THE COURT OF APPEAL
CIVIL

Court of Appeal Record Number: 2023/268

High Court Record Number: 2022/114SP
Neutral Citation Number [2024] IECA 247

Whelan J.
Pilkington J.
O'Moore J.

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENT

- AND –

TIMOTHY CAREY AND FINOLA COLGAN CAREY

APPELLANTS

JUDGMENT of Ms. Justice Whelan delivered on the 17th day of October 2024

1. This is an appeal by Thomas Carey and Finola Colgan Carey (the appellants) against the judgment of the High Court (Mulcahy J.) delivered on 7 July 2023 [2023] IEHC 388 and consequent orders made on 21 July 2023 (and perfected on 18 September 2023) granting orders for possession and orders that the appellants deliver up possession of the lands in folios 7693F and 2513, of the Register, Co. Westmeath to the Bank pursuant to s62(7) of the Registration of Title Act 1964 ("the ROTA 1964") with a stay for four months together with costs.

2. To a significant extent the issues in this appeal overlap with the appellant's appeal against the orders made on 21 July 2023 in related proceedings SP 2022/113 (the subject of Appeal 2023/267) wherein the Bank sought and was granted, *inter alia*, well charging and ancillary orders against the appellants in respect of a lien and three judgment mortgages registered by the Bank over three other folios in the ownership of one or both of the appellants in respect of the same indebtedness. Both proceedings were heard together in the High Court and were the subject of a single judgment. Both appeals were heard together in this court.

3. The appellants are litigants in person and in the course of the appeal the second-named appellant presented the arguments on behalf of both. Several grounds are common to both appeals. As outlined hereafter, these include a contention that this Court should, on the basis of alleged special circumstances which engage the so called Greendale jurisprudence, revisit and set aside its previous judgment delivered on 23 April 2018 ([2018] IECA 109) ("the 2018 judgment") and orders made on 10 May 2018 (perfected on 14 May 2018) which reinstated a judgment in default of appearance obtained by the Bank against the appellants on 12 September 2016 in the sum of €597,831.44 and costs of €396. In addition, both appeals assert that the sums claimed by the Bank are not due by reason of overcharging of interest.

Background

4. The appellants are husband and wife. These proceedings concern the lands comprised in Folio 7693F County Westmeath, 0.12 hectares, registered in their joint names over which Bank holds of a charge for present and future advances registered on 19 September 1989 and Folio 2513 County Westmeath comprising 31.8032 hectares registered in the sole name of the husband over which the Bank holds a like charge registered on 10th March 2008.

5. The Bank issued summary proceedings against the appellants in December 2013, 2013/4066, and obtained judgment in the Central Office against them in default of appearance on 12 September 2016 in the sum of €597,831.44 and costs of €396 ("the 2016 default judgment").

6. On 25 October 2016, the appellants issued a notice of motion seeking an order to set aside the 2016 default judgment. In the first instance the High Court (Barr J.) on 29 May 2017 set aside the default judgment and granted the appellants leave to enter an appearance. The Bank appealed against the said decision. The appeal was heard in this court in April 2018. The Court delivered its judgment on 23 April 2018 ([2018] IECA 109) wherein it considered and rejected the various grounds of appeal advanced by the appellants for all the reasons set out therein. The Court of Appeal by its order made 10 May 2014 (and perfected on 14 May 2018) reinstated the 2016 judgment in default of appearance obtained by the Bank on 12 September 2016. As outlined hereafter the appellants argue that the 2018 judgment of this court should be revisited and set aside.

7. Over four years after the order of the Court of Appeal reinstated the 2016 default judgment, the Bank, having formally demanded payment of the sum then calculated to be outstanding, by Special Summons of 28 June 2022 instituted the within proceedings seeking orders for possession of the lands in both Folio, pursuant to s.62(7) of the ROTA 1964 on foot of the respective registered charges aforesaid. The appellants do not deny that they have failed to discharge their liabilities to the Bank however they dispute the correctness of the sum said to be due and owing and the validity of the claim.

8. The Bank's position was that its powers of sale over the lands in both Folios on foot of the respective registered charges has arisen and was exercisable by it and it was orders for possession of both pursuant to s.62(7) of the ROTA 1964.

9. The appellants contended in the High Court that the Bank was not entitled to orders for possession primarily on the basis that the 2016 default judgment was based on inaccurate and incorrectly calculated interest. The second-named appellant in a replying affidavit asserted on behalf of both that neither the 1989 mortgage nor the 2008 mortgage could be relied upon by the Bank, as neither had been "*signed witnessed or sealed by or on behalf of the Bank."* In each case the 1989 and 2008 indentures of mortgage/charge were duly executed by the appellants but there was no evidence of execution by the Bank. They contend that this omission invalidates the said respective indentures of mortgage/charge. They contend that the Bank is not entitled to orders for possession pursuant to s62(7) ROTA 1964.

10. The High Court, [2023] IECA 388, noted the Bank's contention that its right to possession had arisen in respect of both charges. The terms of both mortgages were said to secure all sums due from the appellants including the sums due on foot of the 2016 judgment which, incidentally, had been subsequently registered as a judgment mortgage against both Folios.

11. The judge noted the appellants' argument that they had satisfied the high threshold required to be met to reopen the 2018 Court of Appeal judgment ([2018] IECA 109) which reinstated the 2016 default judgment. He concluded that it was not permissible to *"disregard an order of the Court of Appeal simply on the basis that a party argues that the court may have been led into error and that the threshold for that court reopening its judgment has been met*" (para. 58). The court noted that no application had ever been made to the Court of Appeal to revisit its own judgment or to reopen same. In addition, it was observed that the appellants had been in possession of the accountant's report concerning alleged overcharging of interest since July 2019 yet no such application had been made to

the Court of Appeal in the intervening time. He agreed with the Bank that the application constituted "*a collateral attack on the default judgment.*"

> *"…it is not open to this Court to now review the default judgment reinstated by order of the Court of Appeal on foot of a final judgment of that Court."* (para.59).

12. The judgment, citing *Bank of Ireland v Cody* [2021] IESC 26, noted that in possession proceedings the Register in Land Registry was to be regarded as conclusive as to the Bank's ownership of the two charges. Regarding the order for possession, the trial judge concluded that it was "*clear from the terms of the 1989 Mortgage and the 2008 Mortgage that the entitlement to seek possession has arisen and is exercisable on the facts."* (para. 67). He noted that the deeds secured *"all sums due and owing"* and as such extended to sums due on foot of the judgment mortgages registered on the Folios on 1 March 2017.

13. To the appellants' contention that neither mortgage was signed or sealed by the Bank, the trial judge was of the view that since both were executed by the appellants he was *"satisfied that it is not a basis for refusing to permit the Bank to enforce its security."* In that regard he relied on the decision in *ACC v Kelly* [2011] IEHC 7.

<u>Notice of appeal</u>

14. By notice of appeal dated 16 October 2023 the appellants contend that the amount claimed by the Bank in the sum of €597,435.44 plus €396 costs:

> *"[d]oes not represent the principal money secured by the instrument of charge pursuant to the indenture of mortgage dated 12 July 1989 and neither does it represent the principal money secured by the deed of mortgage and charge dated 3 March 2008 and as a consequence thereof the said sum is not well charged on the properties listed in the within proceedings and an order for sale of the said properties should not be granted to the plaintiff."*

The latter point does not arise as the Bank does not seek or require a well-charging order where the application is predicated on meeting the proofs for a possession order pursuant to s.62(7) ROTA 1964.

15. The appellants relied on the *"detailed confirmation"* said to have been provided to the High Court of non-compliance by the Bank with the terms and conditions of both the 1989 and 2008 mortgage instruments. The arguments of same primarily focussed on the non-execution of either mortgage instrument by the Bank.

16. The first ground contends that the 2016 summary judgment sum of €597,435.44 plus €396 costs "*does not represent the principal money secured*…" by the 1989 and 2008 instrument of charge/deed of mortgage and charge. The appellants contend that the judgment of the Court of Appeal, [2018] IECA 109, which had reinstated the 2016 summary judgment of the High Court was decided on the basis that same "*was not irregular and as such could not be challenged by the defendants unless they had a defence which could sustain itself. Further the Court of Appeal in the said judgment found that there was no reason to suspect that the sum claimed by the Plaintiff in the said judgment was not supported by the facts of the case".* It was contended that the appellants had proven that sum "*claimed in the Default Judgment was false and unsafe*". It was contended that the appellants "*did not sit on their hands*" in continuing to challenge the " *false and unsafe amount claimed"* by the Bank "*as evidenced by its letters to the senior management of the Plaintiff Bank and at the Financial Service Ombudsman*…". It was contended that in consequence the right of the Bank to seek possession had not arisen and was not exercisable. It was contended that this Court should "*review or set aside*" its earlier judgment *2018 IECA 109* which had reversed a High Court order made 29 May, 2017 setting aside the 2016 default judgment and had reinstated the latter order.

17. The appellants' written submissions seek to reverse the orders for possession made by the High Court pursuant to s.62(7) of the ROTA 1964 in respect of the lands in Folios 7693F and 2513 of the Register of County Westmeath

18. Reference is made to the affidavit of debt sworn by Mr. Brendan Murphy in support of the application for judgment in default of appearance entered by the Bank in the Central Office on 12 September 2016.

19. The appellants outline in their submissions that they brought of motion on 25 October 2016 which resulted initially in the 2016 default judgment being set aside which decision was reversed on appeal in this court in the 2018 judgment.

20. These submissions offer no satisfactory explanation for the very significant delays on the part of the appellants in engaging the firm Candor Chartered Accountants and Registered Auditors to investigate the account statements. They refer to their continuing *"quest to gain sight of … account statements covering all accounts"* with the Bank. There is no evidence to suggest that at any time they formally sought discovery in writing from the Bank or applied to the High Court for discovery from the date of service on them of the proceedings in January 2014 onward. It is contended that they did not receive *"a purposeful response … other than a letter from the plaintiff's solicitor dated 18 October 2021 effectively dismissing the overcharging issue*" (Submissions, para. 10 filed on 16th January 2024).

21. The appellants complaint to the Financial Services Pension Ombudsman (FSPO) was rejected as being out of time.

22. The submissions contend that the indentures of 1989 and 2008 include identical terms and conditions in respect of the application of interest charges on the loans the subject of each. They contend that given the alleged inaccuracy of the interest element of the claim, the Bank has failed to comply with s.62(7) of the ROTA 1964.

23. Further, the appellants argue that the High Court in its decision under appeal [2023] IEHC 388:

> "[*i*]*gnored or omitted to acknowledge the defendants' reliance on the detail contained in the terms and conditions of the said charges with regard to the application of interest charges on the loan the subject of the charges and the definition of the term 'monies hereby secured*'".

Essentially the appellants' argument is based on a contention that the Bank overcharged interest which not permitted by the terms of either mortgage and that in consequence the Bank's demand for payment of the monies " *does not represent the sums due pursuant to the terms of the charges*".

24. It is contended that the alleged overcharging of interest "*related the one of the loans the subject matter of the restructuring arrangement"* concluded between the parties in September 2010 on foot of a restructuring facility acceptance of which was executed and agreed to in writing by the appellants on 2 September 2010 *"and as a consequence thereof rendered the final restructure facility sum advanced as not being representative of the monies secured by the charges in respect of which the plaintiff now seeks possession of the property secured hereunder."*

25. The appellants complain that letters of demand dated June 2022 and February 2022 were issued by the Bank's solicitor rather than its own direct employee *"for the purpose of affirming any figures demanded by the plaintiff therein".* They seek that the orders of the High Cort be struck out asserting that the Bank *"cannot seek to rely on the terms of s.62(7) of the ROTA 1964 for its claim to the relief granted by the High Court by way of orders for possession."*

26. At the appeal hearing the appellants confirmed that they sought not alone a striking out of all orders made in the High Court on 21 July 2023 but also that the default judgment

obtained by the Bank on 12 September 2016 be set aside. Thus, the application in effect seeks in the first instance that this Court review and set aside its 2018 orders that the judgment obtained by the Bank in default of appearance on 12 September 2016 against the appellants in the sum of €597,831.44 together with costs of €396 be reinstated.

27. The Bank in its response to the appeal contends as follows: that it has met the requirements for orders for possession of the lands in both folios as set forth in *Bank of Ireland v. Cody* [2021] 2 I.R. 381; firstly, it is owner of the registered charges over the two Folios and its right to seek possession has arisen and is exercisable. It argues that the appellants' assertion that the judgment sum the subject matter of the 2016 default judgment is erroneous or includes an overcharging of interest could not have been entertained by the High Court and that the trial judge correctly concluded that it was impermissible for him to disregard the 2018 orders of the Court of Appeal.

28. The Bank contended that the High Court judge was correct in his assessment that it was a matter for this court as to whether or not the wholly exceptional jurisdiction to review its own final 2018 judgment could be invoked and that the trial judge was correct that no such application had been made to this court despite the appellants having had the benefit of an accountant's report since July 2019.

29. The Bank contended that an email received by the defendants in 2019 from the Court of Appeal office did not support their claim that they had applied to the court of appeal to revisit the 2018 judgment.

30. The Bank argued that its non-execution of the 1989 and 2008 charges was not an impediment to enforcement where the appellants had executed the deeds, the judgment sum is correct and it is entitled to an order for possession under s.62(7) ROTA,1964.

Analysis

The Greendale Jurisdiction to revisit and reverse

31. In substance the appellants contend that this Court should now revisit and reverse its 2018 unanimous judgment and orders made in Appeal Record No. 2017/276, [2018] IECA 109 reinstating the Bank's 2016 default judgment against them. The appeal was heard in April 2018 - over five years after the summary proceedings were served on the appellants in January 2014. They never entered any appearance in the said proceedings. The 2018 judgment is comprehensive, engaged with key arguments advanced by the parties and reached its conclusions for the reasons explained in the judgment. Given the manner in which the appeal was conducted by the appellants, I am satisfied that the arguments amounted in substance to a *Greendale* application.

32. By motion (which issued in October 2016) seeking to set aside the 2016 summary judgment in the High Court the appellants did not allege irregularities with regard to the level of interest as a ground, nor was it contended that the Bank had engaged in overcharging of interest or was disentitled to Courts Act interest.

33. It is clear from the decision of this Court in *Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63 that a court has exceptional jurisdiction to revisit any issue or finding of fact determined in the written judgment. The court ought to be satisfied firstly that there are "*strong reasons*" or "*exceptional circumstances*" which warrant it doing so. This jurisdiction is frequently described as "*the Greendale jurisdiction*" derived from the decision of the Supreme Court in *Greendale Developments Ltd (No.3)* [2000] 2 IR 514 as reinforced by Clarke C.J. in *Student Transport Scheme Ltd. v. The Minister for Education and Skills* [2021] IESC 35. In the latter case, it was reiterated that where an unsuccessful party seeks to have a final order set aside it must establish as a prerequisite a fundamental denial of justice against which no other remedy is available such as an appeal. Clarke C.J. emphasised that the court was entitled to give detailed consideration to the merits or otherwise of the factual contentions being relied on by the party seeking to re-open as

otherwise it could "… *allow an easy backdoor to reopening proceedings which would, in my view, be in fundamental breach of the principle of finality*".

34. The trial judge was entirely correct in his analysis and conclusion that it was not open to him to review or reverse the 2018 judgment or the orders of this court – a proposition contrary to all authority. It is noteworthy that the appellants in 2018 did not seek leave to appeal against the 2018 order made by this Court reinstating the default judgment. Had they considered that there was any error or omission on the part of the Court that met the material threshold, it was open to them to make an application for leave to appeal pursuant to Article 34.5.3 of the Constitution. They elected not to do so. Most importantly it needs to be pointed out that the issues which the appellants now seek to raise to impugn the 2018 order including alleged overcharging of interest, alleged waiver of Courts Act interest, non-execution of security instruments in 1989 and 2008 were never raised as issues before the Court of Appeal in 2018.

Delay

35. No reasonable explanation has been advanced by the appellants for why they took no step to raise issues concerning interest when opposing the Bank's appeal to this Court in 2018. Merely because they did not have to hand the Candor report at that time does not suffice for an answer. The Supreme Court such as in *A.A. v The Medical Council and the Attorney General* [2003] IESC 70 ("*A.A.")* and this Court have frequently made clear the continuing importance of the principle in *Henderson v. Henderson* 1843, 3 Hare 100, set forth by Sir James Wigram VC:

> *"I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of the adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, it will not (except under special circumstances) permit the same parties*

to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belongs to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time."

36. In *A.A.* the Supreme Court (Hardiman J.) cited with approval *Cox v. Dublin City Distillery (No. 2)* [1915] 1 IR 345 where Pallas C.B. held *"that a party to previous litigation, as against the other party to that action, was bound 'not only [by]' any defences which they did raise in that suit, but also any defences which they might raised, but did not raise therein'".*

37. As this Court noted in *ACC Bank Plc v. Cunniffe and Others* [2017] IECA 261 (Whelan J.):

"91. There is a public interest in the efficient conduct of litigation. In this regard, the judgment in Woodhouse v. Consigna Plc. [2002] 2 All ER 737 of Brooke L.J. is of relevance to the facts in this case where he considers the public interest in the efficient conduct of litigation and states:-

> *'But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in Henderson v Henderson [1843] 3 Hare 100 that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all, is a rule of public policy based upon the*

desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever, and that a defendant should not be oppressed by successive suits where one would do.'"

92. It is noteworthy that Hardiman J. in the Supreme Court in A v. The Medical Council 2003 … cited the following passage from Bingham L.J. in Johnson v. Gore Wood [2002] W.L.R. 72 where he stated:-

' Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not twice be vexed in the same matter. The public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.'"

38. The appellants offer no satisfactory explanation for the failure to obtain a report in regard to the issue of interest charges from the date of the summary proceedings 2013/S4033 were served on them on 7 January 2014 to July 2019 -a delay of over five years. At the latest all issues including alleged waiver of Courts Act interest and the Banks non-execution of the 1989 and 2008 instruments ought to have been raised before this Court in the 2018 appeal hearing.

39. The arguments with regard to the notice of motion dated July 2019 the subject matter of an email from the Court of Appeal office does not avail the appellants. They were on clear notice with effect from 29 July 2019 that *"unfortunately the motion should not have been accepted"* by the Court of Appeal office. The motion was returned to the second named appellant with advice as to her entitlement to apply for a refund on the stamp fees paid. It is not credible to suggest that either of them could have reasonably believed that any issue directed to seeking that this court revisit the 2018 judgment was being pursued by them before this court as and from receipt of the email dated 29 July 2019. The appellants in 2019 abandoned any effort to have this court revisit the 2018 judgment.

40. The appellants' submissions state that *"following the Court of Appeal decision, the defendants continued their quest to gain sight of their account statements covering all accounts with the Plaintiff…"* (para. 8). This implies that prior to the 2018 judgment the appellants already had issues concerning interest. Very strong reasons for why that fact was not brought to the attention of this Court would be required to be identified now and none such are forthcoming.

41. The dominant purpose of the appellants in seeking to deploy the 2019 Candor report now is to revisit the merits of the 2018 decision which had reinstated the Bank's 2016 default judgment. It is not an appropriate function of a review process to merely seek re-argue the prior appeal with the introduction of new grounds and arguments and to have the Court revisit the merits of a decision it has already made as encompassed in a prior judgment. Furthermore, no errors or omissions are alleged to arise in the 2018 judgment [2018] IECA 109. The Court did not fail to engage with any fundamental matter the subject of a ground of appeal or argument before it nor is it asserted that it omitted to engage in an issue which results in a potential constitutional injustice to the appellants. The issue of interest was never raised by the appellants in 2018. They have simply failed to

discharge the very heavy onus of proof upon them before the exceptional jurisdiction to revisit for the purposes of reviewing and/or setting aside a prior judgment and order can be pursued.

42. The jurisprudence makes clear that the jurisdiction to review and set aside a prior judgment and order cannot be invoked on the basis of the discovery of new evidence. As Clarke C.J. observed in *School Transport* at 7.16 - " *I would again emphasise that it would fall short of the threshold necessary to allow for a reopening as a result of a successful Greendale motion, to merely establish that the Court of Appeal was in error*." The appellants contend that this principle is not engaged by reason that the Bank allegedly "*knew*" of the overcharging of interest throughout. But it is clear from the jurisprudence that the "*discovery of new evidence*" in question concerns discovery by the party seeking to invoke the jurisdiction of the Court to review/set aside an earlier judgment and orders.

43. Practice Direction CA14 dated 15 February 2023 governs applications *after* that date to revisit its judgments by this court and makes clear that before the jurisdiction can be engaged circumstances must be identified to demonstrate that through no fault of the applicant the order or judgment made operates both to deny the applicant justice and to breach the applicant's constitutional rights. CA14 is based on the existing jurisprudence.

44. Ordinarily, it is a two-step process. Firstly, a determination whether such a review is warranted and thereafter, in the event that it is considered so warranted, the review takes place. Furthermore, as the jurisprudence particularly of the Supreme Court makes clear that it is desirable in the interest of finality and certainty that any review application to the Court of Appeal be initiated as soon as possible. The purported notice of motion of July 2019 is to no avail in the context of the obligations to act with expedition.

45. The appellants' arguments indicate that issues regarding interest or execution of the security instruments were not raised by the appellants in this court in the 2018 appeal

hearing. That fact identifies the sole reason why neither was engaged with in the judgment. It cannot thus be said that either the 2018 order or judgment are in any *Greendale* sense deficient. The appellants have not met the requirements in the Supreme Court case-law to demonstrate cogent and substantive grounds which are objectively sufficient to enable this court to determine that a hearing of a review application on the merits is justified.

46. It became evident in the course of the hearing of this appeal that issues regarding interest were not raised by these appellants in the 2018 appeal hearing. There was no basis for revisiting the judgment on grounds of error or omission on the part of this Court. The appellants fall far short of satisfying the principles identified in the various decisions of the Supreme Court and this Court including but not limited to *Greendale Developments Ltd. (No.3)* [2000] 2 IR 514, *DPP v. McKevitt* [2009] IESC 29, *Bailey v. The Commissioner of An Garda Síochána* [2018] IECA 63, *Friends First v. Smithwick* [2019] IECA 197, *Launceston* and *Tassan Din v. Banco Ambrosiano* S.P.A. [1991] 1 IR 569 which, critically in the context of this appeal, is clear authority for the proposition that the discovery of fresh evidence even if it would have affected the result of the hearing had it been available at the time the matter was originally determined, shall not be a basis for setting aside a final order or judgment.

47. It is clear from the decision in *Tassan Din v. Banko Ambrosiano* S.P.A. [1991] 1 IR 569 at pp. 581-583 that such is the case. Murphy J. at p.582 observed:

> *"In the Ampthill peerage case [1977] AC 547 Lord Wilberforce in considering the nature of the fraud … which would justify setting aside a judgment of the Court commented as follows:-* (p.571 of judgment)
>
> > *"What is fraud for this purpose? Learned Counsel for John Russell without venturing on a definition suggested that some kind of equitable fraud, or lack of frankness, was all that is meant, but I cannot accept so anaemic an*

ingredient. In relation to judgments, and this case is surely a fortiori or at least analogous, it is clear that only fraud in a strict legal since will do. There must be conscious and deliberate dishonesty, and the declaration must be obtained by it. Authorities as to judgments make clear that anyone wishing to attack a judgment on the grounds of fraud must make his allegation with full particularity, must when he states it be prepared to prove what he alleges and ultimately must strictly prove it."

Murphy J. in *Tassan* continued:

"In the light of the foregoing I am satisfied that nothing short of fraud pleaded with particularity (and ultimately established on the balance of probabilities) would be sufficient grounds in the present case for upsetting the decision given by the Supreme Court … "

48. The *Greendale* jurisprudence and the general power of a court to set aside its own orders or judgments where same are procured by fraud are distinct but adjacent powers. It is noteworthy that in their notice of appeal the appellants contend that the sums claimed were *"false and unsafe"*. There is reference to *"falsity"* and that the sum is *"invalid"* it is contended that the sum claimed is *"incorrect" "not representing the sum legal due [sic]" "the default judgment was false and unsafe".* Nowhere is it unequivocally asserted that the Bank's claim was fraudulent. Nowhere is fraud in the strict sense asserted or proven by the appellants to the standard established in *Tassan*.

49. The *Greendale* principle was considered by Murray J. in this Court *In the matter of Decobake Ltd. (in liquidation)* [2022] IECA 31 at para. 42 where he notes that:

"The courts enjoy a general power to set aside their own judgments where they are obtained by fraud (Desmond v. Moriarty [2018] IESC 34) and the equally exceptional power –relied upon here by Mr. Coyle –to set aside a final judgment

where a failure to do so would represent a breach of the constitutional right of a party (Re Greendale Developments Ltd. (No.3) [2000] 2 IR 514). The latter jurisdiction is –as it must be –significantly constrained by the over-riding importance of the finality generally attending any order of a court that is not interlocutory in nature, and the right of parties to proceedings (and in many cases, others who were not parties) to order their affairs with some certainty that the decision of a court once unappealable, will stand."

50. In substance what they seek to do is re-argue on new and different grounds the issue already determined on appeal to this Court in [2018] IECA 109 was never the subject of any application for leave to appeal to the Supreme Court. The *Greendale* jurisdiction is never available where the basis for the application arises from an appellant's own fault as was made clear in the *Greendale* judgment itself by Denham J. at p.544, an authority cited by Murray J. in *Decobake* at para. 43(v). As was observed by Dunne J. in the Supreme Court in *Murphy v. Gilligan* [2017] IESC 3 at p.20:

"It is important to emphasise that the purpose of a Greendale application is not to permit an aggrieved party to argue a point or issue that could have been raised previously which was not in fact raised or indeed, to reargue a point or issue previously raised. If the [appellants] wanted to challenge the making of the order of Moriarty J. by reference to the fact that there had already been two previous s. 3 orders made, there was no reason why that could not have been done years ago. …"

Conclusion on Greendale application to revisit 2018 judgment and orders

51. I am satisfied that the appellants have not established that the *Greendale* jurisprudence can be invoked by them on the facts disclosed. Neither is there any valid basis identified to warrant setting aside the 2018 judgment and orders of this.

52. Insofar as it is claimed that the appellants could not act without the Candor report of July 2019 same offers not legal basis for interfering with the terms of the 2018 judgment or the order. Such is clear from the decision of Clarke J. in *Student Transport Scheme Ltd v. Minister for Education and Skills* [2021] IESC 22 where he notes:

> *"The mere fact that there may be new evidence or materials which might suggest that the High Court or the Court of Appeal were in error is not, in itself, a reason to breach the principle of finality and enable a successful Greendale application to be brought."*

The said decision was cited with approval by Murray J. in *Decobake*. The application to revisit and review the 2018 decision and order is refused.

Execution of the Mortgage and Charge Instruments

53. The appellants rely on the fact that the Bank appears to have executed neither of the mortgage/charge instruments. The Bank does not dispute this contention. Conventionally the execution of an instrument by a corporation is to be done as provided in its Articles of Association.

54. However, it is noteworthy that from 12 July 1989 up to the institution of the within proceedings, the appellants never raised any issue with regard to non-execution of the Deed of Charge by the Bank. Likewise with regard to non-execution by the Bank of the Deed of Mortgage and Charge of 3 March 2008. Each was registered as a burden on the respective Folios 7693F and 2513, Co Westmeath and expressed in each case to be registered as a charge of which the Bank was owner "*for present and future advances*".

55. It is not suggested that the funds secured were not advanced by the Bank to the appellants or that they are not indebted to the Bank. The facility letter of 5 August 2010 which was accepted and executed by both appellants on 2 September 2010 wholly undermines this stance. It recites the "Security Held" by the Bank at page 2 where the first

and second securities held by the Bank are the first legal charges/mortgages over Folios 7693F and 2513, Co. Westmeath. In signing the said agreement by way of acceptance the appellants effectively acknowledged the validity of the two charges.

56. Additionally, the Bank can invoke the conclusiveness of the Register. Section 31(1) of the ROTA 1964 provides:

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

This provision substantially reiterated the prior law which operated from 1 January 1892 by virtue of s.34 of the Local Registration of Title (Ireland) Act 1891 and Registration of Title Act, 1942.

57. The appellants have nowhere established actual fraud. There is no evidence that the Bank executed either instrument. However, it has invoked s31 and the long-established statutory principle of the conclusiveness of the Register.

58. The Bank's title to the burdens registered in Part 3 of Folios 7693F and 2513, Co. Westmeath respectively, is in each case, in the language of *Woods & Wylie, 6.27,* "*inviolable on the basis of the conclusiveness of the register*" in the absence of fraud. In *Guckian v Brennan* [1981] IR 478 the High Court, Gannon J., held *'The duty of ensuring*

that any instrument of transfer is valid and effective, so as to enable a transmission of ownership to be duly registered, falls upon the Registrar at the time of the registration'.

59. Clarke J. in *ACC plc v Kelly & Anor* [2011] IEHC 7, considering a similar argument observed:

> " *I am not satisfied that the fact that there was no evidence of ACC having executed the mortgage deed is of any relevance. I am more than satisfied on the evidence that both of the Kellys executed the mortgage deed*. (para.9.4)

60. The Bank seeks to rely on *Cooch v Goodman* (1842) 2 QB 580, but that is a decision which turns on its own idiosyncratic facts concerning enforceability of covenants and whether a court was precluded from taking judicial notice of a matter if the contrary proposition was conceded in argument. It has no obvious material nexus with the issue arising in the instant case.

61. The appellants are strictly correct that the prescribed land registry forms for transfer of registered land provide for execution in like manner as in the case of conveyances of unregistered land as was observed by the Supreme Court in *Devoy v. Hanlon* 1929, IR 246. However, by virtue of s31 of the ROTA 1964, the appellants are precluded from going behind the entry on the register of the two charges in the Bank's favour unless they could prove fraud. A technical point with regard to execution cannot override the clear statutory intent which renders the Register conclusive as to title save where actual fraud is proven. It is not open to the appellants to now purport to rely on this technical point and it does not avail them. They do not contest that in each case they executed the instruments of security in favour of the Bank which it now seeks to rely upon to secure orders for possession of the property in accordance with the terms of the indentures of mortgage and charge. As such the said instruments were executed by the appellants who are sought to be bound by the possession orders which the Bank obtained in the within proceedings. The Bank, as a party

which took the benefit of both deeds is bound by the said instruments in equity even if it did not execute them as authorities such as *Webb v. Spicer* (1849) 13 QB 886 demonstrates.

The 2016 judgment sum is inaccurate

62. The appellants could only impugn the validity of the 2016 judgment sum either by a successful application to review the 2018 decision of this court reinstating same on the Greendale principles or on the basis of establishing actual fraud within s31(1) of the ROTA 1964. Fraud in that sense is not alleged and the standard of exceptionality to be established in light of the *Greendale* jurisprudence including *Launceston* was not established by the appellants as set out in detail above. This contention is not maintainable on any basis. Court rate of interest is payable pursuant to the Debtors (Ireland) Act 1840. The rate claimed is fixed by SI No.624/2016 at 2%, operative from 1st January 2017. It appears that the Bank does not claim the higher rate (8%) payable under the Courts Act 1981 (Interest on Judgment Debts) Order 1989, S.I. No. 12 of 1989 up to the 31 December 2016.

Section 62(7) of the ROTA 1964

63. The Bank invokes s.62(7) of the ROTA 1964 to procure possession of the lands in the two charges folios. The subsection provides:

> "(7) *When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession."*

Section 62(7) was repealed by the 2009 Act, Schedule 2, Part 5, but continues in full force and effect with regard to instruments registered prior to 1 December 2009. Such was the effect of s.27(1)(c) of the Interpretation Act 2005.

64. As was observed by Dunne J. in the Supreme Court in *McEnery v. Sheahan* [2019] IESC 64 at p.3:

> *"It is a well-established principle consistent with the Act of 2005 that the legislature does not intend to change the law beyond the immediate scope and object of an enactment and that the more radical a change can be said to be, the more weight is given to such presumption."*

65. At all events s.1 of the Land and Conveyancing Law Reform Act 2013 put the matter beyond doubt and confirmed the continued application of the repealed provisions of relevant legislation, including s.62(7) ROTA 1964 to all mortgages and charges created prior to 1 December 2009 which measure was introduced to assuage persistent doubts on the issue notwithstanding the clear provisions of the Interpretation Act 2005.

66. The essential proofs where a chargeholder seeks possession on foot of a burden registered over registered land include that the applicant is the registered owner of the charge and that the right to seek possession has arisen and become exercisable by the charge holder, as held in *Guckian v Brennan* [1981] 1 IR 478, p.489, as followed in *Tanager DAC v. Kane* [2018] IECA 352. The Bank clearly satisfied the proofs in s62(7) as the High Court judge correctly held. This ground of appeal is not stateable.

Conclusion

67. No ground of appeal advanced by the appellants is maintainable. The conclusions of Mulcahy J. were entirely correct. The Bank is entitled orders for possession in respect of the lands in Folios 7693F and 2513 of the Register County Westmeath pursuant to s.62(7) of the 1964 Act. This appeal falls to be dismissed on all grounds.

Costs

68. My provisional view with regard to costs is as follows. Both this appeal and Appeal 2023/267 significantly overlap. Whilst historically decisions such as *In Re Jacks* [1952] I.R. 170, per Murnaghan J., would suggest that within proceedings might have been brought by summary summons I am satisfied in light of the jurisprudence that it was also open to the appellants to bring same by special summons. O.96, r.14 provides:

> "*Procedure by special summons shall be adopted, in the case of an application to the court under the Registration of Title Act, 1964, s.62(7) by an owner of a charge created before 1st September 2009 for possession of registered land and the foregoing rules of this order shall not apply to such proceedings.*"

69. Both sets of proceedings were between the same parties and concerned the realisation of securities and/or judgment mortgages over five separate folios in respect of same. The debts in question were restructured/consolidated by the facility agreement executed by the appellants on 2 September 2010. Although no formal order of consolidation was made pursuant to the Rules of the Superior Courts, it is clear that both sets of proceedings proceeded as one and there was very significant overlap in the evidence. Both were dealt with together, succinctly and in substance as one set of proceedings. In light of the manner in which the case was thus conducted, it appears to me that the most appropriate course of action is that there be one set of costs in respect of both appeals (2023/267 and 2023/268) which were conducted on a quasi-consolidated basis. If either party contends for a different order, written submissions no longer than 2000 words to be furnished to the other side and to the Court within fourteen days from the date hereof with any response of like length thereto to be filed within a further fourteen days. The court will then consider the arguments and make a formal determination as to costs.

70. My colleagues Pilkington and O'Moore JJ. have had the opportunity of reading this judgment before it was delivered and have indicated their agreement with it.