AN CHÚIRT UACHTARACH

THE SUPREME COURT

No. 150/2023

[2025] IESC 3

Dunne J.
Charleton J.
Hogan J.
Murray J.
Collins J.

Between

CAVE PROJECTS LTD.

Plaintiff/Respondent

-and-

PETER GILHOOLEY, JOHN KELLY, JOHN MORONEY, RORY O'BRIEN AND JOSEPH O'HARA

Defendants/Appellants

JUDGMENT of Mr. Justice Gerard Hogan delivered the 28th day of January 2025

Introduction

1. Commencing in 2015, the Oireachtas has introduced a series of changes designed to ensure that firms who engage in credit servicing activities are now required to be authorised by the Central Bank. The present appeal raises the question of whether these legislative changes can have any retrospective effect to debt enforcement proceedings which commenced well before these statutory changes took effect and, in any event, whether the defendant appellant is entitled to raise this point in this appeal given that it was not directly at issue in the original High Court hearing. These issues arise in the following way.

Background facts

2. In September 2007, the Bank of Ireland ("the bank") advanced a loan facility of some €12m to a partnership of some five persons, including the appellant, Mr. Kelly. The money was advanced as a commercial property loan in order to facilitate the development of certain lands in Clare, Limerick and Galway.

3. The loan facility was called in by the bank in January 2011 and the present proceedings were duly issued in its name against the original five defendants. In October 2011 the National Asset Management Agency ("NAMA") issued an acquisition notice in respect of the loans and security under s. 90 of the National Asset Management Agency Act 2009. In January 2013 a loan asset sale deed was subsequently executed by NAMA with the plaintiff company, Cave Projects Ltd. ("Cave Projects") so that the latter company acquired the loans. It was confirmed in the course of the hearing that this is the sole loan of this kind which Cave Projects owns.

4. Shortly afterwards three of the other four defendants settled the claims against them and they further agreed to assign their interests in the secured land if demanded. Cave Projects was then substituted as the plaintiff in the existing summary summons proceedings which had originally been brought by the bank. Cave Projects then applied for summary judgment against the second and fifth defendants. In January 2015 the High Court refused to enter summary judgment and the matter was adjourned for plenary hearing. As it happens, Mr. Kelly sought to have the proceedings subsequently struck out for want of prosecution. This application was ultimately rejected by the Court of Appeal in a decision delivered on 28th October 2022: see *Cave Projects Ltd. v. Gilhooley* [2022] IECA 245.

5. The plenary hearing was heard by the High Court in November 2022. During the course of that action Cave Projects reached an agreement with the other remaining defendants. This meant that the proceedings continued *only* as against the remaining defendant, Mr. Kelly. Mr. Kelly was legally represented at that hearing. In the event O'Regan J. found for Cave Projects and judgment was entered against him in the sum of €11.4m.: see *Cave Projects Ltd. v. Gilhooley* [2022] IEHC 718.

6. Mr. Kelly duly appealed to the Court of Appeal where he represented himself. Shortly before that appeal was due to be heard, the Central Bank issued a public notice ("the Central Bank notice") on 21st September 2023, to the effect that it believed that Cave Projects was engaged in credit servicing services in the State although it held no authorisation from the Central Bank as a credit servicing firm. The notice further stated that it was a criminal offence to engage in credit servicing without the appropriate authorisation. It is important to state, of course, that the notice did not change the legal position, but simply recorded the opinion of the regulator.

7. While the Court of Appeal admitted the Central Bank notice *de bene esse*, the Court nonetheless rejected the appeal in a ruling delivered on 3rd October 2023: see *Cave Projects Ltd. v. Gilhooley* [2023] IECA 241. Dealing with this point Haughton J. said first (at para. 49) that it was not a pleaded defence and that it was not the subject of any evidence before that Court. Haughton J. then continued (at paras. 50-52):

> "50. Cave Projects take these objections and further submit that it is 'purely a regulatory matter which has no relevance to the claim in these proceedings.'
>
> 51. That may well be so, although I do not consider it necessary to make any determination on the issue. It would be surprising indeed if the effect of the legislation was Cave Projects were prohibited in law from opposing this appeal and seeking to hold the judgment granted to it in the High Court, because that would be a serious interference with its constitutional right of access to the courts. Further, it certainly cannot be said, on the evidence before the court that Cave Projects in defending this appeal in respect of the order for payment to it of €11,407,826.09 to which it is clearly contractually entitled, is engaging in the provision of financial services to members of the public.
>
> 52. That said I would content myself with saying that it is not an issue that was raised or argued in the High Court or the subject of evidence, and it was not addressed in the judgment, and it is therefore not an issue that should be considered on this appeal."

8. This Court subsequently granted leave to appeal on 24th January 2024, pursuant to Article 34.5.3º of the Constitution. The grant of leave was confined to the single overall question of the credit servicing/Central Bank notice issue and whether this had implications for the appeal itself: see [2024] IESEC DET 8.

9. As the argument before this Court has developed, it can be said that this general question can be broken down further as follows: First, is the appellant entitled to raise the Central Bank notice/credit servicing issue? Second, if so, is Cave Projects engaged in credit servicing without authorisation so far as this appeal is concerned? Third, if the answer to the first two questions is in the affirmative, what, if any, implications do this have for the present appeal?

10. At the original hearing of the appeal in July 2024 the Court considered that it would be desirable that the Central Bank should be heard on the credit servicing issue. It invited the Bank to present written submissions which it duly did. Counsel for the Bank attended the resumed oral hearing in November 2024 and briefly addressed the Court.

The relevant legislative provisions

11. Before proceeding further, it is next necessary to set out the relevant legislative provisions.

12. Part V of the Central Bank Act 1997 ("the 1997 Act") was amended by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 ("the 2015 Act"). The 2015 Act brought credit servicing firms within the regulatory remit of the Central Bank and credit servicing is now a regulated activity. The 2015 Act has since been amended by the Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Act 2018 ("the 2018 Act") and by the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 ("the 2022 Act)". The 2022 Act took effect on 16th May 2022.

13. The 1997 Act (as amended) provides that a legal person who meets the definition of a "Credit Servicing Firm" is required to obtain authorisation from the Central Bank in order to engage in the activity of credit servicing. "Credit servicing" is defined by s. 28

of the 1997 Act (as amended) for the purpose of those enactments in relation to a credit agreement as:

"(i) holding the legal title to the rights of the creditor under the agreement,

(ii) managing or administering the agreement, including—

notifying the relevant borrower of changes in interest rates or in payments due under the agreement or other matters of which the agreement requires the relevant borrower to be notified,

taking anv necessarv steps (or the purposes of collecting or recovering payments due under the agreement from the relevant borrower, or managing or administering any of the following:

(A) repayments under the agreement;

(B) any charges imposed on the relevant borrower under the agreement;

(C) any errors made in relation to the agreement;

(D) any complaints made by the relevant borrower;

(E) information or records relating to the relevant borrower in respect of the agreement;

(F) the process by which a relevant borrower 's financial difficulties are addressed;

(G) any alternative arrangements for repayment or other restructuring;

(H) assessment of the relevant borrower's financial circumstances and ability to repay under the agreement;

(I) determination of the overall strategy for the management and administration of a portfolio of such agreements,.

(J) maintenance of control over key decisions relating to such a portfolio,

(iii) communicating with the relevant borrower in respect of any of the matters referred to in subparagraph (ii)." (emphasis added).

14. A “credit agreement” is defined in s. 28 of the 1997 Act as “an agreement whereby a creditor grants, or promises to grant, credit to a relevant borrower.” A “credit servicing firm” is defined in the 1997 Act as:

“(a) a person (other than the National Asset Management Agency or a NAMA group entity (within the meaning of National Asset Management Agencv Act 2009) who undertakes credit servicing other than on behalf of an owner of credit,

(b) a regulated financial service provider taken to be authorised to carry on the business of a credit servicing firm by virtue of subsection (3),

(c) a credit servicing firm taken to be authorised to carry on the business of a credit servicing firm by virtue of subsection (4), or

(d) a credit servicing firm referred to in paragraph (b) of section 34FA(l) that undertakes, on behalf of a person referred to in the said section 34FA, credit servicing within the meaning of subparagraphs (i), (ii) and (iii)(l) to

(VIll) of paragraph (b) and paragraph (c) of the definition of 'credit servicing' in section 28(1).”

15. This definition is further supplemented by s.28(2) which provides,

“... For the purposes of this Part—

(a) a person who holds the legal title to the rights of the creditor under a credit agreement (in this paragraph referred to as "the holder") is taken to be credit servicing even if any action referred to in subparagraph (ii) or (iii), as the case may be, of paragraph (a) of the definition of 'credit servicing" in subsection

(1) is being undertaken by a person, acting on behalf of the holder, authorised to carry on the business of a credit servicing firm, and

(b) a person who holds the legal title to the rights of the owner under a consumer hire agreement or a hire-purchase agreement (in this paragraph referred to as "the holder") is taken to be credit servicing even if any action referred to in subparagraph (ii) or (iii), as the case may be, of paragraph (b) of [he definition of "credit servicing" in subsection (l) is being undertaken by a person, acting on behalf of the holder, authorised to carry on the business of a credit servicing firm.”

13. The operation of as a credit servicing business without an authorisation is, in fact, a criminal offence. Section 29 of the 1997 Act provides:

“(1) A person shall not carry on a regulated business unless the person is the holder of an authorisation.

(2) A person who contravenes subsection (l) commits an offence and—

(a) If tried summarily, is liable on conviction to a fine not exceeding €2, 000 or

(b) if tried on indictment, is liable on conviction to a fine not exceeding €100, 000.

(3) A person who, after being convicted of an offence under subsection (2), continues to contravene subsection (1) commits a further offence on each day or part of a day during which the contravention continues and—

a. if tried summarily, is liable on conviction to a fine not exceeding €200 for each such day or part of a day, or

b. if tried on indictment, is liable on conviction to a fine not exceeding €7, 500 for each such day or part of a day."

14. Section 36J of the 1997 Act (as amended) also provides that an application for an injunction may be brought by a person whose interests would be affected by a contravention of Part V:

"36J.—(l) If a person has engaged, is engaging or is about to engage in conduct that involved, involves or would involve—

(a) contravening a provision of this Part, or

(b) attempting to contravene such a provision, *or*

(c) aiding, abetting, counselling or procuring a person to contravene such a provision, or

(d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision, or

(e) being in any way, directly or indirectly, knowingly concerned in, or a party to, the contravention by a person of such a provision, or

(f) conspiring with others to contravene such a provision,

the Court may make an order restraining the person from engaging in the conduct. The Court may include in the order a requirement that the person do a specified act."

Whether the Court should address the Central Bank notice issue

15. The appellant, Mr. Kelly, contends that the Court of Appeal erred in not admitting this issue relating to the Central Bank notice regarding the credit servicing issue as a ground of appeal. He stressed that the underlying facts are not in dispute and that what rather has happened is a new, supervening fact of decisive importance, namely, the publication of the Central Bank notice after the hearing in the High Court. While accepting that the general test as articulated by this Court in *Lough Swilly Shellfish Growers Co-Op Society Ltd. v. Bradley* [2013] IESC 16, [2013] 1 IR 227 is that the admission of entirely

new arguments on appeal is discouraged and is generally precluded, Mr. Kelly points to the fact that there is, as acknowledged by O'Donnell J. in *Lough Swilly,* a spectrum of cases. There may be instances – of which Mr. Kelly says this is one – where the risk of prejudice to the opposing party is slight and, where, in the words of Clarke J. in *Ambrose v. Shevlin* [2015] IESC 10, the "strength of the argument which concerns encouraging people to put their whole case before the court may be reduced."

16. Mr. Kelly also points to the underlying public policy considerations relating to what he says is now inherently unlawful activity, such that any prejudice suffered in the context of the litigation should weigh lightly in these circumstances and that technical or procedural arguments should not prevent this Court from considering the consequences of such activity.

17. For its part Cave Projects objects to this Court hearing arguments on this issue. It contends that the case now made by the appellant lies at the wrong end of the spectrum identified by O'Donnell J. in *Lough Swilly.* It says that the credit servicing issue was never pleaded and that no relevant evidence was ever called in the High Court. Nor has any formal application been made to amend the pleadings or to adduce new evidence on appeal. While accepting that Mr. Kelly is the sole remaining creditor of Cave Projects, it contends that he is not a "consumer" for the purposes of these loans and that the authorisation issue would have no bearing whatever on the existing proceedings. The question of whether Cave Projects is in fact engaged in credit servicing such that Central Bank authorisation was required could only be determined in proceedings as between the Central Bank and Cave Projects, such as where the Central Bank sought a statutory injunction pursuant to s. 36J where it sought to prohibit the company from engaging in credit servicing activities.

Whether Cave Projects is engaged in unlawful activity

18. Mr. Kelly maintains that the effect of the 2015 Act (and the subsequent legislative changes) is to render the enforcement of the contract substantively illegal in the absence of Central Bank credit servicing authorisation in favour of Cave Projects. There is no saver in the Act for existing loans.

19. Quoting Breslin and Corcoran, *Banking Law* (4th edition) (at 271-272), he contends that the effect of the 2015 Act is that "only authorised credit servicing firms can acquire title to loans and that such entities are then required to observe the [consumer and SME] codes in the performance of their functions." He contends that the Court must give effect to the public policy considerations inherent in the 2015 Act, saying that Cave Projects never had a legal right to acquire the debt in the first place and that each action taken on foot of the agreement was also illegal.

20. Cave Projects does not accept that it is carrying on the business of credit servicing. It contends that even if it was so engaged in such activity, this does not vitiate its judgment or its entitlement to sue in respect of it. It says that if it were correct that it was engaged in such activity, such conduct only became illegal on 21 April 2019 by reason of the legislative amendments long after these proceedings had been commenced.

21. It further states that there are no public policy reasons which require that Cave Projects's loan should thereby become unenforceable, even if it was engaged in credit servicing without authorisation. It draws attention to the fact that the original loan was for commercial property investment purposes. If the object of the 2015 Act was to ensure that non-banking institutions afforded the same degree of consumer protection to consumers and SMEs, there is no evidence that Mr. Kelly was a person entitled to the protection of particular Central Bank Codes of Conduct, or that he has suffered from some non-compliance with those codes.

22. In the light of this Cave Projects contends that the Court of Appeal judgment should be affirmed.

Whether Mr. Kelly is entitled to raise the credit servicing issue in this Court

23. The first question which falls to be addressed is whether Mr. Kelly is now entitled to raise this issue of credit servicing in the appeal before this Court. It is clear that this was not a defence which was pleaded or raised directly even after the 1997 Act was amended following the commencement of the 2015 Act. It is true that Mr. Kelly sought to raise this question at the hearing before O'Regan J. in the High Court in November 2022 but the transcript of that hearing reveals that this was done in a rather desultory fashion. Certainly, this issue was not put directly in the examination and cross-examination of the witnesses. When the judge immediately responded to a rather half-hearted endeavour to raise this point by saying that such matters cannot "suddenly be just brought up at a whim", counsel for Mr. Kelly appeared to accept this. At all events, the matter was not pressed on behalf of the defendant.

24. Admittedly, the actual notice from the Central Bank was published only in September 2023, i.e., just a few weeks before the actual hearing of the appeal before the Court of Appeal in October 2023. Yet this has been an issue of which Mr. Kelly has been aware for quite some time. This is a factor which must weigh heavily against any claim by him that he is entitled to raise this argument at this stage.

25. It is true that this Court has long abandoned the rather absolutist position articulated by Henchy J. in *Movie News Ltd. v. Galway County Council*, Supreme Court, 25th July 1977 where he stated that, save for exceptional reasons, the Court should not enter "on the trial of a matter as of first instance and thereby deprive the party aggrieved with its decision of the constitutional right of appeal which he would have had if that matter had been decided in the High Court." It is clear from the judgment of O'Donnell J. in

Lough Swilly ([2013] 1 IR 227 at 244-245) that a more flexible approach is now favoured and that there is a spectrum of cases ranging from cases "where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given" on the one hand to those other category of cases at the other end of the spectrum "where a new legal argument was sought to be advanced which was closely related to argument already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced."

26. It is also clear from the subsequent case-law that this Court is more willing to entertain new arguments on appeal in summary judgment cases where a defendant might otherwise be deprived of a full hearing on the merits: see *Moylist Construction Ltd. v. Delaney* [2016] IESC 283, [2016] 2 IR 283 at 293-294, per Clarke J. Yet where (as here) the application to admit a new argument follows a full plenary hearing in the High Court an appellate court will be most reluctant to do so and will generally only do in exceptional cases: see *Allied Irish Banks PLC v. Ennis* [2021] IESC 21, [2021] 3 IR 733 at 742-743, per MacMenamin J.

27. While present practice regarding the admission of entirely new arguments on appeal may be somewhat more flexible than it was in the past, the fact remains therefore that the reception of such entirely new arguments on appeal remains very much the exception. It is still true to say, as Finlay C.J. did in *KD (orse. C) v. MC* [1985] IR 697, 701, that it was:

> "…a fundamental principle, arising from the exclusively appellate jurisdiction of the Court in cases such as this that, save in the most exceptional circumstances, the Court should not hear and determine an issue which has not been tried and decided in the High Court. To that fundamental rule or principle

there may be exceptions, but they must be clearly required in the interests of justice."

28. To this one might add the comments of Clarke C.J. in *Ambrose v. Shevlin* where he said (at paras. 12 and 13):

> "It must be strongly emphasised that a trial in the High Court is not a dress rehearsal. It is at the trial that the rights, obligations and liabilities of parties are to be definitively determined., There may be cases where, as O'Donnell J. pointed out in *Lough Swilly*, it may strictly speaking be the case that a particular point was not raised in the High Court, but where the relevant point does not involve any different facts to those which were relevant to the issues which were raised, and where the point may be regarded as a refinement of, or analogous to, one made at trial. In such cases, the justice of the case may require that a party should be allowed to adjust their case on appeal....
>
> However, on the other side of the equation, there are very real dangers in adopting a practice which is generous in permitting new grounds to be raised. First, there is the overall desirability that parties be required to make their full case at trial. An overly generous approach to permitting new grounds to be raised for the first time on appeal can only encourage either sloppiness or imprecision in the way in which cases are run, or, indeed, attempts to take tactical advantage by only bringing forward a part of a claimant's true case in the knowledge that there will be a good chance that, if it does not work at trial, a different tack can be adopted on appeal...."

29. The present case plainly lies towards the non-admission end of the *Lough Swilly* spectrum. There is no question but that any determination of the question of whether Cave Products were in fact engaged in credit servicing within the meaning of s. 28 of

the 1997 Act would have to have been determined by oral evidence. It would have been necessary for the High Court to have heard oral evidence in order to determine whether Cave Products had, for example, taken any necessary steps to collect or recover payments due under the agreement from the relevant borrower or to manage or administer matters such as repayments, charges, complaints or information or records in relation to the borrower. Nor is this case one which comes within the category of cases mentioned by way of example by Clarke C.J. in *Ambrose* which essentially involve either a modest refinement or variation of an argument already advanced in the High Court.

30. Barring exceptional circumstances, this would suggest that Mr. Kelly should not now be allowed to raise the issue of credit servicing for the purposes of the appeal. I now turn to consider the question of whether there are any exceptional circumstances present in this case.

Whether there are any exceptional circumstances in the present case

31. I do not see that there are exceptional circumstances which might merit a departure in the present case from this general practice and approach in the manner contemplated by Finlay CJ in *KD* and by MacMenamin J. in *Ennis.*

32. It is true that, as counsel for Mr. Kelly argued, there are cases where a defence of illegality need not be pleaded and that it is sufficient for this purpose that the illegality is simply brought to the Court's attention. But it is clear from the authorities that this jurisdiction is itself exceptional, so that a court will refuse to give effect to a contract which is *ex facie* illegal on its face. As Scrutton L.J. famously observed in *Re Mahmoud and Ispahani* [1921] 2 KB 716 at 729:

> "In my view, the court is bound once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge

> comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The court does not sit to enforce illegal contracts. There is no question of estoppel: it is for the protection of the public that the court refuses to enforce such a contract."

33. Even where the contract is not *ex facie* illegal but "there is before the court persuasive and comprehensive evidence of illegality, the court may refuse to enforce it even if illegality has not been pleaded or alleged": see *Birkett v. Acord Business Machines Ltd.* [1999] 2 All ER (Comm) 429 at 433, per Colman J. For my part, however, I do not think that this strict test is satisfied in the present case. There are, I think, a number of inter-related reasons for this conclusion. First, even if Part V of the 1997 Act (as amended) applied to the present case, it is not clear that Cave Projects are indeed engaged in illegal conduct. Second, in any event, I think that it is doubtful that the Part V of the 1997 Act (as amended) does in fact apply to the present proceedings. I now propose to give my reasons in this respect in a little more detail.

Is there persuasive and comprehensive evidence of illegality on the part of Cave Projects?

34. In my view, it is unclear whether Part V of the 1997 Act (as amended) applies to the activities of Cave Projects so far as the prosecution of the present litigation is concerned. It is unclear whether the definition of credit servicing extends to the prosecution of actions for the recovery of debt, still less that it applies to proceedings of this nature which were pending at the time of the commencement of these legislative changes. Nor is it clear that the ongoing prosecution of a single set of proceedings in which the creditor and the putative creditor service provider are the same could constitute "the business of a credit service firm" for this purpose. Finally, it is far from

clear that even if Cave Projects is non-compliant and in breach of the requirements of the 1997 Act that this *in itself* could justify the termination of the present proceedings.

35. Of course, none of these issues have been the subject of any consideration by either the High Court or the Court of Appeal. I do not think that this Court – bereft of possibly key evidence on these issues which might otherwise have been tendered in the High Court – could or should seek to resolve them. It is perhaps sufficient to say that as matters stand this Court cannot be satisfied that the elevated test of persuasive and comprehensive illegality posited by Colman J. in *Birkett* has been satisfied here.

Whether Part V of the 1997 Act (as amended) applies to the present proceedings

36. So far as the merits of this appeal are concerned, it cannot be said with any confidence that s. 28 of the 1997 Act (as amended) does not in fact apply to the present case. Consider the relevant facts. Cave Products acquired the loan in January 2013 and thereafter applied to be substituted as the plaintiff. By that stage – 2013 – Cave Products had lawfully acquired the rights of the original creditor and, moreover, had taken over the pending bank proceedings whereby as substituted plaintiff it sought to recover a significant sum which was later adjudged by the High Court to be outstanding.

37. If Mr. Kelly's argument were correct, it would mean in effect that the present debt-recovery action would have to be stopped in its tracks by virtue by the subsequent amendments to the 1997 Act which took effect in 2015, 2018 and 2022 respectively. It is clear from the established case-law that clear and express statutory language would be required to effect a potentially far-reaching retrospective change of the substantive law for this purpose. Any number of authorities could be cited for this purpose, but it is perhaps sufficient to refer to the judgment of this Court J. in *Sweetman v. Shell E & P Ireland Ltd.* [2016] IESC 58, [2016] 1 IR 742.

38. Here the question was whether the special protective costs rule applicable to environmental proceedings which was introduced by s. 3 of the Environment (Miscellaneous Provisions) Act 2011 could apply to proceedings which had in fact commenced in 2005. In his judgment Charleton J. stressed that this was not simply a procedural change, but it rather affected the substantive law as to costs in which respect of which the parties had vested rights. In these circumstances there was a presumption that the legislation did not apply retrospectively.

39. As Charleton J. explained, this principle of statutory interpretation was grounded on general principles of legal certainty and basic fairness. If the 2011 Act had applied so as to change the costs rules with retrospective effect, this would have been unfair since it "would overturn expectations and litigation planning as to the costs expected rationally by any litigant commencing or facing such an action": see [2016] 1 IR 742 at 758. He saw nothing ([2016] 1 IR 742 at 758-759) in the 2011 Act to suggest that it had a retrospective application: "There is nothing to suggest that the Oireachtas intended to alter the rule as to costs for litigation that had already commenced…There is nothing to suggest that the legislature intended any such result.." Charleton J. added that if such had been intended that "parliamentary draftsmen are well aware that there is an obligation to make any such position clear and explicit. In any event, any such change would be unfair."

40. Much the same can be said in respect of the present case. If the Oireachtas had intended that these important legislative changes could apply with retrospective effect to litigation which had been commenced well in advance of these changes, one would expect that this would have been stated with pellucid clarity. All of this strongly suggests that there is nothing in the 2015 Act (as amended) which could be taken to manifest an intention that it should apply retrospectively.

41. Quite apart from the application of ordinary principles of statutory interpretation, it is in any clear from leading decisions of this Court in cases such as *Hamilton v. Hamilton* [1982] IR 466 and *Delaney v. Personal Injuries Assessment Board* [2024] IESC 10 that there are at least some constitutional limits as to the extent to which the Oireachtas can legislate with retrospective effect in a manner which adversely affects pending litigation where (as here) the claim affecting existing property rights. In *Hamilton*, for example, the High Court had granted specific performance of a contract of sale of a family home in which the husband owner alone was the vendor. It was then claimed by the vendor's spouse that the contract was rendered void by the subsequent enactment of the Family Home Protection Act 1976 which meant that the consent of both spouses to the sale was required.

42. A majority of this Court rejected the argument that the 1976 Act did have – or could constitutionally have had – this effect. As Henchy J. put it ([1982] IR 466 at 482):

> "…if the Act of 1976 was to extinguish or stultify [the purchaser's] constitutional right to pursue his pending claim for specific performance (a claim which the High Court, after a plenary hearing has formally declared to be good in law), the Act of 1976 would be unconstitutional to that extent."

43. In his judgment O'Higgins C.J. observed ([1982] IR 466 at 474) that "retrospective legislation, since it necessarily affects vested rights, has always been regarded as being prima facie unjust". The Chief Justice added that if the 1976 Act had the effect contended for, it would ([1982] IR 466 at 477) "constitute an unjust attack upon and a failure by the State to vindicate the property rights of [the purchaser] …and would constitute a clear infringement of the provisions of Article 40.3.2º of the Constitution." The other members of the majority, Griffin and Hederman JJ., both delivered short concurring judgments in which they stressed that their conclusion that the 1976 Act did

not have retrospective effects was not simply based on the fact that the purchaser had already obtained an order for specific performance.

44. It is equally clear that Cave Project's right to sue to recover for sums said to be due following the credit sale agreement is itself a chose in action and a species of property rights for the purposes of Article 40.3.2º: see *Re Article 26 and Health (Amendment)(No.2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105 at 196, per Murray C.J. The claims which were at issue following the reference of the Health (Amendment)(No.2) Bill 2004 under Article 26 of the Constitution were restitution-style claims in the nature of actions for debt in order to recover payments made in respect of unlawfully imposed nursing home charges. The 2004 Bill had sought to validate these charges and to extinguish potential claimants' cause of action. Even though clause 1(6) of the Bill had contained a saver in respect of pending actions, the Bill was held to be unconstitutional, precisely because it violated the property right of potential claimants since it would have extinguished these claims without compensation. As Murray C.J. stated ([2005] 1 IR 105 at 206 that:

> "Where a statutory measure abrogates a property right, as this Bill does, and the State seeks to justify it by reference to the interests of the common good or those of general public policy involving matters of finance alone, such a measure, if capable of justification, could only be justified as an objective measure for the purpose of avoiding an extreme financial crisis or a fundamental disequilibrium in public finances."

45. Section 28 was enacted as an item of regulatory legislation which was designed to protect the interests of consumers, specifically those whose loans had been sold on by licensed banks to third parties in the aftermath of the financial crash of 2008-2009. This legislation was, however, not in any sense enacted for the purposes of avoiding an

extreme financial crisis or a fundamental disequilibrium in the public finances. While I accept that unlike the measures at issues in the *Health (Amendment) Bill*, s. 28 does not necessarily entirely abrogate the plaintiff's property rights, if the construction of that provision thus contended for by Mr. Kelly were held to be correct it may have the effect that Cave Projects' entitlement to pursue its cause of action would be significantly compromised with retrospective effect. It is true that Cave Projects could of course apply to the Central Bank for authorisation in the event that the legislation were held to be apply with retrospective effect, but the question might be asked as to what then would happen to the litigation in the event that authorisation were to be refused. Is to be said that Cave Project could no longer sue to recover moneys which it contends are owing? The relevance of the fact that on this interpretation Cave Projects would have had the entitlement to seek authorisation from the Central Bank means that for the purposes of a constitutional analysis much might depend on a variety of factors such as the cost of obtaining authorisation and the likelihood of obtaining such authorisation were it be sought. Having regard to the range of evidence before it this Court is obviously not in a position to express a view on these matters.

46. While it is therefore both impossible and unnecessary in these circumstances to express a final view on this question, it is perhaps sufficient to say that in view of the reasoning of this Court in cases such as *Hamilton* and the *Health (Amendment)(No.2) Bill* such an interpretation of s. 28 would raise significant issues having regard to the provisions of Article 40.3.2º of the Constitution. Indeed, one might add that such an interpretation of s. 28 would also raise important issues having regard to Article 34.1 insofar as the continuation of the existing proceedings was subsequently made conditional by retrospective legislative changes on the grant of authorisation by a third-party State

body such as the Central Bank: see, e.g., *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345.

47. All of this means that the *Birkett* test of persuasive and comprehensive evidence of illegality has not been met by Mr. Kelly in the present case. The common law presumption against retrospective effect strongly leans against these legislative changes applying retrospectively to the existing proceedings.

48. If Part V of the 1997 Act did not apply to the present case, then, of course, there was nothing at all illegal about the conduct of Cave Projects, even though it did not have the credit authorisation. This is true whether one approaches the matter by reference to standard principles of statutory interpretation or for that matter - to the extent that this was considered necessary - by reference to constitutional principles illustrated by cases such as *Hamilton* or the *Health (Amendment)(No.2) Bill 2004.*

Conclusions

49. In summary, therefore, I consider that the present appeal should be dismissed and the decision of the Court of Appeal rejecting Mr. Kelly's entitlement to raise the credit servicing issue affirmed. I take this view because Mr. Kelly failed to raise the credit servicing argument in a timely or effective fashion before the High Court. Given that the resolution of this issue would have required the admission of oral evidence and legal submissions in the High Court, this was an issue which came towards that end of the *Lough Swilly* spectrum which suggests that such new arguments should not be admitted on appeal.

50. It would require exceptional circumstances before any such new argument of illegality could be admitted given that it had never been pleaded or raised in the High Court following a full hearing. As I have already explained, I do not think that there are such circumstances. As the conduct of Cave Projects is not *ex facie* illegal, if Mr. Kelly

wished this Court to act at this stage on the alleged illegality it would be necessary for him to demonstrate the existence of persuasive and comprehensive evidence of such illegality.

51. As I have just noted, it cannot be said with any confidence that the legislative amendments to the 1997 Act applied to litigation which was then pending at the time of these legislative changes. Of course, if the 1997 Act (as amended) did not apply to the pending litigation, the arguments based on illegality simply fall away. This is perhaps just another way of saying that Mr. Kelly has not satisfied the burden of demonstrating the existence of persuasive and comprehensive evidence of illegality such as might otherwise have entitled this Court, exceptionally, to act on the basis of an unpleaded illegality which had not been raised or addressed in the High Court.

52. It is for these reasons that I would dismiss this appeal.