

THE HIGH COURT

[2017/9380 P]

BETWEEN

**EITHNE RYAN (A PERSON OF UNSOUND MIND NOT SO FOUND SUING
BY HER NEXT FRIEND GERARD REIDY)**

PLAINTIFF

AND

THE GOVERNOR OF BANK OF IRELAND

DEFENDANT

AND BETWEEN

THE GOVERNOR OF BANK OF IRELAND

COUNTERCLAIMANT

AND

EITHNE RYAN AND BRYAN RYAN

DEFENDANTS TO THE COUNTERCLAIM

JUDGMENT of Ms. Justice Pilkington delivered on the 17th Day of January , 2020

1. This judgment concerns issues surrounding a right of residence, maintenance and support vesting in this plaintiff, over lands within folio CE6759 in the county of Clare.
2. The salient background facts and circumstances are as follows: -
 - (a) Laurence Ryan died testate on the 29th July, 2003 leaving him surviving his spouse, Eithne Ryan (the plaintiff) and their only son, Bryan Ryan (the second named defendant to the counterclaim).
 - (b) A grant of probate issued to his estate on the 22nd day of November, 2004 to Bryan Ryan. The net value of the estate is stated to be €2,843,353.69.
 - (c) Pursuant to the terms of the last will and testament of Laurence Ryan dated 8th January, 2003 after the standard revocation clause, he appointed his son Bryan Ryan as sole executor with the usual direction as to the payment of costs.
Thereafter;

“I give, devise and bequeath my dwelling house at Bunker Hill, Cratloe, Co. 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.

I give, devise and bequeath the farm known as Bunker Hill Stud consisting of 135 acres together with all plant, machinery, livestock and bloodstock thereon to my son Bryan Ryan for his own use and benefit absolutely.

I give, devise and bequeath the sum of €20,000 to my wife Eithne Ryan for her own use and benefit absolutely. I direct that this €20,000 to be comprised of such savings, investments and personal property as may be chosen by the said Eithne Ryan at her own discretion.

I appoint the said Bryan Ryan to be my sole residuary legatee and devisee of this my will".

3. With regard to the plaintiff's right of election pursuant to s. 111 of the Succession Act, 1965, from the letter dated 22nd August, 2003 by Twomey Scott & Co. to the plaintiff, it is clear from its terms that her entitlement was explained to her (including the implications of s. 56 of the 1965 Act, particularly as it relates to farmland) and that she had declined to elect to take her legal right share, in favour of her benefit pursuant to the terms of the will.
4. The dwelling house and lands referred to as Bunker Hill are together comprised in folio CE6759. The land registry entry confirms two registrations on 3rd February 2006; the registration of Bryan Ryan as full owner and the registration on the same date of the following burden:

"The right of Eithne Ryan to reside in the dwelling house and be suitably supported and maintained therein during her life".
5. Unfortunately, the Deed of Assent which would have been executed by Bryan Ryan leading to the registration of his interest and the burden in favour the plaintiff cannot be located.
6. The next registered burden is dated 6th January, 2010 and is a charge for present and future advances repayable with interest in favour of the defendant and counterclaimant, Governor and Company of the Bank of Ireland ('the Bank').

The Indenture underpinning this registration is dated 15th September 2006 and executed by Bryan Ryan and his spouse Annette Ryan of the one part and Bank of the other – the Deed states that Bryan and Annette Ryan are the persons entitled to be registered as owner of the lands described in the Schedule which is described as;

'All that and those the property comprised in folio 6759 County Clare save and except the property comprised in the map annexed hereto comprising 1.733 acres or thereabouts statute measure'

Folio 6759 makes no reference to any interest of Annette Ryan.

The 2015 proceedings – 2015/3781P

7. On the 14th May, 2015, Eithne Ryan issued proceedings bearing Record No. 2015/3781P between Eithne Ryan, plaintiff and Bryan Ryan, defendant ('the 2015 proceedings'). Within the plenary summons dated 14th May, 2015 and the statement of claim of the 17th July 2015, the reliefs sought against the defendant to those proceedings are as follows: -
 - "(a) An order restraining the defendant from pressurising or influencing the plaintiff to give up or rescind her right of residence for the remainder of her life at the dwelling

house known as Bunker Hill, Cratloe, Co. Clare comprised in folio 6759 county of Clare;

- (b) An order requiring the defendant to support and maintain the plaintiff for the rest of her life in accordance with the obligation upon him contained in the will of Laurence Ryan;
 - (c) An order requiring the defendant to carry out all necessary works or repairs and maintenance on the plaintiff's residence in accordance with the obligation upon him contained in the will of Laurence Ryan;
 - (d) A declaration for all necessary accounts and enquiries to determine the monetary value of the plaintiff's right of residence and support;
 - (e) Damages, interest pursuant to statute, further or other order; and costs."
8. Within the papers, there is a letter addressed to the solicitors for Eithne Ryan, from Maloney & Associates the solicitors for Bryan Ryan, dated 18th September, 2015. The letter appears to be in response to the service of Eithne Ryan's statement of claim and in part the letter states: -

"Our client is in no position to retain solicitors and/or counsel to defend your client's claim as he simply has no funds and at any rate we cannot identify any substantive grounds for a defence. Our client does not wish to drag a family dispute involving his mother before the courts especially where he has no obvious grounds to defend same.

Should your client wish to proceed, that is her right. Our client is in no position to defend matters. We are accordingly not entering an appearance.

You can proceed as you deem fit".

9. By notice of motion dated 16th November, 2015, the reliefs essentially identical to those sought within the proceedings, are sought by way of interlocutory relief.
10. By Order of Gilligan J. on 7th December, 2015, the court ordered: -
- "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".
11. Thereafter, the matter was heard before O'Connor J. on 19th October, 2016 and a transcript of that hearing has been furnished. There was no appearance on behalf of the defendant.

12. Within the 2015 proceedings, two persons (both expert witnesses) gave evidence. A chartered accountant calculated and valued the rights of residence and support from the death of her spouse Laurence Ryan, to the date of the hearing. The transcript discloses that the figure was extrapolated from the drawings of the Deceased from his farm and business prior to his death, and then calculated to the date of hearing arriving at a final figure (including 3% compound interest) of €428,225. A chartered engineer gave evidence as to cost of roof repair and appropriate renovations. The figure for works and repairs needed to the property was assessed at €281,000 and in addition €60,000 specifically in respect of repairs to the roof. Those figures together totalling an amount of €779,225. The court then gave judgment for that sum as is reflected in the Order of O'Connor J. dated 19th October 2016 ('the 2016 judgment sum').
13. The court went to great lengths to acknowledge Eithne Ryan, who whilst in court did not give evidence, then a lady of 90 years of age, as an impressive lady and well able to keep up with her activities at that time.
14. What is noteworthy in assessing the legal implications of any right of residence and/or maintenance and support is that this plaintiff Eithne Ryan has lived within the property, in respect of which she has an absolute right of residence, since 1951. She has made it perfectly clear, within the 2015 proceedings and the present case, that she has no intention of moving and wishes to reside there for the rest of her life. That of course is her absolute entitlement and no party to this action disputes this.
15. It does not appear that any steps have been taken subsequently to enforce the 2016 judgment sum and nor (regrettably) has Bryan Ryan seen fit to furnish any of the monies owed to his mother on foot of that judgment (or otherwise).
16. At the outset of these proceedings, an application by motion grounded upon affidavit (exhibiting medical evidence), was made for the first time that the plaintiff proceed as a person of unsound mind not so found suing through a next friend. Initially, the person to be appointed (strongly opposed by the defendant who had filed a substantial replying affidavit) was Mrs. Annette Ryan, daughter-in-law of Eithne Ryan and wife of Bryan Ryan. The conflict of interest in the suggested appointment of Mrs Annette Ryan was, in my view, immediately apparent and indeed was conceded as such by counsel for the plaintiff. Thereafter, (after another nomination with which there was a potential difficulty), Mr. Gerard Reidy, solicitor was, with the consent of all parties, nominated as the plaintiff's next friend. Counsel for the defendant also sought an Order pursuant to RSC O15 Rule 17 that, in respect of her being a defendant to the counterclaim that Mr. Reidy would be appointed as her *guardian ad litem* for that purpose. In my view it is appropriate to make both Orders sought in such circumstances.
17. The present proceedings (2017/9380P) issued on the 14th day of October, 2017, an appearance entered on 25th October, 2017 and a statement of claim served on the 17th January, 2018. The reliefs sought by the plaintiff are as follows:-

- “(a) A declaration that the plaintiff’s registered right of residence, support and maintenance for the duration of her life granted to her by the late Laurence Ryan by will dated 8th January, 2003 ranks at a first charge in priority to the defendant’s charge over the lands comprised in folio CE6759, county of Clare;
- (b) A declaration that the judgment in the sum of €779,225.10 obtained by the plaintiff against Bryan Ryan in proceedings bearing Record No. 2015/3781P ranks as a first charge in priority to the defendant’s charge over the lands comprised in folio CE6759, county of Clare;
- (c) A declaration that the plaintiff’s registered right of residence, support and maintenance for the duration of her life granted to her by the late Laurence Ryan by will dated 8th January, 2003 is a burden over the entirety of the lands and property comprised in folio CE6759, county of Clare”.
- (d) A further relief not proceeded with at the hearing was;

“Further and/or insofar as the same may be required, an order for the taking of an account as to the future value of the plaintiff’s registered right of residence, support and maintenance for the duration of her life granted to her by the said Laurence Ryan by will dated 8th January, 2003.”

Whilst I note that that matter was not argued before the court, nevertheless the relief at (d) above is suggestive that the 2016 judgment sum adjudicated by O’Connor J. within the 2015 proceedings might be revisited at some future point (for the purpose of seeking additional monies into the future post the 2016 judgment sum) and I deal with this point below.

18. From the PRA folio itself, the first relief sought above is self-evident and is not a matter requiring declaratory reliefs, the issue is the nature and extent of that interest as highlighted within paragraphs 17 (b) and (c) above.

19. The defence and counterclaim was delivered on the 22nd day of March, 2018. At paragraph 2(d), it is pleaded: -

“The defendant will contend that under the will the plaintiff’s entitlement to “... a right of residence, support and maintenance” was confined to the dwelling house at Bunker Hill, Cratloe, Co. Clare as referred to above and did not extend to “... the farm known as Bunker Hill Stud consisting of 135 acres...” as devised and bequeathed to Bryan Ryan”.

20. In the alternative, it is pleaded that should the plaintiff’s right of residence, or any burden pertaining to it, have priority over the Bank’s charge, then such priority is confined solely to the dwelling house.

21. The defendant’s counterclaim as follows: -

- (a) A declaration that on a proper construction of the will of the late Laurence Ryan dated 8th January, 2003, the plaintiff's right of residence, support and maintenance for life is provided for in the said will, pertains to and binds only that part of the lands comprised in folio CE6759 consisting of the dwelling house at Bunker Hill, Cratloe, Co. Clare.
- (b) A declaration that the burden registered at number 4 in part 3 of folio CE6759 in respect of the plaintiff's right of residence, support and maintenance for life pertains to and binds only that part of the lands comprised in folio CE6759 consisting of the dwelling house at Bunker Hill, Cratloe, Co. Clare.
- (c) If necessary, an order pursuant to s. 31 and/or s. 32 of the Registration of Title Act, 1964 (as amended) rectifying the register so as to limit the burden registered at number 4 in part 3 of folio CE6759 to that part of the lands comprised in folio CE6759 consisting of the dwelling house at Bunker Hill, Cratloe, Co. Clare only.
- (d) A declaration that the burden registered at number 4 in part 3 of folio CE6759 in respect of the plaintiff's right of residence, support and maintenance for life and/or any charge pertaining thereto does not take priority over the burden registered at number 5 in part 3 of folio CE6759 in respect of the defendant's charge.

22. In my view, the plaintiff's claim can be distilled as follows: -

- (a) The plaintiff claims she has a right of residence, maintenance and support over the entirety of folio CE6759, 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.

23. The defendant's claim is 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) That the 2016 judgment sum of O'Connor J. is an amount sounding in damages only. As such, it can be dealt with by the plaintiff in the normal manner, by the registration of a judgment mortgage as against the folio.
- (c) In short, in respect of this folio, the plaintiff has no entitlement to "attach" the judgment sum to the burden registration on this folio so as to afford it priority over the burden in favour of the Bank.
- (d) It was pointed out by counsel for the defendant that at the present moment the Bank's debt was in the order of €1.4 m and it was not beyond the bounds of possibility that the sum ultimately "attached" as representing the plaintiff's right in 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.

24. The defendant specifically draws attention to paragraph 3 in the statement of claim in respect of the 2015 proceedings No. 2015/3781P. It states as follows: -

"Pursuant to the will of Laurence Ryan, late husband of the plaintiff and late father of the defendant, the late Laurence Ryan appointed the defendant as his executor. He devised and bequeathed the dwelling house at Bunker Hill, Cratloe, Co. Clare to the plaintiff for her life with remainder to the defendant upon her death subject to a right of residence support and maintenance in favour of the plaintiff. The surrounding farmlands known as Bunker Hill Stud were devised to the defendant absolutely".

25. The implications are obvious in that the defendant asserts that this is a clear recognition that the right of residence extends to the dwelling house simpliciter.

26. Within an affidavit sworn by the plaintiff to the 2015 proceedings (grounding an application seeking judgment in default of appearance) she averred: -

"Pursuant to the will of Laurence Ryan, my late husband and late father of the defendant, the late Laurence Ryan appointed the defendant as executor. He devised and bequeathed his dwelling house at... to me for my life with remainder to the defendant upon my death subject to a right of residence, support and maintenance in favour of me. The surrounding farmlands known as Bunker Hill Stud were devised to the defendant absolutely".

27. Whilst this mirrors identically the pleading within the statement of claim, nevertheless it is an averment by the plaintiff personally. The plaintiff, as set out above, was in court before O'Connor J. but whilst she was available to give evidence if required, as she had sworn an affidavit setting out the principal matters within the statement of claim. O'Connor J. indicated that it was unnecessary to call her as he had read her affidavit.

28. This is registered land. Accordingly, pursuant to s. 69 of the Registration of Title Act, 1964, a right of residence may be registered as a burden as coming within section 69(1)(q) comprising: -

“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)”.

29. In my view, s. 69(1)(q) clearly defines and provides for the registration of a right of residence (exclusive or otherwise) as a burden on a folio. However, it also provides within the same section a definition of that right as in the nature of a lien for money's worth in or over property for a limited period not exceeding life (my emphasis).

30. Section 31 (1) of the Registration of Title Act, 1964 confirms with regard to the register that:-

“(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 fit” (my emphasis).

31. The conclusiveness of the register and the operation of s. 31 is well known. As Baker J. in *Tanager Designated Activity Company v. Rolf Kane and Property Registration Authority and Bank of Scotland* [2018] IECA 352 observed:-

“The Register is, therefore, evidence of the title of the owner of the land, and evidence of the title to 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’.”

32. Baker J. then goes on to quote *McAllister; Registration of Title* that s. 31(1) of the 1964 Act established the register as a “iron curtain” behind which it is neither appropriate nor necessary to penetrate. Thereafter, there is a quotation from the Deeney ; *Registration of Deeds and Title in Ireland*, explaining the term “conclusive” in the context of s. 31(1) of the 1964 Act as follows:-

“ ‘Conclusive’ in this context means that the facts stated are to be regarded as true and that no other evidence is necessary or permitted to verify or contradict this statement.”

33. The Bank contends, 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 entirety of the folio then 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 extends to the dwelling house. The expert retained by the defendant Bank, Mr. Rory O'Donnell, consultant solicitor, supports the latter contention.
34. The plaintiff, on the other hand, contends that as a matter of logic and law, the burden extends over the entirety of the folio. 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.
35. As alluded to above, two expert solicitors gave evidence before the court. Mr. Owen Binchy, called on behalf of the plaintiff, a solicitor from O'Connor O'Dea Binchy Solicitors furnished a report. In his opinion, 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.
36. Mr. Rory O'Donnell, on behalf of the defendant, in his initial report points out that, in any right of residence, an issue often arises on the transfer of a farm from father to son, where the son needs to be able to borrow, to run the ongoing farming business and that a charge for a right of residence is usually a problem for any lender. He further points out 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. Mr. O'Donnell further points to the difficulty in there being no clear or, indeed, any delineation as to what area of land comprises the dwelling house and what area the farm. In dealing with these matters, it is fair to say that Mr. O'Donnell extended a degree of criticism to the defendant Bank in not anticipating and dealing with potential issues that arise in cases of this type in advance of the registration of the charge. However, that is not the issue upon which I am required to adjudicate.
37. In light of Mr. Binchy's report, Mr. O'Donnell was asked to consider certain matters further and by letter dated 3rd April, 2019, he states the following: -

“The wording of this burden follows the wording of the will and in my opinion, this charge affects the dwelling house only. The extent of the dwelling house is another matter... In my opinion, it is reasonable to look at the wording of the will if one wants to construe the intention of entry number 4. On looking at the wording of the will it is clear that it distinguished between the dwelling house on the one part and the Bunker Hill Stud on the other and only charged the dwelling house with the right of residence and maintenance. This supports my opinion that this charge affects the dwelling house only. However, that is something for the court to determine”.

Mr. O'Donnell concludes: -

"I have already expressed my view in my report of the 14th March, 2019 as to what a Bank should have required. However, I should point out that the expression "purchaser" is defined in s. 3 of the Succession Act, 1965 as including a mortgagee who in good faith acquires an estate or interest in property for valuable considerations. In my opinion, it was reasonable based on good conveyancing practice for the Bank of Ireland to believe that the charge at entry 4 on part 3 of folio 6759 related only to the dwelling house and as such that it acquired a first charge on the remainder of the land in that folio".

38. Mr. Binchy points, entirely correctly, to the absence of an Assent. It is this document that would have been filed in the Land Registry and upon which the PRA would have registered both the interest of Mr. Ryan as absolute owner and more pertinently to the facts of this case, the registration of the right of residence in favour of the plaintiff Eithne Ryan.

39. I note the email to Ms. Hazel O'Callaghan of 28 March 2019, from the manager of the central storage facility within the PRA where he states: -

"Extensive searches for the quoted instrument have been carried out throughout the PRA offices and the instrument has, at this point, still not been located. Searches are continuing within this office and I will update you as soon as possible as same is located. Please accept my apologies for the inconvenience this is causing you".

40. Within my papers, after the email quoted above, there is a document which appears to be a draft Assent and the pertinent portion of it states as follows: -

"I apply for and assent to my registration as full owner of the property subject to the burdens set out in the schedule hereto, to the registration of which I hereby assent".

The schedule to that Assent states: -

"A right of residence, support and maintenance in favour of the wife of the late Laurence Ryan deceased, namely Eithne Ryan for the duration of her life".

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 6759. 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.

Rights of residence

42. Section 81 of the Registration of Title Act, 1964 ('the 1964 Act') states:-

"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."

43. Pursuant to section 69 of the Registration of Title Act, 1964, a right of residence may be registered as a burden as coming within section 69(1)(q) as set out above. The decision of Laffoy J. in *Tynan v. County Registrar of Kilkenny* [2011] IEHC confirms that a right of residence is not one of the s. 72 burdens which may affect registered land without registration.
44. All who have considered the nature of a right of residence in some detail find a precise definition elusive. However, the matter has been advanced significantly in practical terms by s. 81 of the 1964 Act and the entitlement to register the interest pursuant to s. 69(1)(q) of that Act.
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 as 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.
46. Nowadays it is the notification of that interest on the register that is of paramount importance. It operates to protect both 'sides'; the person entitled to the right and equally the person who is the owner of the land and bound by its terms. The fairness or balance sought to be achieved is that the holder of a right of residence has an interest capable of protection by registration, the nature of that interest means that it cannot be assigned. On the other hand, the owner of the lands has the comfort that this interest remains for a period not exceeding the lifetime of the holder.
47. Since what I might describe as the codification of a right of residence (particularly in respect of registered land) within the 1964 Act, there have been two cases that have considered in detail the nature of a right of residence and the degree to which a monetary value might be attached to it; *Bracken v. Byrne & anor* [2005] IEHC (*'Bracken'*) and *Johnson & anor v. Horace* [1993] ILRM. In both of those cases it is worth noting that the respective plaintiffs were seeking damages arising from their contention that their right of residence had been denied them. In other words, their right of residence (or right of residence, maintenance and support) could no longer be availed of and they were seeking damages arising from that fact.
48. In my view, this is a significant factual distinction. On the facts of this case, Ms. Eithne Ryan resides within the property, the subject matter of the right of residence. Indeed, she has emphatically asserts that 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. I was informed by her counsel that relations between herself and her son the registered owner are good. She has not joined him as a party to these proceedings, and at no point has injunctive relief been sought against him where Brian Ryan is the registered owner of these lands.

49. In *Bracken*, pursuant to the terms of a Deed of Settlement executed in 1967, properties within a single folio in county Wicklow were transferred upon the marriage of Catherine Bracken and Timothy Byrne, subject to (for the purposes of the facts of that case) an entitlement of the plaintiff: -

“...to reside and to be supported and maintained in the said dwelling house at any time they or either of them during their respective lives shall choose to reside there whilst unmarried”.

50. Various factual issues were considered relevant to the judgment of this case; the plaintiff left the property for a time, she also contended that there was an agreement that a site would be made available to her upon which she would build her own property. When a dispute arose as to the ultimate ownership of that site, the plaintiff sought advice as to her right of residence. This case is therefore about the (1) potential quantification of a sum of money to represent her right of residence, maintenance and support in respect of the right of residence both to date and into the future, and (2) reliefs in respect of the right of residence only, in the enforcement of an agreement for the grant of a site to this plaintiff. By the time of the hearing the folio lands had been divided, arising from which Clarke J. states: -

“In those circumstances the house, in respect of which the right of residence exists, remains in the ownership of the first named defendant while the lands out of which the right of maintenance and support is to be met are now, in substance, owned by the second named defendant”.

51. 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.
52. After considering s. 81 of the 1964 Act, the Court then considered the effect of that section and quotes from the judgment of Lavan J. in *Johnson v. Horace* to the following effect: -

“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. 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”.

53. Clarke J. pointed out that neither case law or statute clarifies whether or not a beneficiary of the right of residence, or the owner of the property to which the right is subject, can insist on the right being converted into monies worth. It is noteworthy that the word used is 'converted' not in addition to existing rights. Clarke J. then went on to consider the findings of Lavan J. to the effect that the plaintiff was awarded injunctive relief as, on the facts of that case, the defendant did not have the means nor the intention to make proper provision in respect of her right of residence.
54. However, given that the resolution in *Johnson v. Horace* was to permit the plaintiff to again exercise her right of residence and make an award of damages for the interference with that right up to a certain time, the question arose in *Bracken* as to whether it would be appropriate to direct that the right could no longer be enforced and only thereafter consider whether it might be converted into money. Clarke J. continued: -
- "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".
55. Accordingly, Clarke J. was considering the facts of that case and the implications that arose where, as a matter of fact, the right of residence could no longer be exercised, often due to a significant breakdown in the relationship between the party entitled to the right of residence and the other parties obliged to comply with that entitlement. In short, should there be an injunction compelling enforcement of the right or damages occasioned by the impossibility of its enforcement.
56. The Court continued: -
- "Before leaving the liability issues under this heading I should add that I have given some consideration to the fact that s. 81 of the Registration of Title Act, 1964 refers only to rights of residence and not to rights of maintenance and support. However, on the facts of this case it does not seem to me to be practical to require the exercise of a right of maintenance and support without also requiring the exercise of the right of residence. That might not always be the case. However, on the facts of this case it seems to me that the same result must follow in respect of the rights of maintenance and support as apply to the right of residence".
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. Unlike the cases cited above the plaintiff in this case does not sue the owner of the lands the subject of the interest

but the Bank holding a subsequent charge over it. As set out above this plaintiff never sought injunctive reliefs against the owner of the burden and nor has this defendant issued any proceedings against her.

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. In such circumstances the Court also considered the question and to what extent the conduct of either party plays a role in determining that breakdown in the relationship and thereafter the extent if any of an alternative remedy.

Clarke J. continued: -

“Having regard to the fact that the primary entitlement of the beneficiary of the right to exercise the right conferred upon them, it seems to me that the appropriate test must be that in addition to satisfying a court that it has become unreasonable in all the circumstances of the case to require the beneficiary to be content with the exercise of the right, it is also necessary for the beneficiary to satisfy the court that the balance of responsibility for that situation lies upon the owner of the right. It is not, however, necessary for the beneficiary to establish that they are entirely free from responsibility”

59. Based upon those 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. It has always been exercised.
61. In dealing with the quantum of the case, the court in *Bracken* separately valued the right of residence. The reference to the right of maintenance and support was done with the appropriate multiplier for a person of the plaintiff's age and gender. In assessing the right of residence, the court in *Bracken* continued: -

“...some regard has to be had to the fact that a right of support and maintenance derives from the profitability of the lands out of which the right of support and maintenance is to be met”.

The judgment then notes that the second named defendant had given uncontested evidence of the earnings from the relevant farmlands being the farm over which the right of maintenance and support lies. 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.”

62. 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.

63. In the case of *The Governor and Company of Bank of Ireland & anor v. O'Donnell & anor* [2016] IECA, the Court of Appeal had to consider whether an alleged right of residence vested in the official assignee, in circumstances where the defendants (as persons adjudicated bankrupt) contended that they had the benefit of a general right of residence. The issue for the court (O'Donnell, Finlay Geoghegan and Peart JJ.), was whether that right of residence vested in the official assignee.
64. O'Donnell J., giving the judgment of the court, stated as follows: -
- “A general right of residence is undoubtedly a right touching on or concerning property and perhaps more importantly has an economic value. However, it is not possible to conceive of the Official Assignee being able to assert a right that is concededly personal to the bankrupt, and not assignable by themThe right is on its own terms both personal and non-assignable. While I consider that the correct approach is to treat the general rule as a statutory vesting of all causes of action on adjudication, and that the Court should be slow to enlarge the exceptions to that rule the principle already established and recognised must apply to the case of a right of residence, which on analysis is I consider, a personal right which does not vest on adjudication”.
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.
66. The issue in this case is not that the 2016 judgment sum has been obtained in respect of the rights of maintenance and support to which this plaintiff is entitled. The issue arises in the attempt by this plaintiff to seek to add or ‘tack on’ this monetary amount to the burden registered in favour of this plaintiff on 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.
67. In *Bracken*, Clarke J. did advert to the possibility of calculating a right of maintenance separately from a right of residence but again that is not what is sought on the facts of this case. It is not the calculation of a right of maintenance or support that is the issue; it is deeming or construing that figure as being affixed to or part of the registered interest representing a s. 69(1)(q) burden. No such argument was advanced before O'Connor J. in the 2015 proceedings.
68. Whatever about the difficulty in defining or pinning down a precise legal definition of a right of residence, all agree 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 by 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. There is not, as counsel for the plaintiff sought to argue, any analogy to any type of all sums due mortgage. 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.
70. Those acting for the plaintiff appear to be under the impression that the 'charging' of the 2016 judgment sum will remain until discharged and not in any way linked to the nature of the interest vesting in this plaintiff. They certainly appear to suggest that the 2016 judgment sum might be increased were any additional proceedings brought in respect of outstanding sums sought from Bryan Ryan, from the date of the Order of O'Connor J. to as yet some undefined time into the future and that such a sum might also be attached to the registered burden.
71. The Bank, both in its argument as to the "parameters" of this right of residence and also in support of its argument for rectification of the register seeks that the terms of the last will and testament of Laurence Ryan of 8th January, 2003 be construed by this Court. In my view, the Bank is not entitled to have the will construed upon the facts of this case.
72. 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 s.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 its terms are being properly interpreted and implemented. The Assent or transfer accompanying an application is treated as conclusive (see s. 54(2)(c) of the Succession Act, 1965).
73. The title document in this instance is clearly the missing Assent. In my view on this case, the Bank as mortgagee (and Mr. O'Donnell in his report reminds us that s. 3 of the 1965 Act includes mortgagee within the definition of purchaser), is equally bound by the terms of the Assent and cannot look behind it (this is also confirmed by the terms of section s.51 of the 1965 Act).
74. As set out above 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.
75. The plaintiff has, regrettably, been denied her entitlement to her rights of maintenance and support and the matters disclosed within the proceedings and judgment of O'Connor J. speaks for itself. She was obliged to go to court and depose to these matters on

affidavit in respect of her only son. However, I am informed that relations between them are still good (which is to be welcomed).

76. The Bank has never gainsaid the entitlement of this plaintiff to a right of residence in her private dwelling. That is acknowledged. I appreciate that there may be some difficulties (as Mr. Rory O'Donnell highlights) as to the precise curtilage of that interest and indeed potential access routes and other easements. Again that of course is not something that should concern a 93-year-old lady. Neither has the Bank intimated or issued proceedings in respect of any issues arising in respect of these lands.
77. 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. I have noted that in the *Bracken* case it is clear from the judgment the marriage settlement Deed afforded the right of residence and maintenance of the plaintiff within the dwelling house but it seemed accepted by all that the right of maintenance and support did extend to the farmlands.
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, from Mr. Bryan Ryan. However, the Bank's internal enquiries are not in my view a matter for this Court. Counsel for the plaintiff sought, at some length, to go through internal Bank documentation to clarify the state of its knowledge. That is certainly not a matter for this Court. The plaintiff was not a party to the transaction between the defendant, Bryan Ryan and his spouse.
79. Unfortunately, as set out above, on more than one occasion, I have lamented the absence of the Assent. I am troubled that this document is not before the court. One can perhaps, however, have regard to the terms of the registration itself. Mr. Rory O'Donnell, an expert conveyancer of many years standing, 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.
80. The registration at entry Number 4 on folio 6759 Co Clare of the burden in favour of this plaintiff pursuant to s69(1)(q) 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 amount. 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 69(1)(q) as a 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).

81. No submission was advanced as to the status of such a monetarised burden upon the plaintiff's death. The plaintiff's existing rights as registered take priority to those of the Bank. No financial amount attaches to that interest pursuant to the 2016 judgment sum. The next question is the extent of that interest.
82. On the facts of this case, if the Bank considers that rectification of the register is required, then in my view it must first seek to establish the actual mistake or fraud which s. 31 of the 1964 Act requires for any rectification of that register. I appreciate that a former Bank official was called to give evidence in respect of the documentation held in respect of the granting of this facility and its subsequent execution. At that time, of course, the Bank in procuring its indenture and subsequent charge did so with Annette Ryan and Bryan Ryan as mortgagors and their respective advisors. In my view, 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. This plaintiff (and first named defendant to the counterclaim) is certainly not a party to any agreement(s) entered into by the Bank.

Conclusion

83. In respect of the registration of burdens comprised within folio 6759 county of Clare, registration No. 4 dated 3rd February, 2006, being the right of the plaintiff to reside at the dwelling house and be suitably supported and maintained therein during her life, takes priority in respect of any burdens registered thereafter which includes the burden registered on the 6th January, 2010 in favour of the defendant Bank.
84. The 2016 judgment sum in the amount of €779,225.10 pursuant to the order of O'Connor J. in proceedings 2015/3781P does not attach or form part of the burden in favour of the plaintiff registered on 3rd February, 2006. It is not in any sense a monetised burden as contended for by the plaintiff.
85. It is a matter for those acting for the plaintiff as to how they wish to seek the enforcement of the 2016 judgment sum against Bryan Ryan (the second named counterclaimant to these proceedings). Any registration of their interest in respect of folio 6759, would be registered in the normal way and would not have any priority affecting its registration in the facts of this case. Its priority would, as in the case of the other burdens, date from its registration.
86. In respect of the protection by the plaintiff of her right of residence, maintenance and support, no interlocutory or other relief was sought against Bryan Ryan the owner of the lands the subject of the burden who was not joined as a defendant to these proceedings. This 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.

87. The plaintiff seeks to "attach" the 2016 judgment of O'Connor J. to her existing registration of a burden in February, 2006. It has been forcibly suggested by counsel for the defendant that these proceedings are part of a strategy designed to affect the ability of the defendant to recover on foot of its charge. That is not a matter for this Court. but I have already noted that this plaintiff wishes to reside in the property. She is perfectly entitled to do so. The failure to properly provide for her right of support and maintenance lies squarely with the second named counterclaimant, her son.
88. In my view this case was essentially about priority of burdens, in respect of registered lands and whether, on the very unusual and specific circumstances of this case a judgment sum can thereafter be attached to that burden. It was not about their quantification and in any event, certainly with the areas of taxation and estate administration there are well recognised methods of doing so.
89. For the reasons set out above, 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 Laurence Ryan.
90. In my view, given the absence of the Assent, I can do no more than seek to construe the wording within folio 6759 itself. Mr. O'Donnell, with all of 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 of the circumstances.
91. With regard to the defendant's notice of motion for judgment against the second named defendant to the counterclaim, I am satisfied as to service upon him, he took no part whatsoever in these proceedings, and in such circumstances, I propose to grant the orders sought by the defendant in terms of paragraph 1 of its notice of motion.
92. I confirm my Order that Mr. Gerard Reidy, be appointed as the plaintiff's next friend. I also make an Order pursuant to RSC O15 Rule 17 that, in respect of her being a defendant to the counterclaim, Mr Reidy would also be appointed as her guardian ad litem for that purpose.
93. With regard to the reliefs sought by the plaintiff I propose to make no order in respect of (a) - the order of priority for the registration of a burden is clear and does not require declaratory relief of the type sought. For the reasons set out above I also decline the declarations sought at (b) and (c) of the endorsement of claim.
94. With regard to the defendant's counterclaim I propose to make an Order in terms of paragraph 2.

95. I will hear the parties as to the form of any other orders sought and any other matters including any order(s) as to costs.