THE HIGH COURT

CIRCUIT APPEAL

[2024] IEHC 93

[Record No. 2023 / 92 CA]

BETWEEN:

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

GARY GILMORE AND EILEEN GILMORE

DEFENDANTS

JUDGMENT Of Ms. Justice Siobhán Phelan, delivered on the 20th day of February, 2024.

INTRODUCTION

1. On this appeal against an order of the Circuit Court (His Honour Judge O'Connor) made on the 21st of April, 2023 refusing the Second Named Defendant/Appellant's application to set aside an Order for Possession made on the 5th of June, 2019 (Her Honour Judge Linnane), I am concerned with the finality of a court order made in reliance on consent confirmed to the court through a solicitor on record. It is now denied that consent was given and the solicitor then on record confirms in evidence never having met or spoken with the Second Named Defendant to take instructions. Juxtaposed against the Second Named Defendant's right to constitutional justice in the decision-making process, which she claims has been denied, are broader administration of justice concerns because the finality of orders is core to the administration of justice and the rule of law. As an alternative to an order setting aside the Order for Possession, the Second Named Defendant seeks an extension of time within which to appeal against the said Order.

BACKGROUND

Loan and Mortgage

2. The Defendants' family home in County Dublin is recorded on the Land Registry Folio as having been registered in their joint names on the 4th of July, 2003. An Indenture of Mortgage and Charge dated the 10th of September, 2007 was created as security in respect of loan facilities advanced in September, 2007 on foot of a loan agreement entered into by the Defendants on the acceptance in August, 2007 of a loan offer made by Nua Mortgages Limited (hereinafter "Nua") by letter dated the 17th of July, 2007. The charge in favour of Nua was registered on the 16th of December, 2009. The Second Named Defendant has since confirmed that the purpose of the loan and re-mortgage was to release equity from the family home to purchase a residential property in Portugal.

3. The sum advanced under the loan agreement was €1,985,000.00 and agreed monthly repayments were in the sum of €10,834.79 for a term of 38 years. Under the conditions applying to the loan agreement, the lender became entitled to demand payment of the loan and all outstanding interest and costs should there be an event of default defined, *inter alia*, as including a breach of any of the terms or conditions of the letter of offer (Condition 14(A)). A separate clause provided for an event of default where there was a default by the borrower in payments under the loan agreement and "*the default continued for*" without then specifying the period. Under the Mortgage and Charge the Defendants covenanted that they would, on demand in writing made to them by Nua, or its successors and assigns, pay or discharge all monies and liabilities due, owing or incurred by the Defendants.

4. A number of judgment mortgages were subsequently registered on the property in proceedings brought by several different creditors in separate proceedings. By Deed of Transfer executed by Nua on the 4th of December, 2014, right, title and interest in the loan agreement between the Defendants and Nua was transferred to the Plaintiff. The Plaintiff is now registered as the owner of the Nua charge.

Pre-Litigation Correspondence

5. In circumstances where the loan was in significant arrears and following some engagement in this regard, by letter dated the 8th of September, 2015, the Plaintiff wrote to the Defendants notifying them that they had completed an assessment of the case and advising that their mortgage fell outside the Mortgage Arrears Resolution Process (MARP) and was

considered unsustainable. They were afforded an opportunity to consider their options which included voluntary surrender, trading down, voluntary sale or mortgage to rent. The Defendants were advised to seek independent legal and financial advice and referred to the Money Advice and Budgeting Service (MABS) and referred to information on the Insolvency Services of Ireland and processes under the Personal Insolvency Act, 2012. They were advised of a right to appeal the decision that they fell outside the MARP and a right to consult a Personal Insolvency Practitioner.

6. On the 31st of March, 2016, Solicitors acting on behalf of the Plaintiff wrote to the Defendants by individual and separate letters and demanded payment within 10 days of the loan, the balance of which then stood at €2,393,033.70 including arrears in the sum of €502,935.36.

7. The Solicitors for the Plaintiff wrote to both Defendants again by separate and individual letter on the 12th of April, 2016 calling upon them to deliver up vacant possession of the family home.

8. The only response to this correspondence was a letter from Carley & Associates, Solicitors, dated 8th of April, 2016 referring to the letter of 31st of March, 2016 and confirming authority to accept service of proceedings in respect of their "*clients' home at [address of family home given]*" (underlining added). Both Defendants' names were given as clients.

Possession Proceedings - Service of and Entry of Appearance

9. A Civil Bill for Possession issued on the 1st of December, 2016 seeking possession and claiming periodic default by the Defendants in the payment of monies and had accumulated arrears in the sum of €521,640.20 with a total claimed balance due on the loan of €2,407,602.52. The Civil Bill for Possession was served on Carley & Associates, Solicitors, on foot of their previously confirmed authority to accept service of the proceedings communicated by letter dated the 8th of April, 2016. Carley & Associates also endorsed acceptance on service on the Civil Bill on behalf of "*our clients*" on the 16th of June, 2016 in the following terms:

> *"We hereby accept service of the within proceedings on behalf of our clients and undertake to file an appearance to same." [underlining added]*

10. Two blank "*Entry of Appearance*" forms accompanied the Civil Bill as served. Despite indicating that they had authority to accept service of proceedings on behalf of both clients and further undertaking to enter an appearance on their behalf, there was some ambiguity on the face of the Appearance entered in this regard. The Appearance as entered to the proceedings expressed itself to be on behalf of the First Named Defendant only, but reference was also made to the Defendants in the plural stating that the Appearance was entered in respect of the Civil Bill served on "*them*" and "*the said defendants intend to defending this proceeding*" [underlining added]. The Appearance filed bears a Circuit Court stamp dated the 17th of June, 2016 but seemingly unaware that an Appearance had been filed solicitors for the Plaintiff wrote on the 6th of July, 2016 pointing out that an Appearance had yet to be filed and providing a letter consenting to the late filing of an Appearance.

11. Thereafter, the matter seemingly came before the County Registrar on three occasions and was adjourned in accordance with a practice direction relating to principal private residences before being transferred to the Judge's List. In the Judge's List it was adjourned generally with liberty to re-enter in November, 2017 because an amendment to correct an error in the Civil Bill was required. An application to re-enter proceedings was made in September, 2018 and after two appearances before the County Registrar this application was transferred to the Judge's List where the matter was listed before Her Honour Judge Linnane on the 30th of April, 2019.

12. The Notice of Motion seeking re-entry on foot of which the matter came before Judge Linnane was served on Carley & Associates who were described on the face of the Notice of Motion as "*Solicitors on behalf of both of the Defendants*". In the Affidavit grounding the application to re-enter sworn in March, 2019 it was confirmed that the account was 72 months in arrears. It was further confirmed that the matter had not been re-entered earlier because the Plaintiff had received a telephone call from the Defendants' solicitor advising that a meeting had been scheduled with the Defendants to discuss the options available to them. A proposal was expected but following a subsequent telephone call with the solicitor, the Plaintiff concluded that it could not offer an alternative repayment arrangement or restructuring of the mortgage due to the then financial circumstances of the Defendants. The Statutory Declaration of Service in respect of the Notice of Motion and grounding affidavit referred to service being by registered post on the solicitor acting on behalf of the "*above named defendants*".

13. On the 30th of April, 2019, when the motion to re-enter came before the Circuit Court, there was no appearance in Court on behalf of either of the Defendants. The Judge (Her Honour Judge Linnane) noted that an Appearance had been entered for only one of the two defendants, the First Named Defendant. She was referred by counsel for the Plaintiff to the endorsement on the Civil Bill whereby Carley & Associates accepted service. In response she pointed out that notwithstanding having endorsed service and given an undertaking:

> *"if they don't enter an appearance then you have to go back to square one and serve the defendants themselves."*

14. She further observed, however, that solicitors were properly on record for the First Named Defendant and should be in attendance in that capacity in any event. She let the matter stand while enquiries were made and directed that confirmation be sought that they were in fact acting for "*both defendants*." The DAR of the hearing on the 30th of April, 2019 confirms that when the matter was re-mentioned having been left stand the Court was advised that contact had been made with Carley & Associates and that Mr. Carley confirmed that he was consenting on behalf of both Defendants to the application and apologised for overlooking the date.

15. On that basis, on the clear understanding that an Appearance confirming that he was acting for both Defendants would be filed, the Judge re-entered the proceedings, granted liberty to amend the Civil Bill and gave liberty to serve the amended Civil Bill on the Defendants before adjourning the proceedings for hearing on the 5th of June, 2019. According to the Statutory Declaration of Service then sworn, the amended Civil Bill was served by registered post on Carley & Associates in their capacity as solicitors for the Defendants, albeit that they were not yet on record for the Second Named Defendant.

16. By letter dated the 28th of May, 2019, Carley & Associates were requested by the Plaintiff's solicitor to file an amended Appearance confirming that they were acting on behalf of both of the Defendants as the appearance on file indicated that they were acting on behalf of the First Named Defendant only.

17. From the evidence subsequently put on affidavit, on the 3rd of June, 2019, Mr. Carley, Solicitor in the firm of Carley & Associates, received two emails – one purporting to be from the First Named Defendant and the second from the Second Name Defendant authorising the said Mr. Carley to represent them both in the proceedings. The email which purported to emanate from the Second Named Defendant indicated agreement to a twelve month stay. The email from the Second Named Defendant was sent from a Gmail account bearing her name.

18. On receipt of these emails Mr. Carley entered an Appearance for both Defendants on the 5th of June, 2019 immediately before the matter came back before the Court. The Appearance filed is not in the usual form and while headed "*Memorandum of Appearance*" in the title of the proceedings is expressed as:

> *"I request that you enter an Appearance herein on behalf herein on behalf of the above named Defendants to the Notice of Motion that was served on them on the 22nd of March, 2019."*

19. When the matter was called in Court on the 5th of June, 2019, Mr. Carley was present in Court on behalf of both Defendants. The Court was advised that the deficiency in the form of the Appearance had been rectified and that an updated Appearance had been filed that morning. It is not apparent from the DAR whether a copy of the Appearance filed was available in Court and handed up to the Judge. Mr. Carley addressed the Court to confirm that both of his clients consented to compromise terms agreed whereby an Order for Possession was to be made subject to a stay of twelve months. In response to a query from the Court as to whether the family home was to be sold, Mr. Carley responded that they were going to take steps to sell the family home saying:

> *"They're hoping to sell it in full and final settlement with the bank, is the intention. But there's no agreement with the bank yet."*

20. Based on the consent indicated by Mr. Carley appearing before the Court on behalf of both Defendants an Order for Possession subject to a stay for a period of 12 months was made. Of her own motion, the Judge gave liberty to apply to lift the stay if steps were not taken to sell the family home observing that it was in negative equity and stating:

"it's a pity the defendants didn't adopt this attitude before now….. they clearly can't afford to be living at [address of family home]."

21. She asked that her view in relation to the need to take steps and not sit back anymore be communicated to the Defendants and Mr. Carley appears on the transcript to have agreed to do so.

22. No steps were taken on foot of the Order for Possession made on the 5th of June, 2019 on the expiry of the twelve months stay. It appears that during 2021 there were some proposals to resolve issues "*without prejudice to the Order for Possession*". In a valuation dated the 1st of March, 2021 and exhibited in the application before me, the family home (a six-bedroom property with double garage to the side in a Dublin suburb) was valued at €1,350,000. From the documentation exhibited it appears that some steps were taken to sell the family home. There was some seeming engagement with a separate firm of solicitors seemingly acting for the Defendants, O'Donohoe Solicitors, in respect of a potential conveyance of the family home. It seems from the terms of a letter written on the 3rd of February, 2022 by Mr. Carley that funds were available but a delay was caused because the bank was not prepared to release deeds until an authority was received from the Defendants. The letter from Carley and Associates stated that *"this authority should now be with Start".*

23. Following this, there was further correspondence from the Plaintiff in June, 2022. As advised in a letter dated the 27th of June, 2022, the balance outstanding on the mortgage by then was at €3,000,963.22 with arrears of €1,039,765.60. This correspondence, addressed to Carley and Associates, contained a proposal to settle the Defendants' liabilities with the Plaintiff on the payment of a capital sum of €1,400,000. The offer was stated to be made "*strictly without prejudice to the Order for Possession*". This proposal, which required to be signed in acceptance by "*all borrowers*", was not accepted by the Defendants within the time allowed. By letter dated 8th of September, 2022, the Plaintiff wrote to O'Donohoe solicitors confirming that the request for settlement was closed.

24. A Possession Execution Order was made on the 19th of October, 2022 in respect of the family home on foot of the Order made on the 5th of June, 2019. The Order is erroneously headed in an incorrect record number and recites the Northern instead of Dublin Circuit.

25. The Plaintiff obtained possession of the Defendants' home through the attendance by the Sheriff on the property on the 18th of January, 2023 pursuant to the said Possession Execution Order dated the 19th of October, 2022. In these proceedings, the Second Named Defendant claims that this is the first knowledge she had of the existence of proceedings and any orders in the proceedings.

Set Aside Application

26. By Notice of Motion dated the 8th of February, 2023, grounded on an affidavit of the same date, the Second Defendant sought to set aside the Order for Possession granted more than three years previously. She averred that prior to January, 2023 when the Sheriff attended at her home that she was:

> *"completely unaware of the existence of the Execution Order, or indeed the existence of the proceedings on foot of which proceedings it now appears a Possession Order was made by the Circuit Court on 5th of June, 2019 leading to the Execution Order."*

27. In addition, she claimed to have been:

> *"completely unaware of any underlying issue with Start, or its predecessor Nua Mortgages ("Nua"). I was completely unaware of any material issue with the home mortgage loan and unaware of any risk to my home. I understood that we were discharging of mortgage payments and that nay debts and issues were resolved."*

28. The Second Named Defendant's stated position on affidavit is that she had no knowledge whatsoever of the proceedings or their compromise. She further claims that all correspondence in relation to the proceedings and debt addressed to her had been intercepted by the First Named Defendant. She claims never to have given authority to Carley & Associates, Solicitors, to act on her behalf. She says that the email purporting to come from her did not come from her email account and she refers to a different email address as being her email. She claims that the email account from which the email was sent to Mr. Carley was created by the First Named Defendant for the express purpose of communicating her authority to Mr. Carley but without reference to her. She further claims that the subsequent engagement

by O'Donohoe Solicitors in contemplation of the conveyance of the family home (which never occurred) further to a proposed settlement of indebtedness was not done on her behalf, as she had not engaged them.

29. The Second Named Defendant does not deny that the significant borrowing from Nua occurred. She accepts that she was generally aware of financial difficulties relating to her husband's business dating back to *circa* 2010. She acknowledges that this business ceased trading in or about 2012/2013. She admits that she was aware of claims arising from the cessation of the business against her husband and against herself (arising from guarantees given to assist him).

30. She avers, however, that as far as she was concerned arrangements were in place to discharge debts due to creditors who had obtained judgment mortgages which had in turn been registered against the family home. She refers on affidavit to adjustments made in response to their financial difficulties including the cashing in of a pension by the First Named Defendant, the sale of the property in Portugal and work obtained by the First Named Defendant as a company representative and subsequently as a sales manager (earning approximately €75,000 gross per annum by 2020 excluding a bonus between €10,000 and €15,000 per annum).

31. The Second Named Defendant accepts on affidavit that she was aware that they were struggling to maintain mortgage repayments and she was aware that the First Named Defendant had sought advice from New Beginnings in or about 2016. She says that she was not involved in these discussions because she trusted the First Named Defendant and was caring for her ill mother for whom she was full-time carer until her death in 2021. She maintains that she was assured by the First Named Defendant that the matter was "*in hand*" and he advised her that a deal had been agreed whereby the lender agreed to reduce monthly mortgage payments of €3,500 from 2016/2017.

32. The Second Named Defendant claims that the First Named Defendant simulated her signature on an authority provided to O'Donohoe solicitors to mislead them into believing that the Second Named Defendant was agreeable to and aware of negotiations with the Plaintiff. She confirms that she never spoke to, emailed or contacted any person in Carley & Associates despite their acceptance of service of a Civil Bill for Possession and entry of an Appearance on her behalf nor has she been contacted by them.

33. In seeking to set aside the Order for Possession, the Second Named Defendant explains that she wishes to engage with the Plaintiff to resolve the debt or, failing that and in the alternative, to defend the proceedings in circumstances where she was never served with nor made aware of proceedings and did not consent to the Order for Possession being made.

34. Several Affidavits in reply were filed to the application to set-aside. Notably an affidavit was sworn by Eugene Carley, solicitor with the firm of Carley & Associates, on the 21st of February, 2023. In this affidavit he confirms that a deal in the terms deposed to by the Second Named Defendant of payments of €3,500 per month was unlikely as the First Named Defendant's net monthly income was €4,062.00 in the Standard Financial Statement prepared by the First Named Defendant in November, 2018. He confirms entering an Appearance for the First Named Defendant following referral to him as a client by New Beginnings stating:

> *"I did not at that stage enter an Appearance for Eileen Gilmore as I was informed by Gary Gilmore that she could not handle the situation and she left all financial matters to be dealt with by him."*

35. He confirms, in fact, never meeting the Second Named Defendant. He does not address how he came to endorse service on the Civil Bill undertaking to enter an Appearance in those circumstances. Nor does he address why he accepted service of motions in these proceedings and an amended Civil Bill without alerting the Plaintiff to the fact that he did not act for the Second Named Defendant or otherwise correcting his earlier representations in this regard. He confirms that he corresponded in writing with both Defendants in relation to court proceedings and this correspondence is exhibited. He confirms that he subsequently entered an Appearance for both Defendants on the 5th of June, 2019 following what he referred to as a request from Judge Linnane. He exhibits emailed authorities purporting to emanate from the Defendants separately confirming that:

> *"on receipt of these authorities, I entered an appearance on the 5th of June 2019 for both Defendants and consented to an order for possession in the terms of the court order of the 5th f June, 2019".*

36. Mr. Carley does not address on affidavit why this Appearance was entered in non-standard terms as an appearance on behalf of both Defendants to the Notice of Motion that was served on them on the 22nd day of March, 2019 (the motion to re-enter and amend) rather than to the proceedings as a whole. He does not suggest that the wording was intentional having regard to the nature of his instructions and he does not dispute that he came on record for the Defendants. The authority which purported to emanate from the Second Named Defendant exhibited by Mr. Carley states:

> *"I hereby authorise you to represent me in court negotiations this coming week as discussed for our home at [address of family home]. Myself and my husband are in full agreement to secure the 12 month stay to allow us time to sell."*

37. It appears from his affidavit that Mr. Carley subsequently engaged with the Plaintiff to settle the Defendants' liabilities with the Plaintiff and provided proof of funds and a valuation, but he does not depose to any further direct contact with the Second Named Defendant. He refers on affidavit to his invoice which he says has not been discharged.

38. On behalf of the Plaintiff an affidavit was sworn by an Asset Manager with the Plaintiff. She sets out the background to proceedings. She objects to any interference by the Court with an order made on consent nearly four years previously and asserts an entitlement on behalf of the Plaintiff to finality in litigation.

39. It is pointed out on behalf of the Plaintiff that although accepting that she was aware of financial difficulties, the Second Named Defendant sought to abdicate responsibility in respect of the loan. It is contended on affidavit that she should be estopped from doing so at such a considerable remove. The credibility of the Second Named Defendant's claim to have believed that an arrangement had been entered into in respect of the mortgage in circumstances where no payments whatsoever were made for several years notwithstanding loan repayments due in the amount of circa €10,000 per month is questioned.

40. It is further pointed out on behalf of the Plaintiff that if a fraud were perpetrated by the Second Named Defendant's husband, this should not be visited against the Plaintiff. Reliance is placed on the fact that Mr. Carley confirmed entering an Appearance for both Defendants on the 5th of June, 2019 and consented to the Order made. His original letter dated the 8th of April,

2016 in response to the correspondence addressed to the Defendants, where he referred to the Defendants as *"our clients"*, was exhibited. In this letter Carley & Associates confirmed:

> *"we have authority to accept service of any proceedings that you may issue regarding our clients' home at [address of family home]."*

41. Subsequent correspondence addressed to Mr. Carley in respect of the proceedings, exhibited on behalf of the Plaintiff, referred to his authority to accept service of the proceedings on behalf of "*your clients*". In successive letters the Plaintiff identified Mr. Carley's clients as both the First and Second Named Defendants. Mr. Carley was referred to variously in this correspondence as acting for the borrowers and the Defendants. Mr. Carley never responded to this correspondence to disabuse the Plaintiff of their belief in this regard.

42. The deponent on behalf of the Plaintiff also exhibits the DAR of the proceedings before Judge Linnane on the 30th of April, 2019 and the 5th of June, 2019.

43. Referring to the engagement of a second firm of solicitors on the Defendants' behalf in the context of a proposal to sell the property in 2021/2022, the deponent on behalf of the Plaintiff suggests that it is simply inconceivable that a second firm of solicitors would have engaged in a deal involving the sale/conveyance of the Defendants' family home absent any authority from or contact with the Second Named Defendant.

44. No evidence is adduced as to the second firm (O'Donohoe solicitors) of solicitors' position on the question of their authority to act for the Second Named Defendant or any communication they may have had with her.

Circuit Court Order

45. The application to set aside was refused by the Circuit Court by order made on the 21st of April, 2023. As set out in an affidavit sworn by the Plaintiff's solicitor, the application was refused on the basis, *inter alia*, of the Circuit Court Judge's findings that the Circuit Court was *functus officio*, that the Appellant could not set aside a Consent Order made in 2019, that the Order had been executed and the merits of the case to include the level of indebtedness and arrears significantly mitigated against the application.

High Court Appeal and Stay

46. A Notice of Appeal was lodged on the 28th of April, 2023 and was listed before the High Court for mention on the 15th of May, 2023. By application *ex parte* a stay of execution on foot of the Possession Order made on the 5th of June, 2019 was obtained on the 30th of May, 2023 until the 7th of June, 2023. The sale of the family home was also restrained.

47. By Notice of Motion dated the 30th of May, 2023 returnable to the 7th of June, 2023, the Second Defendant sought a stay of execution on the Order for Possession and an order restraining sale or disposal of the family home on an interlocutory basis. By further order made on the 21st of June, 2023, the stay granted was continued and has seemingly been continued by agreement since then pending determination of the applications before me.

Application for an Extension of Time within which to Appeal Order for Possession

48. By Notice of Motion dated the 11th of July, 2023 (returnable to 15th of November, 2023) the Second Named Defendant sought an extension of time for service and lodgement of a Notice of Appeal against the decision on Judge Linnane in June, 2019.

49. Grounding this application, the Second Named Defendant repeats on affidavit that she had never given authority to Carley & Associates to act and did not consent to the order for possession made. Rather she claims that this order was made through the misrepresentation of the First Named Defendant and the mistake or negligence of Carley & Associates arising from their failure to comply with anti-money laundering and due diligence procedures for onboarding a new client. She confirms that she never even spoke with Mr. Carley.

50. She further claims that as no Appearance was entered on her behalf in June, 2016, the Plaintiff should have re-served the Civil Bill on her directly. She says:

> *"It was clear that Carley and Associates did not represent your deponent during the proceedings. An appearance was entered for your deponent on the morning the possession order was made, at the twelfth hour, and more than 3 years after the proceedings had commenced by Civil Bill served on Carley & Associates. I say and believe that this was done without the necessary due diligence required for establishing the identity of a new client for AML purposes and it appears that Mr. Carley may have relied on the representations made by Gary. For the avoidance of doubt at no point*

prior to his replying affidavit did I have a phone call, meeting (either in person or via applications such as Zoom) or correspond (by post or email) with Mr. Carley or his office. Indeed, he has still not contacted me or explained or apologised."

Defence Issues Identified

51. In seeking to set aside the order made and/or appeal against the decision of the Circuit Court, the Second Named Defendant claims to have a defence to the proceedings which she should be allowed to make. In this regard, she identifies several issues, specifically, that:

i. the demand letter did not plead a default because the terms and conditions of the loan relied upon did not specify the period of continuing default which would trigger a breach of condition:
ii. the transfer of the loan to Nua, whilst signed in counterpart, was not under seal; and
iii. insufficient evidence of compliance with the Code of Conduct was before the Circuit Court.

Finally, a further issue is raised in relation to the form of the Possession Execution Order.

DISCUSSION AND DECISION

Jurisdiction to Set Aside

52. The fact that the Second Named Defendant confirms that she never consented to the Possession Order is relied upon in urging that the Order be set aside. In support of the set aside application it is also argued that as Mr. Carley only came on record for the Second Named Defendant on the 5th of June 2019, the Second Named Defendant was never properly served with proceedings at all. It is contended that the proceedings were thus before the Circuit Court for years without the Appellant being on notice of their existence. It is further contended that the only authority which Mr. Carley had on foot of the Appearance entered was to deal with the motion, not the entire proceedings.

53. For its part the Plaintiff relies, *inter alia*, on the entry of an Appearance on behalf of the Second Named Defendant as an answer to any service question. It asserts an entitlement

to rely on consent communicated by a solicitor acting for the Defendants and the finality of Court orders.

54. In arguing that the Possession Order is not good and valid and is thus "*irregular*" having regard to issues as to service and the Second Named Defendant's consent, I was referred on behalf of the Second Named Defendant during to *O'Tuama v. Casey* [2008] IEHC 49. There an issue arose as to the renewal of a summons in defamation proceedings. It was found that where judgment is obtained irregularly, the court will normally set aside the judgment without enquiring into the merits of the proposed defence. The logic of this position as explained in *O'Tuama* is that the judgment should not have been obtained in the first place and a plaintiff who has obtained judgment irregularly should not have any benefit by reason of having obtained judgment in that fashion.

55. The decision in *O'Tuama* also helpfully addresses the test to be applied on a set aside application where judgment is obtained regularly (i.e. in accordance with the Rules). Where judgment is obtained regularly, the court may, nonetheless, be persuaded to set aside the judgment to permit the defendant to defend the proceedings but will only do so after considering the possible merits of the defence which the defendant would wish to put forward. In the case of a regularly obtained judgment the Court is required to consider whether a defence is disclosed to a standard of "*real prospect of success*" (following the test enunciated by Lynch J. in O*'Callaghan Limited v. O'Donovan & Anor* (unreported, Supreme Court, 13th of May, 1997).

56. Notwithstanding the helpful identification of the tests on a set aside application where judgment is obtained irregularly or regularly, I do not consider *O'Tuama* to be on point in relation to the application before me for the very reason that the judgment obtained in that case was obtained in default of Appearance. Similarly, the cases considered in the judgment in *O'Tuama* were also cases where judgment had been obtained in Default of Appearance, some regularly and some irregularly. Notably, *O'Tuama* did not concern a case where judgment was pronounced following a consideration of the case upon the merits or by consent.

57. While not on all fours, the facts of the case considered by the Court of Appeal in *Start v Tierney* [2017] IECA 103, also referred to on behalf of the Second Named Defendant, bear some resemblance to the facts of this case. In *Start v Tierney* the Court of Appeal found that

an order for possession granted by the High Court based on insufficient service of proceedings (served personally on one spouse but not the other and no order deeming service good obtained) could be set aside. Like this case, the order as drawn recorded that it was made on consent. In *Start v Tierney* it was alleged that a wife had not informed her husband of the service of proceedings in connection with the family home, did not keep her husband fully informed of legal proceedings relating to the family home and did not share documentation served on her in that respect with the result that he was completely unaware of the existence of the proceedings before execution of the Possession Order.

58. The Court of Appeal (Mahon J.) observed that this account was "*difficult to believe*" in the case of a married couple who were not separated but then observed:

> *"On the other hand, it is conceivable that such might happen on rare occasions because of a desire on the part of one spouse to keep bad news from the other spouse, particularly in circumstances where the former had been responsible for the mortgage repayments."*

59. What distinguishes this case in my view is not the respective plausibility of the claim in that case and this one that a married couple did not share important information in relation to proceedings affecting their family home but the significant fact that a solicitor did not appear for either of the parties in *Start v Tierney.* Most importantly a solicitor did not appear for the absent party (moving party on the set aside application) in respect of whom proper service was not established. It was the husband's uncontested evidence in *Start v Tierney* that he was not in court at all when the order was made even though the order as drawn, perhaps through error, recorded that it was his wife who was absent. It was his wife's evidence that no consent was indicated to the order being made but even if consent were indicated, which was not established, reliance was placed by the Court of Appeal on the fact that Order 41, rule 15 of the Rules of the Superior Courts, 1986 provides:

> *"In any cause or matter where the defendant has appeared by solicitor, no order for entering judgement shall be made by consent unless the consent of the defendant is given by his solicitor. Where the defendant has not appeared, or has appeared in person, no such order shall be made unless the defendant attends before the Court and*

gives his consent in person, or unless his written consent is attested by a solicitor acting on his behalf."

60. There was no evidence of compliance with this provision in relation to the consent order made in *Start v Tierney*. The order of the High Court granting possession suggested that the wife (not the husband) was absent and recorded consent to the making of the order even though one party was not represented before the court. In setting aside the order for possession, the Court of Appeal held that insufficient grounds existed at the time of service to warrant not effecting personal service on the First Named Defendant, or in the alternative making an application to deem service to have been made on the borrower's wife. The Court of Appeal emphasised the significant level of constitutional and legal protection enjoyed by the family home and suggested that courts should err on the side of caution and insist that proper service be effected on borrowers. At para. 22 of his judgment Mahon J. stated:

"In this case the particular provision of the Rules of the Superior Courts was not complied with in circumstances where, it seems to me, there was insufficient reason at the time not to do so. Another attempt might have been made to effect personal service on Mr. Tierney, or failing that, an application could have been made to deem service on Mrs. Tierney to have been good service on her husband. This was not done. It is appropriate in those circumstances that a court should err on the side of caution and insist that proper service be effected."

61. I am very mindful of what the Court of Appeal said in *Start v Tierney* regarding the significant level of constitutional and legal protection enjoyed by the family home and this weighs on me heavily, but the circumstances here are different. It is impossible to overlook the fact that a firm of solicitors undertook to enter an Appearance on behalf of both Defendants when accepting service.

62. I cannot accept that the confirmation of authority to accept service in advance and the formal acknowledgement and undertaking endorsed in writing on the Civil Bill upon service can be rendered ineffective by a subsequent failure to enter an appearance in accordance with the undertaking. In my view, the subsequent failure to enter an Appearance on behalf of both Defendants does not have the effect of rendering service irregular on the Defendant for whom an Appearance is not entered when authority to accept service had been confirmed at the date

of service and was not retracted or otherwise clarified. In *Heffernan v. Atkin* [1913] 47 I.L.T.R. 245 it was found that an unqualified acceptance of a writ by a solicitor and an undertaking to enter an Appearance was effective notwithstanding an error in address on the writ where the Defendant was in fact resident outside the jurisdiction. The Court of Appeal declined to set aside a writ on the basis that it required to be served outside the jurisdiction with the leave of the court, which had not been obtained, where service had been accepted in the jurisdiction.

63. It follows in my view that the proceedings in this case were properly served on the Second Named Defendant on foot of the authority communicated by Carley and Associates and their endorsement of acceptance of service on the writ, albeit that there is a separate issue between her and the Carley & Associates as to whether they had actual authority to do so.

64. It is true that the solicitors then proceeded to enter an Appearance for only one of the two Defendants and were therefore not on record for the Second Named Defendant between 2016 and June, 2019. The fact that I am satisfied that the writ was properly served does not address the service of subsequent pleadings in the case in circumstances where there is at the very least an ambiguity attaching to the Appearance entered. While the submission made that if properly vigilant the Plaintiff should have adverted to this is not without force, the failure of Carley & Associates to advise that they had not honoured their undertaking to enter an Appearance for both Defendants, as one would expect if issue were being taken with the authority given and service effected on foot thereof, goes some way to excusing the Plaintiff's failure in this regard. Without absolving the Plaintiff of its failure to advert to or address the fact that no Appearance (or no unambiguous appearance) had been filed on behalf of the Second Named Defendant, I am bound to observe that I consider it truly remarkable and deeply unsatisfactory, that having committed to entering an Appearance and continuing to receive correspondence and court proceedings on behalf of both Defendants that Carley & Associates, officers of the court, never appraised the Plaintiff that they were not, in fact, acting for the Second Named Defendant if this was that firm's understanding of the position. Clearly had the Plaintiff adverted to an issue (as Judge Linnane subsequently did), it is to be expected that they would have proceeded to ensure service on the Second Named Defendant other than through the solicitor who was then only in fact on record for the First Named Defendant. This would obviously have been better practice and would presumably have avoided the issues that now arise on this application.

65. I accept that there is a serious question over the adequacy or effectiveness of service on the Second Named Defendant of pleadings served by delivery to Carley & Associates post the entry of an ambiguous initial appearance in June, 2016. The issue for me now is whether such service issue was cured by the subsequent filing of an Appearance on behalf of both Defendants in June, 2019. A separate issue arises from the fact that the Appearance entered in the Circuit Court office on behalf of both Defendants was described as an appearance to the Motion before the Court. It is not understood what, if anything, was sought to be achieved by this wording used in the appearance filed in June, 2019. Mr. Carley does not address on affidavit whether the wording used was intentional or what he understood its effect to be.

66. It is not clear to me that a solicitor can elect to appear only in respect of some aspects of proceedings even if this were his intention. He is either on record or off record. In fairness to counsel on behalf of the Second Named Defendant, no weight was attached by him to the language of the Appearance, it being the Second Named Defendant's position that no authority of any kind had been given by her to the entry of an appearance on her behalf. Given his subsequent appearance before the Court to consent to final orders in the proceedings on behalf of the Defendants, it seems to me that Mr. Carley could not have intended to convey and cannot properly be taken to have conveyed that he did not have authority to act in the proceedings when entering the appearance. Indeed, in these applications he has relied on the emailed authority from the Second Named Defendant, in controversy, as confirming his authority to act and has not suggested any gap in his authority to consent to the Orders made by the Circuit Court in his presence. Accordingly, while initially formally or effectively entering an Appearance for one of the two defendants only, there is no doubt in my mind that an Appearance had been entered for both Defendants before the Order for Possession was made on consent which consent was confirmed to the Court through the attendance of the solicitor in court on record for both Defendants, on behalf of both Defendants and with ostensible authority from both Defendants.

67. In *Lawless v. Beacon Hospital* [2019] IECA 256 the Court of Appeal (Peart J.) found, in reliance on Walsh J. in *Baulk v. Irish National Insurance Co. Ltd.* [1969] I.R. 66, that the entry of an Appearance to a summons had the effect of curing any defect that may otherwise have been found in the validity of the service. Peart J. observed (para. 13):

"entry of appearance by a defendant is an acknowledgement that the summons has been served and acts as a notification to the court that this is the case."

68. In reliance on this established line of authority it seems to me that by filing an Appearance on behalf of both Defendants and his subsequent appearance before the Court as recorded on the DAR, Mr. Carley unequivocally confirmed to the Court that he was on record for both Defendants and had authority to consent on their behalf to the order indicated in his presence. Whatever case might have been made in relation to service on the Second Named Defendant and the solicitor's authority to represent and bind the Second Named Defendant before the Court up to that point, I am satisfied that it fell away with the entry of an Appearance and the presence of the solicitor in court to consent to orders on foot of that Appearance, at least insofar as the court dealing with the matter was concerned.

69. The orderly and effective administration of justice rests upon the assumed integrity of those working within the justice system. When a solicitor appears in court to confirm consent to an order being made, having formally entered an Appearance, he must be assumed, as an officer of the court, to have instructions to consent to that order. Absent a proper basis for a concern that the solicitor who appears does not in fact have instructions, it is inconceivable that either the court or the opposing party could be required to look behind the consent proffered on behalf of his or her client.

70. The fact that a solicitor undertook to enter an Appearance and subsequently appeared to indicate consent on behalf of a client without proper authority to do so, if fact it is, does not have the effect of negating the service of proceedings upon which he has endorsed acceptance of service and to which he has subsequently appeared. Nor does it ground a conclusion that an order was irregularly obtained by the Plaintiff or that the judgment can be treated as having been obtained other than on foot of proper service or in default of appearance. If, unbeknownst to the court and the Plaintiff, the solicitor on record acted without proper authority or in excess of his authority, such conduct may be amenable to remedy in other fora, but it does not undermine the jurisdiction of the Court to make the order obtained in the possession proceedings. In the circumstances, it seems to me that neither of the tests identified in *O'Tuama* or applied in *Start v. Tierney* have application on the facts and circumstances of this case.

71. An inherent jurisdiction to set aside in cases other than default of appearance or cases where orders have been obtained against an unrepresented party has been recognised, albeit I have not been referred to a case where the jurisdiction has been exercised in respect of an order made on consent. It was confirmed in seminal terms in *In Re Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514 which considered the finality of judgments of the Supreme Court having regard to the provisions of Article 34.4.6 of the Constitution. Although the Court retains a set aside jurisdiction (confirmed in cases such as *In Re Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514, *L.P. v. M.P.* [2002] 1 I.R. 219, *Bula Limited v. Tara Mines Limited (No. 6), Nolan v Carrick* [2013] IEHC 523), it would never be enough to trigger the exercise of that jurisdiction that the moving party establish a defence that has a real prospect of success (as in the case of a regularly obtained order in default of appearance) as very special and exceptional circumstances are required. The difficulties in seeking to set aside an order made on consent were canvassed by the Supreme Court in *Charalambous v. Nagle* [2011] IESC 11 but in terms which acknowledge a jurisdiction to set-aside orders made on consent where no actual consent existed for the order made.

72. This case is unusual and deeply concerning in that the solicitor on record now confirms never having met or spoken with the Second Named Defendant before entering an appearance on her behalf for the very purpose of consenting to an order for possession in respect of her family home. If it is the case that she remained entirely unaware of the proceedings, as she claims, then her rights to constitutional justice have not been respected albeit this could not have been known to either the Plaintiff or the Court making the Order for Possession.

73. On the other hand, an alternative remedy may exist if the conduct alleged by the Second Named Defendant were established. The conduct alleged potentially gives rise to an issue between the solicitor, as between the Defendants, and the solicitors' professional and regulatory bodies. To that extent, the Second Named Defendant's rights would not be set at nought through the absence of a remedy if the Order for Possession is not set aside. There is, however, no remedy, other than an order setting aside the Order for Possession already made (or alternatively extending time for an appeal against the consent order), which would permit the Second Named Defendant to resist the making of a possession order in respect of the family home.

74. As there is what amounts to an allegation of fraud, albeit not on the part of the Plaintiff but as between Defendants and the Defendants and their solicitor, coupled with an excess of authority on the part of a solicitor which together constitute special and highly unusual and unfortunate circumstances and as the courts' powers should be as ample as required to protect a right and the Court has a role in ensuring that its orders are not misused or abused, I have decided that I should consider whether this is a case in which an exceptional power to set aside a final order might properly be exercised.

75. On the basis that I enjoy jurisdiction to set aside the order in accordance with the principles established in the *In Re Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514 line of authority, I now turn to consider whether I should properly do so. As made clear in *Nolan v Carrick* [2013] IEHC 523 relevant factors to guide exercise of the power to set aside a judgment following a substantive process (or by analogy on consent) include the nature of the interest at stake, conduct of the party seeking to set aside, prejudice to the other party, the public interest in the finality of judgments and delay, particularly if during the period of delay the successful party has acted on the judgment. Accordingly, it seems to me that I must have regard to the overall justice of the case.

Real Prospect of a Defence

76. Considering first the question of a defence to the proceedings, Counsel for the Second Named Defendant was valiant in his efforts to identify possible lines of defence whilst all the time maintaining that the Second Named Defendant wished to set aside the Order for Possession not to contest the proceedings, unless necessary, but rather to do a deal with the Plaintiff which might see her staying in her home. Despite counsel's efforts, it seems to me that none of the heads of defence identified were demonstrated as having a real prospect of success. I will address each in turn.

77. Firstly, in relation to the demand letter and the failure to specify a duration for breach of a payment condition in the terms of loan offer, it is difficult to see how this argument could have any real prospect of success given that it was clearly a condition of the loan (Condition 14(A)) that payments be made monthly, and this condition was breached. This is not a case where a breach had been remedied such that the duration of non-payment became a relevant consideration. The evidence is that not a single payment has been made on this mortgage since 2016.

78. Secondly, in relation to the claim that the transfer from Nua to the Plaintiff was defective because the transfer was not under seal, I note that the Deed of Transfer exhibited in the proceedings was signed and witnessed in separate counterparts. Having regard to the decision of the Supreme Court in *McGuinness & Anor. v. Ulster Bank* [2019] IESC 20 where Finlay-Geoghegan J. considered s. 64 of the Land and Conveyancing Law Reform Act 2009 regarding the execution of a deed and was satisfied that the attested signature of an authorised officer was sufficient and had the effect as if it were a document executed under seal, it seems to me that this line of defence does not have a real prospect of success. It bears note in this regard that the Plaintiff has established that it is the registered owner of the charge as reflected on the Land Registry folio entry thereby constituting sufficient evidence of the transfer (per *Tanager DAC v. Kane* [2018] IECA 352, *Bank of Ireland v. Cody* [2021] IESC 26 and *Start Mortgages Designated Activity Company v. Ryan* [2021] IEHC 719) for the purpose of summary judgment).

79. Thirdly, as regards the failure to put evidence before the Court that there had been compliance with the *Code of Conduct on Mortgage Arrears* (hereinafter "*the Code*") because in the affidavit grounding the application for a possession order sworn in May 2016, it was deposed on behalf of the Plaintiff:

> *"I say that if required, a further Affidavit will be sworn dealing with compliance with the Code by Nua and the Plaintiff in due course".*

80. No issue was ever taken, it appears, with evidence as to compliance with the *Code* and no further affidavit was sworn in this regard before judgment was consented to on behalf of the Defendants. Granted, on her case, the Second Named Defendant was deprived of the opportunity to do so.

81. I note that despite the averment on behalf of the Plaintiff which suggests that further evidence may be provided if required, the affidavit grounding the application addresses the question of compliance with the *Code* and confirms compliance with the *Code*, confirms acting with the objective of assisting the Defendants to meet their mortgage obligations, confirms completion of the Standard Financial Statement (SFS)(exhibited subsequently by Mr. Carley) and the receipt of supporting documents, confirms assessment of the Defendants' current

financial circumstances based on the SFS and supporting documents and confirms conclusion, following assessment, that the Plaintiff could not offer an alternative repayment arrangement or restructuring of their mortgage on the basis that the Defendants' mortgage was unsustainable.

82. It is further confirmed on affidavit that a letter had been written to the Defendants on the 8th of September, 2015 notifying them that their mortgage was unsustainable and confirming that the protections of the Mortgage Arrears Resolution Process ("MARP") no longer applied to the Defendants. This letter, exhibited on affidavit, further confirms that proceedings would not issue for at least three months to afford the Defendants an opportunity to explore the options available.

83. In the light of this evidence, it is not clear to me in what way it is contended that there is insufficient evidence of compliance with the *Code*. No specific evidential gap has been identified on behalf of the Second Named Defendant. In the circumstances and having due regard to the decision of the Supreme Court in *Irish Life & Permanent v. Dunne* [2015] IESC 46, I cannot conclude that a real basis for defence has been identified and there appears to be little reality to any basis for a defence being established with reference to the *Code*.

84. The fourth and final issue identified on behalf of the Defendants relates to errors on the face of the execution order. It was, however, accepted on behalf of counsel for the Second Named Defendant that such an error does not affect the Order for Possession which he seeks to set aside as it post-dated it. As made clear in *Crowley v. Ireland & Ors.* [2022] IEHC 596 an error in an Execution Order may be amenable to challenge in legal proceedings (be it by way of appeal or Judicial Review). Separately, reliance on a defective execution order might, depending on the circumstances and the nature of the defect, give rise to a cause of action either in trespass or otherwise but such an error does not undermine the Order for Possession previously made.

85. Concerned as I am by the case advanced that the Second Named Defendant was not accorded constitutional justice in the decision-making process because she was not on notice of the proceedings, having carefully considered what was urged on behalf of the Second Named Defendant as a possible defence to the proceedings, it seems to me that the case made falls well short of demonstrating that a real prospect of successfully defending the proceedings exists.

There is no real basis for a concern, in my view, that had the Second Named Defendant participated in the proceedings and had the case gone to hearing for determination on the merits before a judge that an Order for Possession might have been avoided.

86. Of course, the right to be heard in one's defence, even if one has little to offer by way of defence, is protected under the Constitution. As a core constitutional value inherent in the personal right to constitutional justice safeguarded under Articles 34 and 40.3 of the Constitution, the courts should be properly vigilant to ensure that the right is not trammelled upon. It is a fundamental right integral to the rule of law and even more necessary to the proper functioning of the justice system than an ability to rely on a solicitor's representation to the court that he or she is duly authorised to act. Whether the Court should go so far as to set aside a regularly obtained final and executed order for the purpose of vindicating that right on the special facts of a particular case, even where a defence with a real prospect of success has not been identified, may be guided by the past conduct of the litigant in engaging and seeking to participate.

Conduct and Justice Considerations

87. While it is hard to believe but nonetheless still conceivable that, despite what appears to be subsisting and supportive marriage, the First Named Defendant not only withheld information from the Second Named Defendant in relation to the existence of proceedings and went to extreme lengths to fraudulently fabricate an authority purporting to emanate from her as purported evidence of her consent to the Order for Possession and the subsequent transfer of the family home (as she alleges with reference to no less than two separate forms of authority – one conveyed to Carley & Associates and the other to O'Donohue Solicitors), I would not find, even if this were true, that the Second Named Defendant should be absolved from the consequences of failing to deal in any direct way with her liability on foot of a loan agreement she accepts she knowingly entered into.

88. Even accepting that her husband sought to hide the truth of the full extent of their financial difficulties from the Second Named Defendant, I find her professed belief that an arrangement regarding the payment of the loan had been entered into by the First Named Defendant and that the Defendants were somehow meeting their payment obligations to be so naïve or blindly trusting as to be almost incredible and, if plausible at all, to be incapable of excusing her abdication of all responsibility for joint and several financial responsibilities.

89. On the First Named Defendant's declared income and the Second Named Defendant's income of Carer's Allowance, it was simply mathematically impossible to service loan repayments on a loan of that size on any commercially real basis. I find it very difficult to accept that the Second Named Defendant could truly believe that a monthly liability of circa €10,000, or even the unrealistically reduced payment of €3,500 suggested by her in her evidence as being the amount of the monthly repayment she believed her husband had agreed with the Plaintiff, was capable of being met from her husband's disclosed earnings having regard to their other outgoings. Her evidence in this regard lacks plausibility, particularly as no payments at all were being made.

90. I have considerable sympathy for the impact of the traumatic loss of a family home. I understand that caught in the circumstances of significant financial difficulties either or both defendants might simply have been unable to cope with reality. The human desire to hide one's head in the sand is not foreign to any of us. Allowing for the possibility that the Second Named Defendant is being honest in her evidence as to her professed belief that liabilities were being discharged, it does not seem to me that I can properly permit what I regard as tantamount to wanton ignorance or wishful thinking to carry much weight when balancing the factors which guide the exercise of an exceptional jurisdiction.

91. It is striking that the Circuit Court in this case was at pains to ensure that the Second Named Defendant was represented before the Court. The judge had clearly read the papers. She had formed a view of the merits of the application based on the proofs put before her on affidavit as she indicated that she was unhappy that the Defendants had not confronted the need to sell the family home sooner opining that they could not afford the house. It is manifest from the transcript that notwithstanding her views in relation to the failure of the Defendants to adopt a realistic approach to their indebtedness earlier, she would not have made the orders sought on consent were it not for the fact that a solicitor attended before her, having entered an appearance, professing to have his clients' authority and instructions to consent. Her subsequent remarks confirm that she considered a twelve month stay in the circumstances to be generous and, familiar as she clearly was with the papers, she invited an application to lift the stay if the Defendants were to drag their feet.

92. Manifestly therefore the conduct alleged which gives rise to an interference with the fair and constitutional administration of justice, namely the alleged failure of the Second Named Defendant's solicitor on record to procure actual consent from the Second Named Defendant and/or the fraudulent act of the First Named Defendant in fabricating an authority from her, does not relate to the conduct of the proceedings by the court that heard the proceedings. Whatever about the conduct of the First Named Defendant and/or the solicitor on record, an objective assessment of the conduct of the Plaintiff and the Second Named Defendant in this case mitigates against the exercise of discretion to set aside the Order made. The Plaintiff cannot be criticised for its reliance on an Appearance entered by a solicitor who purported to act with the authority and on the instructions of his clients and circumstances have not been demonstrated which establish that there has been a denial of justice by the Circuit Court in its conduct of proceedings.

Delay and Prejudice

93. As for delay, while the Second Named Defendant did not materially delay once the Order for Possession was executed in January, 2023, the Order for Possession was then more than three and a half years old. The prejudice to the Plaintiff in unwinding an order which had been executed when the Plaintiff is now in possession following efforts to compromise liabilities in a manner which did not require execution over a protracted period of time well in excess of the stay allowed by the Court in June, 2019, is obvious.

94. Applying the principles identified in the case-law and having found no real prospect of successfully defending the proceedings, I am satisfied that circumstances which would warrant the exercise of an inherent but very exceptional jurisdiction to set aside a final order have not been established. The Second Named Defendant abdicated responsibility for the management of her financial affairs at her own peril. There is no fundamental denial of justice in refusing relief.

Extension of Time for Leave to Appeal

95. This brings me to the alternative application before me, namely the application for an order extending time within which to bring an appeal. The application for an extension of time for leave to appeal was only made in July, 2023 (more than six months after execution of the Order for Possession).

96. Considerable emphasis was placed on behalf of the Plaintiff on the fact that the Order for Possession made was a consent order made some four years before the application for an extension of time within which to appeal was brought. By reason of the failure in this period to come to an arrangement in compromise of the Defendants' debt, the Order for Possession had finally been executed. In consequence it was argued on behalf of the Plaintiff that the Order for Possession was spent as at the date of the making of the application as the Plaintiff is in possession following steps taken to execute the order.

97. In argument I have been referred to principles established in *Éire Continental Trading Co. Ltd v Clonmel Foods Ltd*, [1955] IR 170, *Brewer v Commissioners of Public Works in Ireland* [2003] IESC 51, *Irwin v. Deasy* [2010] IESC 35, *Goode Concrete v CRH plc* [2013] IESC 39, *Danske Bank v Kirwan* [2016] IECA 99, *Carlisle Mortgages Limited v. Costello* [2018] IECA 334, *Pepper Finance Corporation (Ireland) DAC v. Cannon* [2020] IESC 2 and, most recently, *Seniors Money Mortgages v. McGovern* [2020] IESC 3 to guide the exercise of my discretion.

98. In *Éire Continental* Lavery J. accepted the submission of Counsel that identified conditions were "*proper matters for the consideration of the court in determining whether time should be extended*" as follows:

a. The applicant must show that he had a *bona fide* intention to appeal formed within the permitted time.
b. He must show the existence of something like mistake and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient.
c. He must establish that an arguable ground of appeal exists.

99. It is clear from the terms of the judgment in *Éire Continental*, however, that the Court did not consider these to be hard and fast rules but recognised the necessity to consider all the relevant circumstances. The jurisprudence since the seminal decision in *Éire Continental* has consistently demonstrated that the conditions there identified operate to guide the exercise of discretion but are not applied as rules of law. The analysis in *Goode Concrete v. CRH* [2013] IESC 39, referred to in *Seniors Money Mortgages v. McGovern* [2020] IESC 3, sets out the purpose behind the obligation to consider all the circumstances. As identified by Clarke J. in

Goode Concrete v. CRH, the obligation of the court when considering an application to extend time (at para. 3.3) is to balance justice on all sides.

100. In *Goode Concrete v. CRH* Clarke J. went on to identify certain considerations that are likely to arise in all cases in the following terms:

> *"Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice. Prejudice to successful parties who have operated on the basis that, once the time for appeal has expired, the proceedings (or any relevant aspect of the proceedings) are at an end, must also be a significant factor. The proper administration of justice in an orderly fashion is also a factor of high weight. Precisely how all those matters will interact on the facts of an individual case may well require careful analysis."*

101. Considering then the circumstances of this case for the purpose of an extension of time application, the Second Named Defendant could not comply with the first *Eire Continental* consideration as she claims not to have been aware of the making of the Order for Possession until several years later. If this is true, then it was impossible for her to show that she had a *bona fide* intention to appeal formed within the permitted time. This is not the end of the matter and I could still extend time. *Goode Concrete* is an example of an exception because the appeal was based on information that had come to the attention of the appellants only after the conclusion of the High Court process. The rationale for holding parties to the stipulated time limits for appeals is, as noted by O'Malley J. in *Seniors Money Mortgages v. McGovern*, that in most cases a party to litigation will be aware of those limits and should not be allowed an extension unless the decision to appeal was made within the time, and there is some good reason for not filing within the time. Further, in most cases, the parties will be aware of all the evidence called, the submissions made and the reasoning of the judge – they have, therefore, all the information necessary for the purposes of deciding whether to appeal.

102. I do not consider that it would be appropriate to refuse an extension of time in this case because of non-compliance with a requirement to form an intention to appeal within the requisite period given the claim to have been entirely unaware of the existence of the Order for Possession. It is not without some significance, however, that when the Second Named

Defendant says she became aware of the Order for Possession, she allowed more than six months to pass before making application for an extension of time. Even this delay is not in my view determinative because this is not a case where the Second Named Defendant did nothing and sat on her hands upon becoming aware of the existence of the Order. If she only became aware of the existence of proceedings resulting in the making of an Order for Possession in January, 2023, it is clear that she moved thereafter to set aside the Order for Possession in a timely fashion. Furthermore, moving to set aside the Order for Possession was an obvious course to take in view of what was alleged to have occurred. In consequence I accept that seeking an extension of time within which to appeal might not have immediately suggested itself as the appropriate remedy and some indulgence is due to the Second Named Defendant in respect of this delay.

103. Although the delay between January, 2023 and July, 2023 is not determinative, significance nonetheless attaches to the overall period of delay between the making of the Order for Possession and the bringing of an application for an extension of time within which to appeal. In weighing rule of law and administration of justice considerations which underpin the requirement for timely application, the length of the delay and the extent to which reliance has been placed on the Order sought to be impugned are both central considerations. In this case the delay is considerable as the order is more than four years old. Furthermore, the Order has been executed such that the Plaintiff is now in possession. Although the property has not yet been sold by the Plaintiff, the *status quo* since the making of the order is entirely changed. I note the analogy made in *Seniors Money Mortgages v. McGovern* with delay in the context of judicial review (see para. 66). The court in judicial review proceedings retains a discretion to refuse relief if, for example, the conduct of the applicant was such as to disentitle her from it. I have already commented above on the Second Named Defendant's conduct *vis-a-vis* her financial liabilities. While such conduct may be understandable amid stressful life events and may reflect the differing capacity of individuals to deal with adversity, care should be taken not to condone it by excusing those who do not face up to their obligations from the requirements of law, while holding those who do to a higher standard of accountability as this would result in its own unfairness. Accordingly, while not a bar to an extension of time delay remains a factor which weighs against the exercise of a discretion to extend time.

104. The second of the three *Éire Continental* guidelines is the least problematic on this application. It seems to me that the requirement to demonstrate the existence of something like

mistake is met in the circumstances of this case where it is alleged that the Second Named Defendant was wholly unaware of the existence of proceedings or the making of the Order for Possession. This constitutes "*something like mistake*".

105. Recalling that relevant considerations are not necessarily of equal importance *inter se*, it seems to me that the most important consideration on the peculiar facts of this case is whether arguable grounds of appeal exist. As Clarke J. pointed out in *Goode Concrete* it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside the time if the Court is not satisfied that there are arguable grounds, even if the intention was formed and there was a very good reason for the delay. As O'Malley J. stated in *Seniors Money Mortgages v. McGovern* (para. 64 to 65) extending time in the absence of an arguable ground would simply waste the time of the litigants and the court. She added:

> *"By the same token it seems to me that, given the importance of bringing an appeal in good time – the desirability of finality in litigation, the avoidance of unfair prejudice to the party in whose favour the original ruling was made, and the orderly administration of justice – that the threshold of arguability may rise in accordance with the length of the delay. It would not seem just to allow a litigant to proceed with an appeal, after an inordinate delay, purely on the basis of an arguable or stateable technical ground. Since the objective is to do justice between the parties, long delays should, in my view, require to be counterbalanced by grounds that go to the justice of the decision sought to be appealed…."*

106. I have addressed the grounds of defence identified before me from paras. 76 to 86 above and for the reasons already given, it seems to me that a requisite threshold of arguability has not been reached on the arguments presented on behalf of the Second Named Defendant. No grounds have been identified which go to the justice of the decision sought to be appealed.

107. In seeking to extend time for an appeal some four years after an order was made, it seems to me that the Second Named Defendant must show a sufficiently strong case to warrant the exercise of a power to disrupt an order duly made and relied upon in good faith by the Plaintiff in entering possession of the property. Permitting an appeal at this remove has serious implications for finality and legal certainty, both fundamental to the rule of law and the administration of justice. More than merely putting the Plaintiff on formal proof or raising

technical points which themselves do not demonstrate that an injustice has occurred, is clearly required. The Second Named Defendant has failed to meet this test.

108. I have concluded that in the circumstances of this case, I should not exercise my discretion in favour of extending time. It seems to me that the Plaintiff was entitled to an Order for Possession in June, 2019. Nothing in the case advanced on behalf of the Second Named Defendant provides a basis for concluding that had she participated in or engaged with the proceedings, that the outcome would have been anything other than an Order for Possession as was in fact made. I am not satisfied that she has identified an arguable ground of defence, still less a real basis for defending those proceedings. Extending time for an appeal at this remove would not do justice between the parties.

CONCLUSION

109. For the reasons given, I refuse both applications. Unless the parties communicate the terms of an agreed order, this matter will be listed not earlier than two weeks post-delivery to deal with any matters arising.