury Professional, 2014) where at para. 6.01 he observes as to the meaning of "*conclusive*" in the context of s. 31(1): -

> "'*Conclusive' in this context means that the facts as stated are to be regarded as true and that no other evidence is necessary or permitted to verify or contradict this statement."*

70. In her judgment in *Tanager* Baker J. observed at para. 31 that McAllister in his text had cited Curtis and Ruoff, *The Law and Practice of Registered Conveyance* (2nd edn., Stevens & Sons, 1965) concerning the "*curative effect"* of s.31 : -

> *"Past defects of title no longer vex each successive owner after the date of first registration with absolute title because henceforth, in the case of freehold land, the proprietor is deemed to have vested in him the fee simple absolute in possession subject to the incumbrances that appear on the register or title and subject to those well-recognised incumbrances, interest, rights and powers known as overriding interests, which do not necessarily always appear on the register, but free from all other estates and interests whatsoever. These are not idle words. The whole essence of the matter is that after the date of first registration of absolute title it is neither necessary nor permissible to go behind the impenetrable curtain of the register."*

She notes;-

> "32. *That statement of principle underlies the clear deeming words of s. 31(1) of the 1964 Act which, in its express language, makes conclusive the registered title to ownership of land and, inter alia, to charges registered against such title*."

71. It is noteworthy also that in *Tanager* Baker J. considered subsequent decisions such as *Guckian v Brennan* [1981] 1 IR 478 where at issue was alleged non-compliance with the

provisions of the Family Home Protection Act, 1976, it being contended on behalf of the non-owning spouse of the vendor that the transfer was accordingly void. Gannon J. observed: -

> "*...s. 31, sub-s. 1 of the Registration of Title Act, 1964, affords the sufficient protection of the vendor and the intending purchaser in relation to all prior transactions of registered ownership as appearing on the title. The duty of ensuring that any instrument of transfer is valid and effective, so as to enable a transmission of ownership to be duly registered, falls upon the registrar at the time of the registration. Thereafter, in the absence of fraud, the register affords conclusive evidence of the validity of the title."*

72. Baker J. noted that pursuant to s. 31 of the 1964 Act the conclusiveness of the Register as constituting evidence of title was subject to the jurisdiction of the court to direct the rectification of the Register on the ground of actual fraud or mistake. She considered the decision of McCracken J. in *Tomkin Estates Limited v O'Callaghan* (Unreported, High Court, 16th March, 1995), observing: -

> "60. …*The first observation to be made with regard to the power of rectification is that the jurisdiction is limited to rectification in the case of actual fraud or mistake, and s. 31(1) of the 1964 Act expressly excludes from the power of rectification any argument that might derive from the knowledge of the registered owner of any 'deed, document or matter relating to the land'. The purpose of that restrictive power is to remove from registered title the vexed question of express or implied notice of any equities that might affect the ownership of land, precisely the type of issue that continues to make the conveyancing of unregistered land complex and at times uncertain."*

She further observed –

> "61. *The nature of this equitable jurisdiction to rectify was considered by Holmes L.J. in the old Irish Court of Appeal in In re Patrick Leonard's Estate [1912] 1 IR 212 at*

p. 226, where he described the intention of the broadly similar provisions of the 1891 Act as 'to preserve the jurisdiction of the Chancery Courts to set aside or reform an instrument upon the ground that it was entered into by what is known as fraud or mistake in equity'. The jurisdiction to rectify is exercisable in an inter partes action grounded on alleged mistake or fraud, and not in a summary action on affidavit."

73. Baker J. noted the statutory power to rectify was contained in s. 32 of the 1964 Act as substituted by s. 55 of the Registration of Deeds and Title Act, 2006 (12/2006), S.I. No. 511 of 2006. She observed: -

"75. *In essence, then, the Register remains conclusive, notwithstanding the power of both the PRA or the court, as the case may be, to rectify the Register to correctly reflect the title of the registered owner.*

76. Proceedings for an order that the Register be rectified by the court under s. 31 of the 1964 Act will usually be inter partes proceedings between the person who claims an entitlement to be registered and the person actually registered. Where rectification is sought under s. 31 of the Act of 1964, it does not appear to me to be necessary or appropriate that the PRA be joined as a party."

As I have earlier observed, *Tanager* is of central importance to the determination of the issues in this appeal.

The nature of the widow's right of maintenance and support

74. The rights registered on foot of the widow's burden fall within s. 69(1)(q) of the 1964 Act, being rights in the nature of a lien for monies worth on or over property for a limited period not exceeding the life of the beneficiary. The said section provides that such rights may be registered as a burden affecting registered land. To secure priority and to fix subsequent purchasers and charge holders with notice of the existence of the rights they must be registered as such by virtue of s. 69(1)(q) and s. 81 of the 1964 Act. The latter section provides: -

> "81– A *right of residence in or on registered land, whether a general right of residence on the land or an exclusive right of residence in or on part of the land, shall be deemed to be personal to the person beneficially entitled thereto and to be a right in the nature of a lien for money's worth in or over the land and shall not operate to create any equitable estate in the land."*

75. Albeit that section 81 refers only to rights of residence and not to rights of maintenance and support, the section can potentially govern both in my view as the decision of Clarke J. in *Bracken* illustrates and the practice of effecting the registration of a single burden where both such rights exist in favour of the same individual or individuals was noted in Browning and Glover, *Registration of Title*, at p. 159. John Deeney, *Registration of Deeds on Title in Ireland*, also observes at para. 18.27: -

> "*When rights of maintenance and support only are created, these rights will be specifically referred to in the entry of the burden on the Folio as 'maintenance and support' in view of the decision in Morgan v Morgan 93 ILTR 117."*

76. In circumstances where the Bank's charge came to be registered several years subsequent to the registration of the burden on behalf of the widow on Part 3 of the Folio, section 74 of the Registration of Title Act, 1964 governs the position and provides that burdens created or arising since the first registration of the land rank according to the order in which they are entered on the Register and not according to the order in which they were created or arise. Deeney, referring to the said section, observes: -

> "*ROTA 1964, section 74 settles the priority of registered burdens inter se according to the order in which they are entered in the Register, and not their date of creation, subject to any entry to the contrary on the Register."*

A right in the nature of a lien for money's worth

77. S.81 operates as a deeming provision as regards the nature of a right of residence and where appropriate, a right of maintenance and support. Similar language is used in s. 69(1) (q) which deals with burdens which may be registered as affecting registered land and refers to "*a right in the nature of a lien for money's worth in or over the property for a limited period not exceeding life, such as a right of support or a right of residence (whether an exclusive right of residence or not)".* The said provision is more expansive than s. 81 to the extent that it makes express reference to a right of support and the language is clearly disjunctive.

78. Similar language is used in s. 69(1)(q) which deals with burdens which may be registered as affecting registered land and refers to "*a right in the nature of a lien for money's worth in or over the property for a limited period not exceeding life, such as a right of support or a right of residence (whether an exclusive right of residence or not)".* The said provision is more expansive than s. 81 to the extent that it makes express reference to a right of support and the language is clearly disjunctive.

79. Kennedy C.J. in *National Bank v. Keegan* [1931] IR 344 (speaking for the majority) had distinguished between two categories of such rights, namely general rights of residence and particular or exclusive rights of residence conferring a right to the exclusive use during the life of beneficiary of a specified room or part of a dwelling house or holding. Kennedy C.J. had observed that a general right created an equitable interest in property whereas the dissenting judgment of Murnaghan J. suggested such rights constituted "*equitable rights*". O'Donnell J. (as he then was) (sitting in the Court of Appeal) noted in *O'Donnell v Bank of Ireland* [2016] IECA 227; *"It appears that the provisions of the Registration of Title Act 1964 adopt the approach taken by Murnaghan J. in National Bank v Keegan*."

80. The legislative intention underlying s.81 of the 1964 Act was to bring to an end the distinction between general rights of residence and exclusive rights over part of a property,

both to be treated from the coming into operation of the 1964 Act as rights in the nature of a lien for money's worth in or over the subject property except in circumstances where the exclusive right of residence is granted over the entire property. The principles applicable where rights to exclusive use of a specific part of the property are created do not arise in the instant case there being registered a general right of residence in favour of the widow. The only party with legal title to the land is the widow's son as the registered owner. Section 81 makes clear that the creation of a lien does not create an estate either legal or equitable in or over the land affected.

81. Section 2(vii) of the Conveyancing Act, 1881 was operative at the time of registration of the widow's burden. It provides:

> *"Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof;"*

82. Thus derived therefrom it can be inferred that the lien in favour of the widow in connection with maintenance and support was an incumbrance and the widow, as a person entitled to the benefit of the right of maintenance and support – which can also be construed as a right in the nature of a lien for money's worth in or over the subject land (albeit personal to her), as such, is an incumbrancer.

<u>The jurisprudence</u>

83. An early Irish case is *Ryan v. Ryan* [1848] 12 I.EQ.R.226.[1] Under the terms of his will the testator James Ryan directed "*that my beloved wife shall have her diet and lodging in this*

[1] Referred to by Professor Harvey, "Irish Rights of Residence - Anatomy of a Hermaphrodite", (1970) Northern Ireland Law Quarterly, 389.

my house of … as long as the lease of it will last, provided she will wish to remain in it with my aforesaid nephew Patrick Ryan: I also order that my wife shall get the bed and bedstead at present used by me, with bedclothes." The nephew went into possession of the dwelling house. The widow lived there for a time and subsequent to the nephew's marriage she left. Then after a period of time she returned to reside in the dwelling and required him to provide board and lodging for her which he refused to do. She then instituted proceedings by way of an equity suit. It had been argued on her behalf that a trust had been created by the terms of the will. Lord Chancellor Brady in his judgment delivered on the 14th November, 1848 observed:

> *"I think the plaintiff is entitled to relief. I read this devise as at least creating an obligation. Whether it creates a trust or not, is not material. There are cases where a mere obligation attached, to property makes the holder a trustee, via others where it has been held not to do so; but without reference to any such question, it is plain that this is an obligation such as this Court will enforce."*

At p. 228 he observed:

> *"A difficulty is said to arise in carrying out a decree to enforce this gift. That may be so; but the difficulty is not insuperable. It is like the case of a gift to a mother to provide for herself and her children. I lately had occasion to consider such a case where a difficulty in construction arose. If the Court cannot compel the maintenance bequeathed to be specifically provided, it can compel the payment of a proper sum to provide it. It would be very difficult to lay down a rule as to the quantity of diet the legatee should have, or the room in the house which she should get; but it is perfectly plain she is entitled to have some diet and lodging, and there is no insuperable difficulty in enforcing that right. As to the past, there is nothing to be done but to ascertain a value in amount for it; as to the future, there is more doubt; but probably the best course will*

be to decree the plaintiff entitled in the words of the will, and leave her then to work out that declaration if she is dissatisfied with the way in which it is obeyed."

Part of the defence arguments in *Ryan* appear to have been directed towards the claim that the widow had taken £400 out of the estate and also that she had voluntarily left the dwelling house upon the marriage of the testator's nephew. With regard to her having left the house for a time, the Lord Chancellor observed *"That must limit the relief for the time past, and it is to be calculated only from the period when she made a demand. The circumstances under which she left the house are not proved, and I cannot assume that she thereby abandoned all claim. It might raise a presumption against her if, on leaving the house, she induced the defendant to alter the arrangement of his affairs on his marriage, or the like; but here there is nothing except the mere fact of his having married, and I see nothing in that to demonstrate that I shall be doing injustice by a decree.' The plaintiff is therefore entitled from the time of her demand, and only from that time."*

84. The stance of Brady L.C. in the judgment in approaching the question of satisfaction of the rights of maintenance and support vested in the widow was informed by equity and it is clear from his language that once the obligation was demonstrated to subsist, a court of equity was willing to enforce same in accordance with equitable principles and considerations.

85. Another example is to be found in *Re M'Guinness's Contract* (1900) 35 I.L.T.R. 65 which concerned a charge for support in maintenance only no specific annual sum being apparently charged in respect of same. The application was brought pursuant to s.5(1) of the Conveyancing Act, 1881 which governed the discharge of incumbrances upon a sale and is of relevance only with regard to the aspect of maintenance and support. In relation to the right of maintenance and the ascertainment of same into the future the approach of the court was to direct an inquiry in chambers as to what was the annual sum necessary and proper to provide for the terminable charge for the support and maintenance of the individual beneficiary who in

that case was a minor/infant taking into account the station in life of the infant charge and all the circumstances of the case the court ordered that further *"upon such annual sum being ascertained will allow payment into court of such capital sum (together with the additional margin, not exceeding 10%) as will by interest and annual withdrawal be sufficient to provide for the charge and exhaust the sum under the termination of the charge."* The note of the judgment states "*in a simple case where all parties are agreed upon the annual sum which is, in the opinion of the court, sufficient and ample to provide for the support and maintenance of the infant, the court will order payment into court without directing an inquiry."*

86. In his *Registration of Ownership of Land in Ireland* (1933), Glover observes at p. 188:

> "*A lien in the nature of a vendor's lien may also exist for money's worth, such as a covenant to support and maintain or to permit a person to reside on the land: Re Shanahan [1919] 1 IR 131; Kelaghan v Daly [1913] 2 IR 328; Richardson v McCausland, Beatty, 457*."

87. The decision in *Kelaghan v. Daly* [1913] 2 IR 328 concerned an *inter vivos* transfer in consideration of natural love and affection and the covenants on the part of the son to maintain A and her daughter during their lives and permit them to occupy the dwelling house. Boyd J. relied on the decision in *Richardson v. M'Causland* (Beatty 457). He considered that there was a single net point arising, namely whether under the terms of the assignment the assignor clearly intended to rely only on the personal covenants therein by way of her right as against the land as security for the fulfilment of the arrangement entered into with her son on the conveyance of the lands. The court noted the terms of the covenant whereby the son for himself and his assigns covenanted with the mother that his executors, administrators or assigns would henceforth "*clothe, support. maintain and keep the said Catherine Kelaghan and her daughter Lizzie during their joint lives and the life of the survivor of them in a manner suitable to their condition in their life; and will permit and suffer them to use, occupy, and enjoy the*

dwellinghouse in the said farm in the same manner as they now occupy and enjoy same". The court noted "*it has been admitted on the argument before me that the covenant, so far as it relates to the occupation of the said house, affects the lands, and that the vendor's lien in respect thereof is operative; but has been contended that the rest of the covenant is merely personal and does not run with the lands*".

88. Following the death of the mother, the son's judgment creditors sold the property subject to the burden of the covenant. At p. 330, Boyd J., framing the rights as in the nature of an unpaid vendor's lien, observed:

> "*There is a long series of cases in which it has been considered what circumstances or covenants will or will not destroy a vendor's lien for unpaid purchase-money.*"

89. He cited, with approval, a number of authorities, including *Mackreth v Symmons*, 15 Ves. 329, where Lord Eldon states:

> "*The principles of Equity applicable to a vendor's lien, both as against a purchaser and against his assignee with notice of the contract….*
>
> *It does not appear to me a conclusion as between vendor and vendee, that notwithstanding a mortgage, the lien should subsist. The principle has been carried this length, that the lien exists unless an intention, and a manifest intention, that it shall not exist, appears.*
>
> . . .
>
> *But it depends upon the circumstances of each case, whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken.*"

90. The judge then considered the terms of the agreement whereby the right of residence and the rights of maintenance and support were granted, and concluded:

"*..it was manifestly the intention of the parties that the vendor and her daughter were not only to reside on the lands, but were also to be supported and maintained out of the profits of the lands as provided in the said deed, and that the covenant therein was part of the consideration of the said deed. There was no other source from which the son could supply the support and maintenance of his mother and sister, except from the profits of the lands conveyed to him.*"

91. The court noted a decision from 1830 in *Clarke v Royle* 3 Sim. 499, observing:

"*…it was held that an agreement to convey lands in consideration of a covenant to pay an annuity showed that the consideration on one side was the conveyance of the estate, and on the other, the entering into the covenants.*"

92. The judge observed:

"*I mention these cases as showing that covenants such as those contained in the conveyance in the present case are not severable, as contended on behalf of the defendant.*

. . .

The defendant, both in the condition of sale and on his conveyance, had express notice of the rights of the plaintiff and is bound thereby."

Observations concerning *Kelaghan*

93. The position of the defendant in *Kelaghan* is, in several material respects, analogous to that of the Bank (the mortgagee) in this appeal. The respondent was fixed with notice of the widow's burden and the tenor and terms of same as they appeared on the face of the folio by act and operation of law prior to registration of their own charge in 2010. No amount of deft advocacy and testimony to the effect that it did or could have relied upon the terms of the will of the deceased can avail the Bank. Likewise, in the instant case, the widow gave valuable consideration for the rights of residence maintenance and support by electing to take the limited

interest under the Will thereby releasing one third of the estate which thereby vested in the executor. It is noteworthy that in *Kelaghan* the right was satisfied, on the evidence that the Bank had notice of the lien by characterising same as being, on the evidence, in the nature of an unpaid vendor's lien.

94. In *Re Shanahan* [1919] 1 IR 131, the covenant contained in an instrument provided, *inter alia*, that the covenantors would:

> ". . . *support, clothe and maintain the said Michael Shanahan in his present residence during his life in the same manner as he has hitherto been accustomed.*"

The burden was registered on the folio as being:

> "*Subject to the support, clothing and maintenance of Michael Shanahan… in case of a disagreement, and of the said Michael Shanahan deciding to leave the said lands, then subject to the payment to the said Michael Shanahan of an annuity of £15, payable quarterly, during his life.*"

95. Following the death of the covenantor, a dispute arose between the covenantee and his widow. In his judgment, Sir Ignatius J. O'Brien held that the rights of the covenantee were charges upon the land and that the covenant was rightly entered as a burden on the folio pursuant to the provisions of the 1891 Act. On appeal, it had been contended that the burden ought to be deleted from the register on the grounds that the rights conferred on the covenantee by the settlement were not charges upon the land comprising the settlement. The court was satisfied that the right of residence was clearly a charge upon the land, and further, in such circumstances, it was impossible to say that the annuity, which had been given *in lieu* thereof, in the event that the covenantee should leave the farm, was not a charge.

96. In *National Bank Limited v. Keegan* (1931) IR 244 the majority of the Supreme Court held that a right of residence was in the nature of an equitable interest. In the case of registered land, that position has to an extent been reversed by s. 81 of the Registration of Title Act, 1964,

but the dissenting judgment of Murnaghan J. warrants consideration also. It must not be forgotten that Murnaghan J. in that judgment characterised the right of residence and suitable support and maintenance in favour of the aunt, under an agreement determined to be voluntary, as having conferred "*equitable rights*" upon her which ranked in priority to the Bank's charge. The critical determination of Murnaghan J. is found in his words "*In my opinion, the memorandum created an equitable charge upon the premises both for residence and support, and did not amount to an assignment*." Murnaghan J. in his dissenting judgment continued:

> *"There remains the point whether such an equitable right is postponed to a subsequent equitable charge by reason of the failure of the donee to register the charge. The ground upon which this contention is based is that the first chargeant should be postponed because the failure to register is such negligence as to make it inequitable for the charge to maintain its priority. To accept such a doctrine between successive equitable chargeants would result in setting up in priority the latest equity, although it, too, was unregistered."*

97. He observed:

> *"In my opinion, no authority can be brought forward in support of the proposition that an equitable right loses its priority because the person entitled has failed to register his equitable charge."*

98. The decision of Budd J in *Morgan v Morgan* (*supra*), which predated the coming into force of the Administration of Estates Act, 1959, required the judge to give consideration to the use of expressions in a Will, where in addition to a right of residence, the widow was granted a right to her "*support, clothing and maintenance therein suitable to her station in life*". In the course of the judgment, Budd J was satisfied that the expression "*suitable to her station in life*" was relevant in construing the expression "*support, clothing and maintenance*" and indicated an intention on the part of the testator to embrace more than mere sustenance of the

widow and entitled her to an amount for clothing, hospital, medical, dental and ophthalmic treatment, together with incidental expenses and requirements as would be reasonable suitable to a person in the position of the widow, having regard to her station in life. In the course of his judgment, at p. 118, the judge, in construing the ambit of the right to support, clothing and maintenance, considered relevant that the deceased was prominent in local affairs and had a good position socially within the community;

> "*I conclude that these are matters which should be borne in mind in assessing what her rights are"*.

As to the exercise of quantifying the amount year on year to be paid in satisfaction of the right to support, clothing and maintenance, Budd J. observed at p. 119:

> "*The question depends very largely on the plaintiff's position in life, which, in turn depends upon the position kept by her husband during his life and upon the nature of the farm that he had and out of which her rights have now to come. As I have already stated, her husband was in a prominent position in the local community*."

In the context of that case, the judge had regard to the net letting value of the entire holding of land which he considered to be approximately IR£500 per annum, observing; "*and I have reached the conclusion from the evidence, that if the farm was properly worked, something substantially greater could be made out of it*".

The farm in question was 90 acres.

99. Elsewhere, Budd J. observed on the facts "*what she is entitled to are rights out of a farm run by a farmer like the defendant*". In construing the ambit of her entitlement to maintenance as including medical-type expenses, he observed "*I have no doubt at all that the words of the Will include reasonable medical expenses, that is obviously, I believe, a part of her support and maintenance*". At p. 120, he observed:

"I think the word 'maintenance' covers food and lodging. Some other meaning must be given to the word 'support', having regard to the use of the words 'in a manner suitable to her station in life', I believe the deceased intended his widow to have such amounts paid for her as were necessary for her to maintain her position.

. . .

Having regard to all the circumstances, the nature of the farm and her station in life, it seems to me that the sum of £25 a year is a fair figure for a period of ten years, £250. I will allow a further sum of £50 for medicines, medical attention, dental and ophthalmic treatment."

100. The court granted a declaration that the widow was entitled to a reasonable sum for incidental expenses into the future, in addition to food and lodging, and that she was entitled to make a demand for these reasonable expenses on an ongoing basis.

The nature of a lien

101. By deeming a right of residence (and in effect also a right of maintenance and support), to constitute "*a right and a nature of lien for money's worth*", the statutory intention underpinning s. 81 of the Registration of Title Act, 1964 was to render such rights burdens which would run with the land and bind successors in title and all parties who took with notice of same. That must be inferred from s. 69(3) of the Act, which deals with "*covenants and conditions*" which may not run with the land or be enforceable. Rights of maintenance and support and rights of residence are not encompassed within that subsection. This Court in *Bank of Ireland v. O'Donnell* has held that a right of residence falling within s.81 is personal to the holder, but is also enforceable against the successor of the owner of the land over which it is enjoyed.

102. A lien at common law was defined in *Hammonds v Barclay* [1802] East 227 per Grose J. at p. 35 as "*a lien is a right in one man to retain that which is in his possession belonging to another until certain demands of him, the person in possession, are satisfied*".

103. By contrast, an equitable lien operates as a right in equity conferred by law or statute. *Halsbury's Laws of England: Lien* (Volume 68 (2021)) notes:

> "*An equitable lien is a species of equitable charge arising by operation of law independent of possession. Since it arises in equity, an equitable lien is subject to all the usual conditions affecting equitable rights. It is not possible to state a general principle which accounts for the diversity of situations in which an equitable lien arises. Equitable liens have been based either upon general considerations of justice or upon the principle that he who seeks the aid of equity in enforcing some claim (such as in an administration of assets) must admit the equitable rights of others directly connected with or arising out of the same subject matter. The most commonly encountered species of equitable lien is that of the unpaid vendor for the purchase money and that the purchaser who has paid the vendor without obtaining a conveyance, arising in circumstances where there is a contract for property. However, a contract is not necessary between the equitable lienor and lienee to attract equitable intervention, an obvious example being the trustee's lien.*"
> (emphasis added)

104. The decision in *Wythes v. Lee* (1855) 3 Drew 396 suggests that liens are founded upon general considerations of justice in equity. In the course of the judgment on appeal, the Vice Chancellor (Sir R.D. Kindersley) observed:

> *"If there is a right of lien, as that is a right in equity, it follows that it must be capable of being enforced by bill."*

105. In *Re Bond Worth Ltd* [1980] Ch 228 at p. 250/251, *per* Slade J, suggests that a lien, properly understood, refers to a right arising by operation of law.

106. In the instant case that the High Court on 19 October 2019 identified the extent of the value of the unsatisfied right to maintenance and support of the widow year on year between the date of death of the deceased in 2003 and October, 2016. The sum of €428,005 was clearly attributed to quantified unpaid maintenance and support as the transcript and determination of O'Connor J. on 19 October 2016 attests.

107. The extent to which courts in this jurisdiction give effect to liens, notwithstanding that strict compliance with obligations have not been complied with, is illustrated by *Bank of Ireland Finance v Daly Ltd* [1978] IR 79, which concerned an equitable mortgage created by deposit of title deeds, but which would have been void for want of registration pursuant to s. 99 of the Companies Act, 1963. However, in that case, in light of the facts of having due regard to the principles governing liens, McMahon J. held:

> "*…I declare that the bank is entitled to an equitable charge on the lands at . . . to secure that sum.*"

Wylie

108. Professor J.C. Wylie's analysis in *Wylie on Land Law* (6th ed., Bloomsbury Professional, 2020) is of assistance, where at para. 22.23 he observes:

> *"'There is also authority for saying that a right of residence may be "an annuity or money charge.' This was the view of Kennedy CJ and Johnson J at first instance, in National Bank v. Keegan, with respect to a general right of residence. Murnaghan J, who dissented from the Supreme Court decision in that case, regarded the right as 'an equitable charge on the premises for residence and support', and a similar view that it may create a charge was expressed in Re Shanahan. The trouble about this analysis of the nature of the right is that an annuity charged on land, e.g. a rentcharge, is usually for a definite sum of money. Similarly, a charge on land is usually for a fixed capital sum*

and right of residence, with allied rights of support and maintenance, were often not easily computable into fixed sums. Furthermore, the holder of a charge on land can apply to the court to have the land sold to pay off the charge. It is highly questionable whether a farmer who left the farm to his son subject to a right of residence in the farmhouse for his widow would have intended that she would be able to sell the farm over the son's head. Nevertheless as the more recent cases discussed earlier illustrate, if the family relationships break down the status quo is impracticable and some such way of resolving the matter must be found." (emphasis added)

Analysis

109. It appears that the characterisation of the right to maintenance and support (as well as a right of residence) on registered land as being a right in the nature of a lien for money's worth, derives from clear authority and has its provenance, at least in part, in the jurisprudence concerning unpaid vendor's liens. Such rights are not unpaid vendor's liens *per se*, but in certain instances such as where an element of valuable consideration or detrimental reliance is given by the covenantee for such a right, they have significant common qualities - as decisions such as *Kelaghan* illustrates. They operate in equity and are enforceable by courts of equity. The lien ranks in priority over all subsequently registered charges, the holders of which are deemed by statute to take with notice of the burden as registered. An equitable lien is the right to have property or a portion of property applied to the payment of a specific liability.[2]

110. In the instant case, both distinct aspects of the lien are protected by statutory notice arising from the registration of the burden expressing both. The lien operates in equity, and accordingly, the remedies of equity are available to compel performance of the obligations thereunder as against the registered owner. The approach recommended by the Bank's expert

[2] Harvey, "Irish Rights of Residence - The Anatomy of a Hermaphrodite", p. 409.

of obtaining postponement or subordination of such a burden prior to advancing monies was prudent and represents what might have happened but did not occur. The Bank admits such a step was never engaged in prior to registration of its 2010 charge. Reliance upon the terms of a will for such purpose, even had it occurred, would have been foolhardy and of no avail, since as demonstrated above, it is the registration that is consequential in determining the nature, extent and priority of such rights. The Bank's failure to subordinate or postpone the widow's rights over the entire Folio cannot be retrospectively cured to the detriment of the widow.

111. There are material parallels between a number of the authorities on unpaid vendor's lien and the facts in the instant case in circumstances where the registered owner on the Folio took a substantial benefit of one-third of the estate when the widow forbore her rights and elected not to take her legal right share and instead took the rights registered on the burden on Part 3 of the Folio. This occurred after receipt by her of the solicitor's letter of August 2003. In that sense, the registered owner obtained possession of the entire holding under what amounts to an agreement for valuable consideration, embodied in the lien as registered and accordingly, having regard to the authorities stemming from *Mackreth v. Symmons* [1808] 15 Ves. Jun 329 at 340 *per* Lord Eldon L.C., he cannot be allowed in equity to renege on the substance of the obligation to maintain and support the widow under the covenant. The Bank, which took not as a *bona fide* purchaser for value without notice but with full notice of the existence, nature and ambit of the burden, cannot be in a better position than the registered owner who acquired the lands represented by the widow's legal right share in consideration of performance of the burden.

Calculation of the value of the unsatisfied lien for maintenance and support

112. Lord Eldon L.C. observed in *Mackreth* "*…to determine what is the lien, it is necessary to point out the amount of it and how it is to be calculated…*" at 343. The case is authority for the proposition that where a party acquires property pursuant to an agreement to pay

consideration, equity renders it impermissible to retain the property without discharging the payment.[3] In the instant case that exercise of quantifying the liability of the registered owner has already been carried out by the High Court on 19th October 2016. The precise sum due to the widow in respect of the satisfaction of her right to maintenance and support, compliance with and performance of which totally failed was clearly identified at €428,225 and was a constituent element of the overall award made by the court. There is clarity and certainty as to the sum in question.

113. Strictly speaking, an equitable lien can differ from an equitable charge in one respect - the latter is generally founded on contract whereas an equitable lien is founded on the principles of equity. Equity operates so that he who obtains or procure possession of property pursuant to an agreement for payment of its value will not be allowed to keep it without payment. The value in the instant case required payment of maintenance and support. The widow did all she could to enforce it and satisfaction of the lien insofar as it has been conversion into a crystallised sum must, in accordance with equitable principles, rank ahead of a mortgagee who took with clear notice of her rights.

Nature of widow's rights

114. In light of the 1964 Act – s. 31, s. 69(1)(q), s. 74 and s.81 - considered in conjunction with the jurisprudence and the judgment and order of O'Connor J. of 19 October 2016 - the widow in the instant case cannot be viewed as the holder of a mere or bare equity the enforcement of which could rank behind the Bank's subsequent charge or satisfaction of the crystallised unpaid burden might conveniently evaporate at the fall of a life. Such an outcome is inconsistent with the authorities.

115. In *Re Ffrench's estate*, [1887] 21 L.R. Ir 283 – a decision considered by Murnaghan J. in *Keegan*, Fitzgibbon and Barry LJJ. reached their conclusions that a subsequent equitable

[3] Harvey, "Irish Rights of Residence - The Anatomy of a Hermaphrodite".

mortgagee could not be adversely affected by the breach of duty on the part of trustees in allowing the trust funds to be used in the purchase of lands for the benefit of the tenant for life in circumstances where that subsequent equitable mortgagee had no notice of the Trust. However, in the instant case, the fact that the Bank had actual notice of the burden and further were aware of the 2015 proceedings which led to the order of 19 October 2016 and elected not to engage with same offer materially significant distinguishing factors and precludes it from denying that satisfaction of the unperformed right to maintenance and support in the sum of €428,225 ranks ahead of its charge.

Bank not a *bona fide* purchaser without notice

116. The *bona fide* purchaser for value doctrine is applicable. The Bank cannot avail of same in light of s.74 of the Act and for all the reasons stated above. *Re Ffrench's estate* is authority for the proposition that even were the rights of the widow to be deemed a mere equity, which in general could be postponed in priority to a subsequent equitable estate or interest in land acquired, that would only operate if the subsequent equity estate or interest acquired was without notice of the prior equity. The Bank is fixed with notice and can be in no better position than the registered owner in that regard.

Effect of 2016 Order referable to burden for maintenance and support

117. The rights of the widow in respect of performance of the obligations on foot of the burden were converted into monies worth by virtue of the Order made in the High Court in 2016. Although by virtue of s.81 she does not hold and did not acquire a vested equitable estate in the burdened property, nevertheless, it is clear from the scheme of the 1964 Act, and in particular s.69(1)(q), that protection was intended by the legislature to be afforded to the holder of rights of a burden that fell within s.81. That is the natural consequence of s.69(1)(q). S.74 of the Act gives priority to the widow's charge or burden according to the date of registration.

The 2015 litigation

118. When served with the pleadings, including the statement of claim that had been delivered in July 2015, the Bank was on actual notice of the non-performance and breaches of the obligations of the registered owner in respect of the widow's prior ranking burden. It had also been pleaded that the widow had been subjected to pressure and influence by the registered owner to give up or rescind her rights under the burden. Further, it is clear that the Bank was on notice and aware that the latest from the Replies to Notice for Particulars dated 15 March 2018, that in June/July 2012 the registered owner advised the widow that the Bank required her to vacate her home of 60 years and to release her right of residence over the property and he never performed rights to maintenance and support over the lands on the Folio to facilitate sale of same by the registered owner for the benefit of the Bank. The position was reiterated in subsequent Replies to Particulars dated 6 December 2018.

119. Once it can be demonstrated that the Bank took with notice of the widow's burden, the Bank is bound by its import and its rights are subject to the equitable discharge and satisfaction of the burden in accordance with the equitable rights of the widow as the prior registered owner of same. The fact that her equitable rights do not constitute equitable interests in the land does not render nugatory her rights. It is to be inferred that they were created to provide for the widow and when the satisfaction of same for the relevant years as specified in the statement of claim were converted, on notice to the Bank and the registered owner, by the order of the court into a money sum of €428,225, that sum attached to the widow's burden as representing converted part of same and as such ranks in priority to the Bank's charge. The priority of the widow's interest is confirmed since at the date of registration of the Bank's charge it had clear notice of the obligations registered in favour of the widow by the prior burden. The Registration of Title Act, 1964 fixed it with notice of same and it must be bound by the inevitable consequences of that fact.

120. The contention of the Bank, in substance, is that non-performance or non-compliance by the registered owner with his obligations on a sustained basis and in the instant case for the entire duration of the appellant's widowhood from the month of July 2003 onwards creates no right or remedy in equity in favour of the widow such as would be capable of enforcement against the lands on the Folio so as to enable her to realise the unpaid maintenance and support (measured by the High Court on 19 October 2016 at €428,225) in a manner that might disturb the subsequent registered charge of the Bank so registered in 2010 with full notice of the burden. Such a contention is contrary to the principles of equity and not supported by authority.

121. What the Bank contends is that the rights of the widow are purely personal and avail her only as against the registered owner. That is inconsistent with the doctrine of notice enshrined in the Registration of Title Act, 1964. If such an argument were sustainable there would be little purpose in registering rights of maintenance and support as burdens on folios. The widow's equity and equitable rights as to maintenance and support are good against subsequent purchasers/chargeants with notice of her rights and the Bank was such. The combined effect of s.69(1)(q) coupled with s.74 have the consequence that the widow's right in respect of the right to maintenance and support as converted into money's worth by virtue of the Order of O'Connor J. in 2016. The two burdens rank *vis-à-vis* one another *"according to the order in which they are entered on the register…".* The widow's burden by virtue of s.74 *"shall rank in priority to any other burden affecting the land and created or arising since the first registration of the land not being a burden to which, though not registered, the land is subject under s.72."*

122. The decision in *Keegan* is distinguishable from the instant case on the basis that it was concerned with unregistered interests, neither of which had been the subject of memorials registered in the Registry of Deeds, 1707. Of course, in the instant case, the widow's position is immeasurably more significantly protected, in that she enjoys the combined statutory

benefits of s.69(1)(q), s.74 , s.31(1) and s.81 of the Registration of Title Act, 1964. Murnaghan J. in his dissenting judgment concluded that the equitable rights of the aunt, created pursuant to the voluntary agreement with her nephew was not subject to the Bank's equitable mortgage. The decision of Murnaghan J. offered a significant roadmap to the framers of s.81 if the 1964 Act and further offers a like road map to the court as to how a right "*in the nature of a lien*", such as that enjoyed by the widow, ought to be treated by a court of equity, it being a right registered as a burden in priority to the Bank's interests, and in respect of which the Bank took with full notice.

123. In the case of *Bank of Ireland & Anor. v. O'Donnell & Anor.* (*supra*), an issue arose as to whether the right of residence over the unregistered property was a proprietary right, and "*an interest in property*", which as such would vest in the official assignee. These issues are not engaged, of course, in the instant case. Nonetheless it is of note that O'Donnell J., in delivering the judgment of the court, at para. 44, observed:

> *"It appears that the provisions of the Registration of Title Act 1964 adopt the approach taken by Murnaghan J. in National Bank v Keegan [1931] 1 I.R.344. The provisions of section 81 are relevant insomuch as they suggest the endorsement of the Oireachtas of a concept that such rights are at least analogous to liens. Coughlan observes at page 302: "aspects of other conventional mechanisms are also listed by the section so as to produce a hybrid somewhere between a bare licence and a proprietary interest". It is not however necessary to resolve or even address these difficulties in this case."*

124. In the instance case, the right of maintenance was a burden of a type which the High Court was willing and prepared to quantify, and did so on 19 October, 2016 in the sum of €428,225. It falls to be satisfied in the sum of 428,225 out of the Folio in priority to the Bank's charge.

Recent jurisprudence and application of same to the facts

125. In the case of *Bracken v. Byrne & Anor.* (*supra*), Clarke J. had to engage with the issue as to whether separate rights of residence and maintenance and support could be converted into a sum of money. In that case, the issue arose because the beneficiary was unable to exercise her rights due to a breakdown in the relationship with the owners of the property. On the facts, the dwelling, in respect of which the right of residence subsisted, remained in the ownership of the first named defendant, the lands out of which the right of maintenance and support were to be met were owned by the registered owner. Clarke J. in the course of his judgment considered the law on rights of residence and maintenance, citing the earlier decision of *Johnston and Anor v. Horace* [1993] ILRM 594, where Lavan J. had to consider the effect of s.81 in the circumstances of that case. Clarke J. cited with approval the observations of Lavan J.:

> *"18. It should be noted that at p. 598 of the judgment Lavan J. indicated that neither the case law nor the statute clarifies whether or not the beneficiary of the right or the owner of the property can insist on the right being converted into monies worth. In dealing with that issue the court went on to state the following:-*
>
> > *'I have no doubt but that there are circumstances in which a court could enter by agreement with the parties into a valuation of their respective interests. <u>There are also circumstances where a court might compel such a valuation in the general interest of the administration of justice or under its equitable jurisdiction</u>.'"*
> >
> > (emphasis added)

126. That observation of Lavan J., in my view, accords with Irish jurisprudence, at least ranging back as far as *Ryan v. Ryan* [1848] to which I have made earlier reference It demonstrates the view of the High Court that rights of residence and rights of maintenance and support are capable of conversion into monies worth, and further, the court has power to do so under its equitable jurisdiction which, in substance, recognises the entitlement to convert when

the interests of equity require it in accordance with general considerations of justice. Lavan J. had observed in *Johnston v Horace* on the evidence before him that "*the defendant has not the means nor the intention to make proper provision for the plaintiff's right of residence*". The exact same observation can legitimately be made in respect of the registered owner with regard to discharging the obligations inherent in the widow's right of maintenance and support vested in her and registered as a burden on this Folio. The widow never received any maintenance or support from the death of her spouse onwards as her affidavit and the uncontested evidence before the High Court on 19 October 2016 attested.

127. Clarke J. in *Bracken*, in reviewing *Johnston v Horace*, continued at para. 20:

> *"In those circumstances the plaintiff was awarded injunctive relief which in substance allowed her to become able to enjoy the right of residence and also was awarded damages in respect of interference with the right up to the date of trial."*

Clarke J. continues:

> *"It is clear therefore, that the reason why Lavan J. was not persuaded to convert the plaintiff's entitlement to money was that it was impractical on the facts of that case so to do. The case is therefore not authority for the proposition that a court could not covert the right of residence to money in an appropriate case."* (emphasis added)

128. At para. 23 Clarke J., having noted that neither party to the proceedings advanced an argument that there was an entitlement as a right on the part of either the owner of the property, or the beneficiary of the right, to have it converted into money, observed;-

> *"In a case where the owner of such rights is effectively excluded from the enjoyment of those rights by the owner of the property there may be circumstances where the appropriate form of redress which the court should grant would be to value the rights and direct that the beneficiary be paid for those rights rather than to grant injunctive relief. Clearly the ability of the defendant to pay the sums thus awarded would be an*

important factor in the exercise of the court's discretion as to whether the remedy should be by way of injunctive relief to restore the enjoyment of rights on the one hand or the payment of the sum of money in lieu on the other hand."(emphasis added)

129. In the instant case, it will be recalled that the widow has been effectively excluded from enjoyment of a right of maintenance and support since the death of her husband in July, 2003, which failure and exclusion is continuing. Thus, her rights to maintenance and support, and the vindication of same from the perspective of equity falls squarely within the observations of Clarke J.

Breakdown in relations

130. At para. 23, Clarke J. continued:

"However in many such cases it may well be that the breakdown in relations between the parties is not as clear-cut a set of reasons as enabled Lavan J. in Johnson to take the view which he did on the facts of that case. The circumstances which may lead to such a breakdown can lie at any point upon a spectrum from one where the entire blame may rest upon the beneficiary of the right on the one hand to a case where the entire blame may rest upon the owner of the property on the other hand."

131. Such an approach may be warranted in a case where the court is called upon to assess compliance with a right of residence. Logically, it can have no relevance in determining the ambit of equitable remedies available to ensure enforcement of a right to maintenance and support, elected to be taken by a widow for valuable consideration, who has secured judgment to the value of that equitable right in the sum of €428,225 and who remains entirely blameless for its sustained non-performance by the obligor.

132. As far as the right of maintenance and support is concerned, there is no suggestion in the instant case that the widow is in any way to blame for the non-performance, failure and omissions on the part of the registered owner to discharge his obligations on foot of the burden

for maintenance and support, the High Court judge erred insofar as it is suggested that it determined otherwise. It conflates the indicia of two distinct burdens and imposes on the vindication of rights of maintenance factors and considerations uniquely relevant to rights of residence. In the alternative if a breakdown in relations be considered a prerequisite to securing equitable remedies to enforce a secured right to maintenance and support the institution of the 2015 proceedings and securing of judgment against the obligor thereunder in the sum of €428,225 amply satisfies that requirement in the instant case in my view.

133. Clarke J. in *Bracken* observed:

> *"... it is, perhaps, important to note, that in the absence of very voluminous evidence indeed it might, in many cases, be difficult for the court to determine, with any precision, the precise apportionment of blame in relation to what will, often, be a breakdown in relations between parties stemming from a whole variety of reasons."*

Application of principles in *Johnston v Horace* and *Bracken v Byrne* to instant case

134. No party suggests that the widow is to blame for non-payment of her maintenance and support. She is confronted with total non-performance of the obligation to be maintained and supported out of the lands in the Folio, a state of affairs very different to, and not captured by, the remarks of Clarke J. concerning exercise of a right of residence in that regard.

135. Insofar as the judgment of the High Court may imply at para. 74 (as was suggested on behalf of the widow) that the remedies of equity might abate where the claimant was 93 years of age or to facilitate giving substance to the Bank's unproven suspicions, I find no authority for that proposition. Her age does not wither the ambit of equitable remedies she can invoke nor can the custom of sustained non-compliance by the registered owner with the obligations as to maintenance and support registered in her favour on the Folio fade the variety of equitable

remedy available to vindicate her prior equitable rights having due regard to general considerations of justice in equity and precedent.

136. Each case falls to be considered in accordance with the principles of equity as an exercise as to how the court, on the given facts, is properly to approach compliance with obligations imposed on a property owner and registered as a burden in favour of the beneficiary. No single "*test*" can adequately encapsulate all possible permutations and salient factors or anticipate which set of circumstances will meet the threshold referred to by Lavan J. when property may need to be sold to satisfy equitable right secured on the title. Where egregious and sustained deprivations of the rights, particularly of an older or vulnerable person to maintenance and support is continuing it can readily be understood that a threshold for equitable intervention requiring sale of property will be met.

137. In the instant case, by contrast with *Bracken v. Byrne*, the widow gave valuable consideration in electing not to take her legal right share, which enured to the benefit of the registered owner. By contrast, Ms. Bracken was a volunteer who took a benefit under a deed of settlement executed by her late father.

138. Clarke J. observed at para. 25:

> *"Prima facie the starting point must be that the entitlement of the beneficiary of a right is to have that right enforced. Therefore the starting point should be that the owner should be entitled to appropriate injunctive relief to ensure that they can enjoy the right."*

Here the non-performance is of the positive right to maintenance and support satisfaction of which sounds in money.

139. In the instant case, as the transcript of the hearing before Mr. Justice O'Connor on the 19th October, 2016 makes clear, a full hearing was had at which the registered owner failed to attend, and in respect of which the Bank was on full notice but elected to ignore the proceedings, and failed to engage or advance any argument disputing to the widow's

contentions, which included that she had been subjected to undue influence or pressure to yield up her right of residence and her right of maintenance and support for the benefit of the Bank.

140. Injunctive relief is of no avail in respect of performance of the right of maintenance and support in the instant case. The burden to be satisfied is only part of the judgment for €779,225.10, as is represented by €428,225. The supporting judgment of 19 October 2016 clearly quantified the sums due in satisfaction of the right of maintenance and support as €428,225.

141. In this case, in contrast with *Johnston v. Horace*, issues surrounding the circumstances whereby such rights can be extinguished or terminated are not engaged. The widow does not seek termination or extinguishment. She seeks satisfaction of her equitable right and, in particular, satisfaction of her right to maintenance and support for which, as stated above, she gave valuable consideration. It follows from Clarke J.'s observations in *Bracken* that, in such circumstances, she is entitled to an effective equitable remedy to ensure recognition, enforcement and enjoyment by her of the right and satisfaction to the extent that it has been quantified. That right ranks ahead of the Bank's subsequent burden.

142. The registered owner, by failing to engage with the 2015 proceedings suffered the judgment to be made against him, and the court, in substance, in exercising its powers on the 19th October, 2019, entered into, *inter alia*, a valuation of the right of maintenance and support from the date of death of the deceased to the date of the hearing, and based on expert evidence concluded, and the court was satisfied, that the correct valuation be fixed at €428,225. Neither the Bank nor the registered owner suggested that the registered owner had satisfied any part of the obligation, nor is it asserted that subsequent to the judgment any part of same was satisfied by discharge.

143. The evidence is consistent only with complete failure of performance of the equitable obligations of the registered owner on foot of the burden in respect of maintenance and support,

which has been sustained and continuing for upwards of 20 years. Despite taking all reasonable measures to enforce her right to maintenance and support for which she gave valuable consideration, she has been denied the benefit of the right concerned.

The Bank's arguments

144. If the Bank's position, as endorsed by the High Court is correct, then the widow is left bereft of any remedy at all, for in the intervening time since the registration of her burden, the registered owner has created a charge over the property in favour of the Bank. The indebtedness appears to be substantial and may, possibly, even exceed the value of the property. It is to be inferred from submissions and arguments on the part of the Bank that, if as it contends, the rights of the Bank were to rank or be satisfied in priority to tangible realisation or satisfaction of the prior registered right of the widow to support and maintenance, there will be nothing left for the widow.

The burden being one for maintenance and support it can readily be inferred that it was always intended that it be discharged in money, and hence it was entirely foreseeable to the Bank when it took its subsequent charge in 2010, and where her prior burden of maintenance and support was over the entire Folio, that the Folio itself fell to be resorted to in circumstances where there was complete default in satisfaction of and compliance with the burden of the lien and the nature of the lien of monies worth in respect of maintenance and support during the lifetime of the widow. On the date the Bank registered its charge in 2010 the burden for maintenance had remained unperformed for over 6 years. The Bank's own expert witness acknowledged that burdens for support and maintenance conventionally encumber land rather than dwelling houses.

Reasonableness

145. Clarke J., in *Bracken*, observed:

"It seems to me that one of the questions which the court needs to address is as to whether it has been demonstrated that it is not reasonable, in all the circumstances of the case, to require the beneficiary to be satisfied with the enjoyment of the rights to which she is entitled, enforced, if necessary, by appropriate injunction."

146. In the instant case, the Bank suggest that the judgment obtained by the widow is a personal matter between herself and the registered owner. If so, it is self-evidently worthless, notwithstanding that she yielded up her right to one third of the estate which directly benefitted the registered owner in consideration of the registration of the burden for her maintenance and support.

147. The question is whether it is reasonable for the Bank to assert that the widow has in substance no equitable entitlement to resort to the land itself for satisfaction of the quantified and crystallised value of her unsatisfied right in respect of support and maintenance in the sum of €428,225, representing the value of the unperformed burden to October, 2016. In substance, having taken with notice of her prior burden, as I am satisfied the Bank did, and, as I find, her burden encumbered the entire Folio, the Bank has not identified any principle of law or equity to support its contention that enforcement of her right should rank after the Bank's charge.

148. Such a proposition would render the benefit for her right to maintenance and support specified in the burden nugatory, debasing to a nil value her rights to be supported and maintained. Such an approach is contrary to equitable principles and the public interest. Each case must turn on its own facts. The value of the widow's right to maintenance and support has been quantified in terms of money to the 19th October, 2017. Difficulties presenting in other cases around the issue of quantification does not arise.

Import of Judgment referable to maintenance 19 October 2016 – €428,225

149. I am satisfied that the judgment and order of the High Court of 19 October 2016, on its true construction and having due regard to the transcript of the hearing, monetised the widow's

right of maintenance up to the date of the said trial, and affixed the valuation of same at €428,225. The Bank was not a *bona fide* mortgagee for value without notice of the nature and extent of the widow's prior burden for maintenance.

150. In consequence the Bank is estopped from contending that the unsatisfied accrued liability of €428,225 referable to and due in respect of maintenance and support to the widow falls to be satisfied in postponement or subordinately to its charge.

151. Satisfaction of the said sum of €428,225 ranks ahead of the Bank's entitlement in circumstances where the Bank elected not to seek any deed of postponement, either in respect of the entire or part, of the widow's rights or to otherwise subordinate her rights in the Bank's favour and where it was self-evident from a perusal of the Folio, on any fair construction of same, that the burden of the obligation with regard to maintenance and support extended over the entire Folio.

Complete breakdown

152. In the instant case, by analogy with *Bracken*, there was a complete breakdown in the performance of the obligation for maintenance and support. She apparently never received the benefit of same. Her rights were withheld from beginning, and a sustained refusal and neglect to comply with same occurred notwithstanding the institution of court proceedings by her and prosecution of same to judgment.

153. Whilst Clarke J. entered into a detailed analysis in *Bracken* of the genesis and history of a dispute between two siblings, nothing analogous arises in the instant case, simply the sustained withholding of the discharge of the obligation by the registered owner of the land and the sustained and continuing loss to the widow from the non-performance and non-compliance with the obligation to maintain and support. Egregiously this has continued notwithstanding that she is of advanced years. Her entitlements were for her lifetime and to be in accordance with the standards to which she was accustomed as the spouse of a noted stud farm proprietor.

154. I am satisfied that the order of O'Connor J. in October, 2016, in substance, *inter alia*, insofar as unpaid maintenance is concerned converted the undischarged right of maintenance and support in favour of the widow measured from the date of the deceased's death in 2003 to the date of the judgment into a sum certain in money and identified with certainty the sum attributable to non-performance of the burden for maintenance and support. As in *Bracken*, there was uncontested expert evidence before the High Court concerning valuation of the right of maintenance. As O'Connor J. observed in the course of the hearing on 19 October 2016, a reasonable approach was adopted:

> *"The court has heard the evidence of Mr. Maguire who has taken a very reasonable approach and has double checked by reference to the average cost of living now, and the figures match up and the court is impressed with the way the exercise was carried out."*
>
> (p. 9l, lines 17-24)

155. I do not consider it necessary on the facts to come to a view that satisfaction of the cost of the works otherwise considered, and the other sum awarded in respect of €281,000 for repairs, including to the roof, also takes priority. That aspect of the claim was not fully pursued in the High Court in the within case. The claim and this appeal are confined to the complete non-performance of the obligation of the registered owner towards the chargeant as quantified in 2016.

"Therein"

156. It is noteworthy that the burden makes reference to the right of support and the right to be "*suitably supported and maintained therein during her life*". Both experts who gave evidence before the High Court clarified why the word "*therein*" was deployed. The experts appear to me to be familiar with advices that might emanate from time to time from the Conveyancing Committee of the Law Society, and as such therefore were in a position to know and assist the High Court as to why that particular word was deployed as of 2003 when the

Will was being drawn up. They both agreed that the objective was to ensure that the obligation to support and maintain would not continue to be enforceable in the event that the beneficiary of the burden for maintenance and support came to reside in a nursing home. It appears that the widow now does reside in a nursing home. That is not an issue in this appeal.

157. Arguments on the part of the Bank that the word "*therein*" connoted that it was the dwelling house that was incumbered for the purpose of the maintenance and support of the widow fly in the face of common sense, contrary to any authority, inconsistent with all norms, and, in particular, are inconsistent with the clear evidence of both experts tendered to the High Court on the 3rd April, 2019 (Day 2 of the hearing, at page 54, line 2 and line 5, and page 86, line 3 and line 5). Insofar as the trial judge accepted arguments to the contrary advanced on behalf of the Bank same was an error.

158. I am satisfied that the word *"therein"* was intended to confine the benefit of the obligation to maintain and support the widow to be delimited and, in particular, that the obligation would not be enforceable in circumstances where the widow came to reside in a nursing home. The experts were in agreement on the matter and the Bank's expert observed *"I think that practice has grown up because of that and the cost of nursing homes."* (Day 2, p.86, lines 4-6). The word "*therein*" does not in any wise dictate the ambit of the property over which the rights of the widow were secured by virtue of the registration of the burden on 3 February 2006 which demonstrably on its face is registered against the entire Folio.

159. The rights of the widow, which she took in lieu of her one-third legal right share under s.111(1) of the Succession Act, and with the benefit of the assurances given her in the letter of August 2003 that the farmlands would not be sold ultimately took the form of the burden registered at Entry 4 in Part 3 of the Folio. Those assurances coupled with the valuable consideration given by the widow gave rise to an estoppel as against the registered owner. The widow's unsatisfied rights were crystallised to the 19th October, 2016 in respect of the

obligation to maintain and support her due to that date. The unsatisfied sum raises an equity in her favour which requires satisfaction of €428,225 out of the lands in the Folio in priority to the Bank's charge.

"*Equity will not suffer a wrong to be without a remedy*"

160. Hilary Biehler in the leading text *Equity and the Law of Trusts in Ireland* (7th ed., Round Hall, 2020), at page 20, observes of the maxim above:

> *"The principle which lies behind this maxim is that equity will intervene to protect the recognised right which for some reason is not enforceable at common law and it reflects the basis for the origins of the equitable jurisdiction of the Chancellor. However, as equitable jurisdiction became more established, it also grew increasingly formalised and based on precedence".*

161. She further observed:

> *"... It has recognised that equitable principles need to adapt to meet the demands of justice in a modern legal system. As Hogan J. stated in ACC Loan Management Limited v. Connolly [2017] 3 I.R. 629, 'If equity will not bring that moral element to the common law and ensure that in a modern setting the vulnerable are adequately protected, the principles of equity will in time come to be seen as just another set of rules, as desiccated, inflexible and narrow as they were in the days of Lord Eldon in the early 19th Century'".*
>
> (page 654)

162. The difficulty identified by Professor Wylie in regard to computability of the sums due to the widow for unpaid maintenance and support under the burden registered on the Folio charged with payment of same does not arise in the instant case, insofar as liability between July, 2003 and October, 2017 is concerned, because the sum is certain in money, and has been crystallised. A sum of €428,225 was identified and formally proven as due and owing to the widow on foot of the registered burden for satisfaction of the right of maintenance. Further, the

clear evidence was that she was continuing to reside in the dwelling, and therefore the maintenance and support was payable to her by virtue of the construction of the word "*therein*", on which there was a unanimous expert view expressed in the High Court, namely, that it was payable as such while she continued to reside in the dwelling house. The sum has been commuted into a fixed sum. The valuation of her rights beyond that time is not something that falls to be considered in the context of this appeal.

Professor Wylie may be correct that it is highly questionable whether a farmer who left a farm to his son, subject to a right of residence, would have intended the widow be able to sell the farm over the son's head. By the same token, it is most certainly to be doubted whether the testator in the instant case, who devised the entire stud farm to the registered owner, subject to a right of residence to his widow, together with an entitlement to be suitably supported and maintained therein during her lifetime, intended that his widow would be left without remedy and receive nothing at all by way of satisfaction of her unperformed entitlement to be suitably supported and maintained in the dwelling house for her lifetime. It is also questionable whether such a farmer in creating such limited rights in favour of a spouse with the objective of keeping the farmstead intact intended that a Bank fixed with notice of her burden which registered a charge subsequent to registration of a burden for maintenance and support would be entitled to assert that when complete and sustained non-performance of the maintenance obligations occurred resulting in litigation to judgment and the widow obtains a decree – representing over 13 years unpaid maintenance and support - such a blameless spouse should be left empty handed and precluded from any meaningful equitable remedy to satisfy the defalcation of the obligor in favour of a Bank which registered a charge notice of the spouse's rights and that burdens affected the entire Folio and when the Bank's charge lacks priority.

Objective valuation

163. The non-performance of the obligation as to maintenance and support, registered as a burden, cannot enure to the benefit of either the mortgagor or the mortgagee in this case. The approach of monetisation or capitalisation of the sum due, as ascertained by the High Court in 2016 in respect of maintenance and support, accords with the approach of Lavan J. in *Johnston v. Horace*, where he considered such a course of action to be appropriate, *inter alia*, where such maintenance was not being paid;

> *"I have no doubt but that there are circumstances on which a Court could enter by agreement of the parties into a valuation of their respective interests. There are also circumstances where a Court might compel such a valuation in the general interest of the administration of justice or under its equitable jurisdiction. The Court in valuing the right should carry out an objective valuation independent of the alleged circumstances in which the valuation is sought."(emphasis added)*

In the instant case the "objective valuation" has already be carried out by the High Court on 19 October 2016 on notice to the registered owner and the Bank.

164. Indeed, Lavan J. envisaged that in respect of future payments of maintenance the securing of same might involve a capital sum to cover future payments. The key distinguishing factor was that that case was concerned with the plaintiff's right of residence.

Lavan J. in *Johnston v Horace* observed;

> "*It is only in circumstances where such periodic sums are not being paid or that the property is being disposed of that the lien becomes a lien secured or enforceable by way of additional security in the form of a capitalised sum if necessary*."

165. The widow readily meets that threshold for the equitable enforcement of her quantified right to maintenance and support. The satisfaction of the claim by the construction of that part of the judgment of the 19th October, 2016 exclusively referable to unsatisfied maintenance and support has been the subject of an "*objective quantification*" of €428,225, on the facts of this

case is warranted and necessary having due regard to all the factors identified above and the general considerations of justice in equity. To determine otherwise would be contrary to the maxim that "*equity will not suffer a wrong to be without a remedy*". The court would thereby ignore the registered owner's conduct in benefitting from her election and wholly failing to maintain and support her. It would defeat the testator's intention. It would enable repudiation of the representations given in the August 2003 letter to the widow. It would facilitate the reneging of the burden for maintenance and support. It would enable the registered owner and the Bank – parties to the subsequently registered charge - to benefit by excluding the widow entirely and thereby place the burden of providing for the widow now in her late 90's upon the State or her own resources. It would establish a precedent for the construction of a burden for maintenance and support which would be contrary to the public interest and the principles of equity. It is a relevant factor also in the instant case that the registered owner is in default on foot of the subsequently registered charge in favour of the Bank and the holding will inevitably have to be sold to satisfy the Bank's claims.

He who seeks equity must do equity – the equitable doctrine of election

166. The registered owner elected to take the substantial advantage that enabled him to become registered owner of the entire holding by availing of the widow's 2003 election under s.115 of the Succession Act to take the devise under the will. This enlarged his rights in the holding very substantially. The quid pro quo was the commitment on his behalf as executor in the letter of August 2003 to the widow that the property could not be sold without her prior consent and the registration of the burden on the Folio. Notwithstanding his clear obligation pursuant to the burden, he has entirely failed on a sustained basis to suitably support and maintain the widow during her life. The benefit he took on foot of the widow's election represents one-third of the holding. As a result, he was a beneficiary of her election. Upon securing the statutory election of the widow, the registered owner was obliged to perform the

obligations registered as a burden at Entry No. 4 on the Folio on the 3rd February, 2006. The value of the loss to the widow was monetised for the sum certain in money in October 2016 as stated above.

Conclusions

167. I am satisfied that the High Court erred in the approach adopted to reach a conclusion that the rights of residence maintenance and support registered in favour of the widow in Part 3 of the Folio pertained to and bound only the part of the lands comprised of the dwelling house. This finding is incorrect and contrary to the clear tenor of the Folio and the burden registered at entry number 4 on Part 3. Such an approach could only be reached by, directly or indirectly, taking into account the terms of the Will which is clearly impermissible having regard to the statutory provision and for all the reasons deftly drawn together by Ms. Justice Baker in *Tanager DAC v. Kane* as outlined above. The entire system of registration of land in the State depends upon the conclusiveness of the Registrar.

168. The burden in favour of the widow falls to be construed with due regard to s.31(1) and the decision in *Tanager* is particularly apt when a third party such as the Bank subsequently engages in transactions with the registered owner of property where same is subject to a prior registered burden in favour of a third party and where the Bank does not postpone or subordinate the prior incumbrance. On any reasonable construction of the Folio, it was self-evident that the burden extended to the entire Folio and not to part thereof.

169. In the instant case, the issue in this appeal ultimately narrow down to the right of maintenance and support in particular. The right of the widow to be *"suitably supported and maintained therein during her life"* extended to the entire Folio. Insofar as the judge favoured the evidence of an expert who described how he would have approached the process, the Bank's expert emphasised that he would have gone behind the burden and looked at underlying documentation had he acted for the Bank in the lending transaction. However, the issue in this

case is not concerned with what did or did not occur in the context of the Bank making enquiries prior to creating a burden in their favour and registering same on 6 January 2010 against the Folio. The Folio was conclusive. The Bank was fixed with notice of widow's prior burden for maintenance and support which extended over the entire.

170. It is clear in his response to questioning on behalf of the widow that the expert for the Bank emphasised *"Sorry, I am not the Land Registry. I can look behind"*. Elsewhere he stated *"the banks don't have to lend. I set out at length in my report what the bank should have done, which, I think, has dealt with any angle of it."* (Day 2, p.74, lines 1-9 inclusive). The Bank's expert was focussing in part on giving evidence as to what, hypothetically, he might have done had he acted for the Bank in the transaction which led to the creation of a subsequent charge in its favour. In deciding to grant or withhold a loan on the strength of the Folio as a security, the Bank was free to go behind the Folio or not or adopt whatever approach it chose. That however is not in issue in these proceedings and insofar as the Bank's expert suggested that there was an entitlement to look behind the burden on the Folio and, in particular to consider the terms of the Last Will and Testament of the deceased, in these proceedings when construing the widow's burden for maintenance and support, that was not correct and is contrary to s.31(1) and all authority.

171. I am satisfied that the trial judge erred insofar as she, having correctly determined that the Bank was not entitled to have the said will construed upon the facts of the case (para. 71) for the reasons set out in the judgment, nevertheless proceeded to conclude that on a proper construction of the terms of the registration of the widow's burden, the said burden both as to residence and the right to maintenance and support, in fact only extended to the dwelling house. That erroneous conclusion may have been based on the testimony of the Bank's expert having *"…expressed the view that in his view, the wording of the burden itself on the folio lands is to be construed as vesting a right of residence in the dwelling house simpliciter."* (para 79) The

said witnesses testimony when considered in its entirety in conjunction with his report suggested that he arrived at that conclusion after having perused the will. The construction of the burden on the face of the Folio was not a matter for expert evidence, it was a matter for the court. Howsoever such a construction was arrived at by the Bank's expert or the court, it was demonstrably and patently incorrect. The burden - certainly as to maintenance and support - which is the only aspect at issue in this appeal - as registered as a burden on Part 3 on the Folio self-evidently extends to the entire Folio. The trial judge erred at para. 90 in finding otherwise.

Estoppel

172. Another way of viewing the rights of the widow in the context of the competing assertions be made on the part of the Bank that it has acquired rights as a subsequent mortgagee that rank ahead of satisfaction of the widow's right to recover the quantified unpaid maintenance is through the prism of the doctrine of estoppel. In the instant case, I am satisfied that as against the legal personal representative, who is the registered owner against whose interest the Bank has registered the burden, on the 6 January 2010 subsequent to the widow's burden, an estoppel arises which precludes the registered owner and the Bank from denying that the rights of the widow extend over the entire Folio in accordance with the terms of the registered burden itself and are enforceable in priority to the Bank in the sum of €428,225. The letter aforementioned embodied clear representations by and on behalf of the legal personal representative and primary beneficiary that a modified right was on offer to the widow in consideration of her electing not to take her legal right share.

173. Each case concerning a right of residence and/or maintenance and support turns to an extent on its own facts. There is a spectrum of circumstances from, at one end, a case where the holder of the right has given valuable consideration for same to instances where the beneficiary is a volunteer towards whom the settler or testator had limited or perhaps no legal or equitable obligations recognised by the law. In the instant case, the widow was not a

volunteer. She yielded up valuable rights in electing to take the benefit of the burden registered on the Folio in lieu thereof and had the benefit of the assurances in the August 2003 letter. If her rights are to be deemed to be hybrid in nature, rights for which she gave valuable consideration veer closer to the proprietary end of the spectrum where interests broadly analogous to an unpaid vendor's lien might be found rather than the opposite end represented by bare licences and mere equities.

174. To an extent, therefore, there is a significant analogy to be drawn between the facts in the instant case and those which obtained in *Kelaghan* where the court characterised the unsatisfied rights as being in the nature of an unpaid vendor's lien. Whilst, the right of residence creates passive obligations, the obligation to maintain is an active one. There is clear and uncontested evidence in the instant case that there has been non-performance and non-compliance with the obligation to maintain and support from July 2003 to date.

175. I agree with the pragmatic approach adopted by Clarke J. in *Bracken* that while s.81 explicitly refers to *"a right of residence"* and is entirely silent with regard to rights of maintenance and support, where at para. 39 he observed having due regard to the facts of that case that *"…the same result must follow in respect of the rights of maintenance and support as applied to the right of residence."* That principle applies also in the instant case in light of s69 (1) (q) of the 1964 Act. It was so intended and the language of the burden on its face appearing on the Folio is very clear and not open to doubt.

176. I am satisfied that both the registered owner and the Bank are estopped by their respective conduct from denying the right of the widow to have the monetised sum referrable to her maintenance and support lien attached to that burden in part satisfaction of her right to maintenance and support in accordance with the provisions outlined above. This is necessary because the Bank purchased with notice of the burden, and that it extended over the entire Folio.

177. As Lavan J. correctly noted in *Johnston,* in the earlier case of *Keegan* at 354, Kennedy C.J. in the Supreme Court noted: "*the general right of residence charged on a holding is capable of being valued in moneys numbered at an annual sum and of being represented by an annuity or money charge*". In the instant case that charge is quantified at €428,225. Its satisfaction must rank in equity in priority to the Bank's charge. The money's worth evaluation posited by Lavan J. in *Johnston* is already to hand and represented by the said sum.

Notice

178. The Bank is fixed with notice of the burden and that it extended to the entire Folio in priority by virtue of ss. 31(1) and 74. Therefore, the Bank was not a *bona fide* mortgagee for value without notice nor can the benefits or rights of such an entity be projected onto itself in the context of the discharge of the unsatisfied equitable rights of the widow.

Election

179. I am satisfied that the equitable doctrine of election is engaged on the facts of the instant case. Accordingly, the doctrine of approbation and reprobation operates for the following reasons:

- The context of the circumstances whereby the widow came to be registered as the owner of the burden on the Folio is relevant. She was the holder of rights enforceable for her benefit at her election guaranteed by Statute pursuant to s.111(1), 115 and s.56 of the Succession Act 1965. She elected as between her legal right pursuant to Statute and her rights under the devises and bequests arising. More importantly, she dealt with her statutory rights in a manner distinctly advantageous to the registered owner in reliance on representations contained in a letter of 22 August 2003 which stated *"It is the duty of the personal representative or the executor,…, to advise you of these rights and we writing to you on his behalf to advise you of the rights."* A representation was contained in the said letter

"These rights will be registered as a burden on the title and therefore the property ***cannot*** *with your consent be sold."*

- As a matter of law, having regard to s.31(1) of the 1964 Act, the registration of the burden in favour of the widow is conclusive as to the nature and extent of her rights as extending over the entire Folio. By virtue of the doctrine of election, the registered owner, having taken a substantial benefit by virtue of the approach adopted by the widow in taking an interest of lesser value than her legal right share, is precluded, *inter alia,* by virtue of the equitable doctrine of election and its operation by means of the doctrine of approbation and reprobation from attempting to contend that her rights and interests are to be cut down from those conclusively shown on Burden No. 4 on Part 3 of the Folio which demonstrates that her right to be suitably supported and maintained during her life extends to and encumbers the entire Folio. The letter in question was written on behalf of the executor in the due administration of the estate.
- The course of action taken by the widow enured to the executor's personal benefit. In the language of Lord Cairns L.C. in *Codrington v. Codrington* (1875) L.R. 7 H.L.854 at 861/862, the executor who benefitted from the widow's decision to take the rights registered in her favour at Entry No. 4 on Part 3 of the Folio with the ensuing advantage to him by enlarging his devise under the will *"...cannot accept the benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them."*

180. It is evident from the documentation that was before the High Court and which was submitted to this court in respect of this appeal, including the Bank's own records, that the Bank, having failed to secure postponement or subordination of the widow's burden to their own charge, subsequently endeavoured on a variety of occasions to procure that the registered

owner would prevail upon the widow to retrospectively consent to an arrangement which would confer such a priority on the Bank. There was clear testimony before the High Court on 19 October 2016 that the widow felt that the registered owner *"was putting unfair and undue pressure on her in relation to vacating the property."* (Transcript p.2, 19 October 2016, High Court, lines 19-20.) At the age of about 90, she had to invoke the protection of High Court proceedings in 2015 to restrain such pressure. In an affidavit sworn on 3 November 2015, the widow deposed *"...the defendant has sought to place unreasonable and illegitimate pressure and influence on me to forego my life interest and rights to support in maintenance in favour of the defendant and/or his creditors. I have made clear my intention to reside for the remainder of my life at ... where I have resided since 1951.*"

181. Having approbated and vested in himself the substantial benefits arising from the course of action taking by the widow, the registered owner cannot now reprobate the reciprocal obligations he assumed and the ensuing benefits vested in the widow on foot of her burden. In turn, the Bank can be in no better a position than the registered owner.

Satisfaction of the Burden for Maintenance and Support in Equity

182. In the instant case, the question arises as to what approach is to be adopted towards the Order obtained in the High Court on 19 October 2016. In my view assistance can be obtained from earlier authorities in that behalf including from the decision of Lavan J. in *Johnston v. Harris*. Rights in the nature of rights to be maintained and supported can indeed be at times difficult to quantify in terms of money. As *Wylie on Irish Land Law* at para. 22.21 observes that is so *"...especially when accompanied by vague provisions as to support her maintenance"* and he references *Bracken* in that regard. In the instant case, the court is confronted with the obligation of evaluating whether equity requires that the quantified sum referrable to unpaid maintenance - €428,225 - and support the subject matter of a hearing and Order of the High Court in 2016 ought to rank in priority to the Bank's charge. It very clearly ought to.

183. It will be recalled that Lavan J. in *Johnston v. Harris* considered that the valuation should reflect the circumstances of the particular case. He also observed that a valuation, in that case a right of residence, should not unduly force a sale of the property so as to destroy the other interests therein. "*To that extent, any valuation needs to be tempered with caution"* (see at p.600). Those words are particularly apt when considering a non-exclusive right of residence. Less so in addressing a case of unsatisfied maintenance and support.

184. An approach must be adopted that countenances the fact that the Bank ought not to gain adventitious advantage from the registered owner's default in circumstance where it created its charge with full notice of the nature and extent of the widow's burden registered 3 years and 11 months prior to its charge and was at all times fixed with notice that the said burden extended over the entire Folio and further that the burden extended to the obligation to maintenance and support which is the primary subject of this appeal.

185. Having due regard to the authorities, the widow in the instant case must be placed in no worse a position than was the widow in *Ryan v. Ryan* in 1848 where Brady L.C. on the evidence expressed the view that *"It is plain that this is an obligation such as this Court will enforce"*. As in *Johnston* the registered owner does not appear to have either the means nor the intention to make proper provision for the widow in accordance with her vested right to maintenance and support secured by the burden. As such therefore and echoing the remarks of Clarke J. in *Bracken* at para. 19, it was entirely appropriate for the High Court in October 2016 to have converted into monies worth the unsatisfied value of the said maintenance and support rights.

186. It is difficult to contemplate a more extreme case of non-compliance and/or non-performance of the obligations imposed by the burden registered in favour of the widow than the instant case. She was aged 78 at the date of death of her spouse in 2003 two decades ago. She gave valuable consideration for same. Registration of her burden implicitly suggested that same was available to satisfy the obligations in respect of maintenance and support should

default occur as it clearly did. The High Court judgment of 19 October 2016 proceeded on the basis that the sum of €428,225 represented her entitlement for the unsatisfied burden for maintenance and support to date. This represents a clear instance where regard ought to be had to the maxim that "*equity looks to the intent not the form*". The intention of the widow and of Judge O'Connor in the High Court in 2016 was very evident from the pleadings when read with the transcript and order. The registered owner of the lands and the Bank were served and on notice of the proceedings. It is to be inferred from the jurisprudence including *Johnston v. Harris* and *Bracken* that in an appropriate case *equity imputes an intention to fulfil an obligation* and in circumstances of sustained and total non-performance a court can order sale of property if needs be to satisfy an obligation to maintain registered as a burden on the Folio. Such an Order merely operates as a conversion of the vested right of the widow secured by her registered burden.

187. The Bank was fixed with notice that the property was encumbered for fulfilment of the widow's burden in Part 3 of the Folio. Its decision not to subordinate the widow's rights has material legal consequences. The part of the judgment of 19 October 2016 clearly and distinctly referrable to the right of the widow to maintenance and support was monetised or converting into a sum certain in money the unsatisfied burden for maintenance and support. That part of the Order of 19 October 2016 which is, from a perusal of the judgment, wholly and exclusively referrable to the unsatisfied right of maintenance and support, namely the sum of €428,225, ranks in priority to the Bank's charge and is annexed to the widow's registered burden which represents the unsatisfied burden converted into a sum certain in money encapsulates the right of the widow in respect of maintenance and support in satisfaction of those rights from the date of death of the deceased in July 2003 to the date of the judgment.

188. It is a matter for the widow and her next friend as to how same ought to be satisfied including whether some or all of the property be disposed of for the purposes of realisation of

the unsatisfied quantified burden. The benefit of the judgment to the extent of €428,225 enured to her and vested in her. That part of the 2016 judgment sum alone ranks in priority to the Bank's charge in the context of these proceedings.

Decision

189. It follows accordingly for all of the above reasons that the Order of 5 February 2020 in this instance falls to be set aside to the extent sought in the notice of appeal.

190. In lieu thereof the widow is entitled to a declaration that the widow's burden at entry number 4 on part 3 of the Folio specified in the statement of claim ranks in priority to the Bank's subsequently registered charge over the entire property.

191. A Declaration that in proceedings, Record Number 2015/3781P, dated 19 October 2016, the sum of €428,225, being a constituent part of the sum of €779,225 awarded thereby, which represents the unsatisfied quantum of the widow's burden for maintenance and support up to the 19 October 2016 is attached to and does form part of the burden registered in favour of the widow at Entry No. 4 on Part 3 of the Folio.

192. Further, a declaration will be made that the widow's burden in respect of her right of residence, support and maintenance pertains to and is a burden over the entirety of the lands comprised in the said Folio.

Non-Admissibility of the Will

193. Insofar as the respondent Bank contends that the decision of the High Court was supported by the terms of a Will, the Will of the deceased was not receivable in evidence and such an approach is contrary to the provisions of the Registration of Title Act, 1964, section 31(1) in particular and contrary to the clear decision of this Court giving by Baker J. in *Tanager* which represents a correct statement of the law and precludes the approach contended for by the Bank.

194. The Bank has not identified any valid basis for rectification. The Bank seeks impermissibly to reverse the legal consequence of the fact that is not, and was not, a *bona fide* mortgagee for value without notice by purporting, in effect, to rely on the doctrine of unilateral mistake rectification. No evidence was adduced to that effect before the court. Neither was there evidence adduced by the Bank that engaged the doctrine of common mistake rectification.

195. The widow's burden on its face coupled with the letter written to the widow on 22 August 2003, having regard to the representations therein contained, raised an estoppel had any party with *locus standi* attempted to go behind the clear terms of the burden registered in favour of the widow over the entire subject Folio on the 3 February 2006. The terms of the burden itself, coupled with the aforementioned letter, demonstrate that the widow was entitled to resist any application for rectification - particularly one emanating from a party without *locus standi* - who took with notice of the true nature and extent of the burden as affecting the entire Folio. The aforesaid letter demonstrates the existence of representations the substance of which deviated materially from the terms of the specific devise and bequest to the widow under the terms of the Will in question. The registered owner was estopped by his conduct as aforesaid and by the doctrine of election from purporting to seek rectification and indeed never sought rectification. The Bank lacking locus standi can be in no better a position in that regard. There is no cross appeal on the issue of rectification. The counterclaim and all other claims of the respondent fall to be struck out in all the circumstances.

196. The use of the word *"therein"* does not bear the construction as advanced on behalf of the Bank. Further, the construction advanced by the Bank in respect of the *"therein"* on the widow's burden in the Folio was flatly contradicted by both experts who gave evidence to that effect in the High Court.

197. Whilst ordinarily maintenance and support rights tend to be satisfied out of the rents and profits of the subject land, that was not done and given the proven sustained failure and the

extreme nature of same calls for an equitable remedy that gives substance to the rights of the widow in all the circumstances. The threshold in *Bracken* has been readily met by the widow in the instant case given the complete and sustained deprivation of maintenance she experienced from the date of death of her husband upwards of twenty years ago to date and the non-performance and non-compliance with her right to be suitably supported and maintained for her lifetime as registered on the Folio and in respect of which she, by forgoing her legal right share, gave valuable consideration to the benefit of the registered owner.

Costs

198. The widow, having been wholly successful, is entitled to costs in respect of the High Court and in this Court as against the Bank to include costs of meeting the counterclaim and defending same and to include all reserved costs, and costs of a stenographer. If the respondent Bank contends for an alternative order as to costs, a written submission identifying each and every ground in support of same will be provided within twenty-one days from the date of delivery of this judgment - the widow's representatives having a further twenty-one days within which to respond thereto. The submissions of either party not to exceed two thousand words.

199. Woulfe and Murray JJ. concur in this judgment.