THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 260

Record Number: 2012 375SP

Court of Appeal Record Number: 2019/27

Haughton J.
Power J.
Murray J.

BETWEEN/

ADM MERSEY PLC

FIRST NAMED RESPONDENT

- AND –

AIDAN FLYNN

SECOND NAMED RESPONDENT

- AND –

ALLIED IRISH BANKS PLC

CLAIMANT/APPELLANT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 29th day of September 2020

Introduction

1. This appeal concerns the extent of the functions and powers of the Examiner of the High Court (or, in this case, the Assistant Examiner, and references to Examiner may be taken to include an Assistant Examiner) in taking accounts and pursuing enquiries as to encumbrances in a mortgage suit and filing a Certificate accordingly; the jurisdiction of the High Court under O. 55, r. 50 of the Rules of the Superior Courts in hearing an application to vary or discharge an Examiner's Certificate in "special circumstances"; and the effect in both processes of s. 31 of the Registration of Title Act, 1964 which provides for the registers kept in the Land Registry to be conclusive evidence of the ownership of an interest in land.

Background Facts

2. By Deed of Mortgage dated 18 January 2007 ("the Mortgage") made between the second named respondent ("Mr. Flynn") and AIB Mortgage Bank ("AIBM") and Allied Irish Banks plc ("AIB" /the appellant) Mr. Flynn mortgaged to AIBM and AIB as security for the total debt owing to each of them as lenders –

   "ALL THAT AND THOSE that piece or plot of ground containing approximately 10.7 acres, (43,300 square meters) being part of the townland of Leckaum, Barony of Gaultiere in the Electoral Division of Killea Dunmore East in the County of Waterford and being part of the lands comprised in Folio 684 of the Register of Ownership of

Freehold Land County Waterford and more particularly delineated on the Land Registry Map attached hereto and thereon outlined in red EXCLUDING the area outlined in green comprising 2.24 acres (9065 square meters)."

("The mortgaged land").

3. Mr. Flynn was not then registered as owner of the mortgaged land, but was entitled to be so registered. "Part 2 Ownership" in Folio 684 shows that Mr. Flynn became registered as "full owner" of the property described in that Folio on 21 October 2009.

4. It is important to note that Folio 684 relates to more property than just the mortgaged land. Part 1(a) describes the property as follows –

   "The property shown coloured Red as Plan(s) 684, C13TH on the Registry Map, containing 5.2179 hectares, situate in the townland of LECKAUN, in the barony of GAULTIERE, in the Electoral Division of Killea."

   The mortgaged land does not extend to the entirety of the property described in Folio 684, leaving the area outlined in green on the map attached to the Mortgage, representing something less than one fifth of the entire of the property comprised in the Folio, not encumbered by the Mortgage.

5. The Mortgage refers to both AIBM and AIB as "lenders" and "lender" means either of them, and expressly provides that it is "security for the total debt owing to each Lender, whether or not a Lender holds other security" (Clause 2.1). The "total debt" means all amounts payable by Mr. Flynn in respect of any loans or credits granted by either lender. Clause 5, headed "Ranking of Security" provides –

   "5.1 The Lenders hereby agree and the Mortgagor hereby acknowledges that regardless of anything else to the contrary in this Mortgage:

   (a) until AIB Mortgage Bank has granted a full release or discharge of this Mortgage (the "AIB Mortgage Bank Release Date"):

      (i) this Mortgage shall rank first as security for the Total Debt owing to AIB Mortgage Bank in priority in all respects to the security held under this Mortgage by AIB;

      (ii) thereafter shall rank next as security for the Total Debt owing to AIB;

      and

   (b) after the AIB Mortgage Bank Release Date, for so long as any Total Debt remains owing to AIB, this Mortgage shall rank as security for the Total Debt owing to AIB, regardless of:

      (i) the order, registration, notice, execution or date of any of the security contained in this Mortgage; or

(ii) the creation in favour of either of the Lenders of any further or additional security over the undertaking properties or assets of the Mortgagor; or

(iii) any fluctuation in any Total Debt from time to time owing to either of the Lenders or the date in which any Total Debt is incurred; or

(iv) any contrary provision in any agreement between the Mortgagor and any Lender.

5.2 Until the AIB Mortgage Bank Release Date, this Mortgage may be enforced only by AIB Mortgage Bank and AIB shall not take any steps to enforce this Mortgage, appoint any receiver or take possession of the Mortgaged Property without the prior written consent of AIB Mortgage Bank."

6. From the copies of the Mortgage exhibited it appears to have been executed by Mr. Flynn, and his signature to have been witnessed by William M. Cullen solicitor, although this was in controversy before the Assistant Examiner. It does not appear to have been executed by or on behalf of either AIBM or AIB. It bears a stamp "Land Registry registered as a burden in Folio 684 of the Register, County Waterford Inst. No. D2009LR192582".

7. Part 3 of Folio 684 details "Burdens and Notices of Burdens, and records that also on 21 October 2009 the charges in favour of AIBM and AIB under the Mortgage were separately entered and recorded as Burdens in the following terms: -

> "2a 21 – Oct – 2009
>
> D2009LR192582J Charge for present and future advances repayable with interest. AIB Mortgage Bank is owner of this charge as tenant in common in undivided shares, the owner's share at any time being the proportion that the debt owing to the owner secured by the charge bears to the total debt owing to the owners in common secured by the charge.
>
> This Charge (Entry 2a & 2b) affects plan 684 only (See D2009LR192582J)
>
> 2b 21 – Oct – 2009
>
> D2009LR192582J Charge for present and future advances repayable with interest. Allied Irish Banks plc is owner of this charge as tenant in common in undivided shares, the owner's share at any time being the proportion that the debt owing to the owner secured by the charge bears to the total debt owing to the owners in common secured by the charge."

8. On 20 April 2011 AIB obtained judgment against Mr. Flynn together with a Ms. Geraldine Dunne for the sum of €550,853.14 together with €315.98, making together €551,169.12, together with interest thereon at 8% per annum from 26 April 2011.

9. On 28 June, 2011 the first named respondent, then called ADM Londis Limited Company, now renamed ADM Mersey Public Limited Company with effect from 18 June 2018 ("ADM

Mersey") (this court having acceded to an application to amend the title to the proceedings accordingly) obtained judgment against Mr. Flynn for the sum of €150,000.

10. On 25 August 2011 ADM Mersey registered a judgment mortgage against Mr. Flynn's entire interest in Folio 684. This was recorded at entry three in part three of Folio 684 as follows: -

"3 25 – Aug – 2011

D2011LR098567E A judgment mortgage in respect of a judgment obtained by ADM Londis public limited company against Aidan Flynn and Geraldine DUNNE on the 28th day of June 2011 in the High Court (Record Number 2010/2392S) in an action, matter or cause of ADM Londis Public Limited Company v. Aidan Flynn and Geraldine Dunne on the interest of Aidan Flynn in the property."

11. On 15 February, 2013 AIB registered a judgment mortgage against Mr. Flynn's interest in Folio 684 in the following terms: -

"4 15 – Feb – 2013

D2013LR014271R A judgment mortgage in respect of a judgment obtained by Allied Irish Banks plc against Aidan Flynn and Geraldine Dunne on 20th day of April 2011 in the High Court Record Number 2010 No. 4731S in a cause/matter/action of ALLIED IRISH BANKS plc v. Aidan Flynn and Geraldine Dunne against the interest of Aidan Flynn and Geraldine Dunne in the property."

12. In 2012, ADM Mersey commenced these proceedings. By order dated 3 December 2012 the High Court (Feeney J.) made a well charging order and an order for sale of the property comprised in Folio 684. In the usual way the primary order directed that, in default of Mr. Flynn disputing the figures or paying the judgment debt within a prescribed period, the registered lands should be sold at such time and place and subject to such conditions of sale as should be settled by the Court and that an account of all encumbrances subsequent as well as prior to and contemporaneous with the plaintiff's demand and an enquiry as to the respective priorities of all such demands as shall be proved be made.

13. Mr. Flynn did not dispute the figures, nor did he discharge the judgment debt owed to ADM Mersey, and on 23 May 2013 ADM Mersey issued a Notice to Proceed on foot of the order of 3 December 2012, and this was returnable in the Examiner's Office on 4 July 2013.

14. Following the publication of an advertisement for incumbrancers, the sitting to prove claims was first listed before the Assistant Examiner of the High Court (Mr. Louis MacDermott) on 4 September 2013. Before the Assistant Examiner at that hearing was an affidavit of Patrick McNamara, an assistant manager of AIB, sworn on 15 August 2013. Mr. McNamara made that affidavit "on behalf of Allied Irish Banks, p.l.c.". At para. 3 he deposed to AIBM and AIB being registered charge holders over "the property comprised in

Plan 684 of Folio 684 County Waterford". This averment was not accurate in that the charge only extends to part of Folio 684. Mr. McNamara then exhibited a true copy of the Mortgage, in which the Schedule and attached map showed the more limited reach of the charge. He then deposed to the judgment obtained by AIB and entered up against Mr. Flynn and Ms. Dunne on 20 April 2011 and he averred –

> "I say that the Judgment Debt herein remains unsatisfied to the Bank and the Bank are continuing to rely on the security herein."

15. Order 55, rule 51 stipulates that –

> "Notes shall be kept of all proceedings before the Examiner with proper dates, so that all such proceedings in each cause or matter may appear consecutively, and in chronological order, with a short statement of the questions or points decided or ruled at every hearing."

Although the notes recording the proceeding before the Assistant Examiner on 4 September 2013, and a later hearing before him on 8 October 2013, were not exhibited, there was a suggestion (in the written Submission of ADM Mersey to this court) that these notes had been seen by the trial judge, although not seen by the parties. This court decided in advance of the appeal hearing to obtain copies of these official Notes from the Examiner's Office, and these were circulated to the parties in advance of the appeal hearing. Neither party to the appeal objected to this, or to this court having regard to the contents of those Notes in reaching its determination.

16. The Note of the proceeding before the Assistant Examiner on 4 September 2013 records that the matter was adjourned from 4 July 2013 and that those attending were Mr. Kevin Kennedy of Michael Nugent & Co. Solicitors acting for the ADM Mersey, and Ms. Mairead Keane, of Pearts, Agents for Barry C. Galvin, Solicitors acting for AIB. The following then appears under the heading "Adjudication of Claims": -

> "**Comments: -**
>
> Advertisements have been vouched. Incumbrancers were notified (copy of letters produced; now on file). One claim only (that of AIB) entered. Mortgage document exhibited thereto is unsigned by the mortgagor. Supplemental affidavit to be filed addressing this point and, also, clarifying what claim is being entered – whether it is in respect of a judgment mortgage (burden 3 on the folio) or in respect of the charges (of burdens 2a and 2b). affidavit to be filed by Fri. 4 October 2013 and adjudication thereon listed for Tuesday October 2013."

17. The Note goes on to refer to matters concerned with Counsel's opinion on title and draft particulars and conditions of sale, and the Assistant Examiner's advice to Mr. Kennedy that he should nominate an auctioneer and valuer, and submit draft conditions of sale for approval, and that it was ADM Mersey's obligation to provide vacant possession to a purchaser for which purpose it might be necessary to apply for an order for possession.

18. Before the matter came before the Assistant Examiner on 8 October 2013 a further affidavit was filed on behalf of AIB on 16 September 2013. This affidavit is sworn by Mr. John O'Brien, solicitor of Barry C. Galvin & Son, solicitors acting on behalf of AIB, and is stated to be supplementary to the affidavit of Mr. McNamara. Mr. O'Brien deposes that "…this deed of mortgage was registered in the Land Registry at Part 3 – Burdens and Notices of Burdens, number 2a and 2b on Folio 684 County Waterford", and he then exhibits a true copy of the folio. He then again deposes to the judgment obtained by AIB on 20 April 2011, a copy of which he exhibits, and at para. 5 he states –

> "I say that accordingly I am satisfied that the claim of Allied Irish Banks p.l.c., ranks in priority to the claim of ADM Londis p.l.c., over the property comprised in Folio 684 County Waterford."

19. The note of the resumed hearing before the Assistant Examiner on 8 October 2013 records as those attending Mr. Kennedy on behalf Michael Nugent & Co, solicitors for the plaintiff, and Mr. Paul Boyd of Pearts, agents for Barry C. Galvin Solicitors for AIB. The following relevant Comments are noted: -

> "**Comments:** - Adjudication of claims:
>
> Affidavit of John O'Brien filed 16th September 2013 considered. The affidavit is on behalf of Allied Irish Banks plc and not AIB Mortgage Bank. Accordingly, this is not in respect of a claim by AIB Mortgage Bank. No such claim has been entered. The mortgage deed at Exhibit A does not appear to be signed by the mortgagor (see page 6 of the exhibit). The claim on foot of a mortgage described in paragraphs 2 and 3 of the affidavit is not admitted on the grounds that evidence of the charge has not been produced.
>
> The affidavit, at paragraph 4, details the claimant's judgment mortgage. This is shown at burden no. 4 on the Folio and copy of the relevant FiFa is exhibited. Judgment mortgage of Allied Irish Bank plc admitted in the amount of €550,853.14 and costs of €315.98, plus continuing interest."

The Note goes on to deal with the Particulars and Conditions of Sale and the settling of an auction date and auctioneers.

20. The copy Mortgage exhibited in the Affidavit of John O'Brien looks identical to the copy Mortgage exhibited previously by Mr. McNamara. I will return later to the issue raised by the Assistant Examiner as to execution by the mortgagor.

21. It is important to note that after the hearing on 8 October 2013 Barry C. Galvin solicitors for AIB should have been aware that AIB's claim as an incumbrancer and on foot of the charge registered at 2(b) of Folio 684 – and hence the claim to priority over the judgment mortgage registered in favour of ADM Mersey – was not being admitted, as their representative was present at that hearing.

22. ADM Mersey then advanced the proceedings before the court, seeking an order for vacant possession which came before the High Court in May 2014. Barrett J. directed that AIB be put on notice. It is averred in an affidavit sworn by Mr. Donnchadha Murphy, solicitor in Barry C. Galvin & Son, as sworn on 14 November 2018 that AIB was represented at the adjourned date and it was stated on behalf of AIB –

> "That it held a first legal charge over the Defendant's interest in Folio 684, County Waterford and, as such, priority was being claimed over Mr. Nugent's application to execute his Judgment Mortgage. The Court noted the Claimant's position." (para. 13).

At that hearing an order was made granting possession of the property described in Folio 684 to ADM Mersey against Mr.Flynn, for the purposes of sale of the property.

23. Ultimately, in 2017 the sale of the (entire) property was completed for €110,000, and the Examiner issued a Certificate of Result of Sale which was filed on 5 September 2017.

24. The sale having been completed, on 25 September 2018 notice was issued of a sitting before the Examiner on 3 October 2018, together with the Examiner's draft Certificate, to finalise that certificate. Mr. Murphy avers in his affidavit sworn on 9 October 2018 (at para. 7) that –

> "Despite a request to adjourn the hearing of the matter to allow the Claimant's Solicitors time to put matters on affidavit in satisfaction of their claim, their request for an adjournment was refused and the matter was determined."

25. Solicitors for both parties were present before the Assistant Examiner on 3 October 2018 when the Certificate was finalised. The Certificate notes the attendance by ADM Mersey by its solicitors, that Mr. Flynn had not attended although duly served, and that AIB also attended by its solicitors. The Certificate recites the advertisements for encumbrances; the evidence produced before him; the primary well charging order and subsequent orders of the High Court, the result of the sale, the affidavits of Mr. McNamara and Mr. O'Brien filed on behalf of AIB, the Land Registry sealed and certified copy Folio 684 of the Register of Freeholders for the County of Waterford dated the 4 day of May 2018 and the Certificate of Funds dated 10 May 2018.

26. In the Schedule to the Certificate the Assistant Examiner certifies the encumbrances and the order of priorities. The first mentioned is the AIB charge appearing at entry no. 2a "…In respect whereof no claim has been entered". The following three entries are then relevant: -

> "(2) The Charge appearing by entry no. 2b of Part 3 of the said copy Folio and this Certificate mentioned to have been registered by Allied Irish Banks p.l.c. against the interest of the Defendant in that part of the said Folio shown in Plan 684 in the Land Registry on the 21st day of October 2009 in respect whereof a claim has been

entered by Allied Irish Banks p.l.c. which claim has not been admitted pursuant to the Ruling of the Assistant Examiner dated the 8th day of October 2013.

(3) The principal moneys and interest thereon by said Order dated the 3rd day of December 2012 declared to be well charged on the interest of the Defendant in the said lands and premises on foot of a Judgment registered in the Property Registration Authority on the 25th day of August 2011 in said Order mentioned on foot of which there is due to the Plaintiff the sum of €157,306.63 for Principal together with interest from the 28th day of June 2011 and the Plaintiff's costs when taxed and ascertained.

(4) Judgment Mortgage appearing by said copy Folio and this Certificate mentioned to have been registered on the 15th day of February 2013 against the interest of the Defendant herein in favour of Allied Irish Banks p.l.c. on foot of a Judgment obtained in the High Court in proceedings entitled 'Record No. 2010 No. 4731S *Allied Irish Banks p.l.c. v. Aidan Flynn and Geraldine Dunne*' on the 20th day of April 2011 in the sum of €550,853.14 together with costs of €315.98 €550,853.14 on foot of which a claim has been entered and proved."

The Certificate is signed by Mr. Louis Mac Dermott as Assistant Examiner and dated 3 October 2018.

27. As to the status of an Examiner's Certificate, Order 55, rule 49 provides –

"49. Every Certificate, with the accounts (if any) to be filed therewith, shall be filed in the Examiner's Office, and shall thenceforth be binding on all parties to the proceedings unless discharged or varied upon application by motion of which notice shall have been served *within eight days of such filing*; provided that in case of an application to discharge or vary any Certificate to be acted upon by the Accountant without further order, or any Certificate on passing receivers' or liquidators' accounts the notice shall be served within 3 days after the filing of the Certificate." [Emphasis added]

28. By Notice of Motion dated 10 October 2018, and grounded on an affidavit of Mr. Donnchadha Murphy sworn on 9 October 2018, AIB made application pursuant to O. 55, r. 49 to vary the Examiner's Certificate. Mr. Murphy averred that the Assistant Examiner –

> "Erred in failing or refusing to admit the Claimant's claim pursuant to a Deed of Mortgage between the defendant herein of the one part and AIB Mortgage Bank and Allied Irish Banks plc of the other part. I say and believe that an error was made in circumstances where the said charge was registered on behalf of both AIB Mortgage Bank and Allied Irish Banks plc at numbers 2a and 2b of Part 3 of Folio 684 in the Land Registry on the 21st October 2009." (para. 4).

Mr. Murphy further averred that AIB's charge took priority over ADM Mersey's judgment mortgage.

29. However it seems that this application was not determined. In a later affidavit sworn by Mr. Murphy on 25 October 2018 he avers at para. 3: -

> "I say that when the application appeared before the Assistant Examiner on the 22nd October last, it transpired that the application was incorrectly before him and the only remedy remaining to the Notice Party [AIB] was to issue this Notice of Motion pursuant to O. 55, r. 50."

It is not quite clear why this should be so given that the Examiner's Certificate is dated 3rd October 2018 and O. 55, r. 49 would appear to have allowed eight days for the filing of a Notice of Motion seeking discharge or variation. This does not appear to be a case where the shorter three-day period applied because, as will be seen, further application to the court was required to approve a Payments Schedule, and the payment out of funds could not have been made by the accountant "without further order". Perhaps the reason it was not heard was that the motion was not served within the eight days.

30. At any rate two Notices of Motion then issued on 26 October 2018. The first is a motion issued by Barry C. Galvin & Son on behalf of AIB seeking "an Order pursuant to Order 55 Rule 50 of the Rules of the Superior Courts to vary or discharge the Certificate of the Examiner which has issued herein, dated the 3rd October 2018" and grounded on the affidavit of Mr. Murphy sworn on 25 October 2018.

31. Order 55, rule 50, which is central to this appeal, states –

> "50. The court may, in special circumstances, upon an application by motion for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties."

Mr. Murphy in his affidavit relied on his earlier affidavit of 9 October 2018; he accepted that the Certificate was now binding. He asserted that unless the Certificate was varied AIB would be "gravely prejudiced" as its Mortgage was prior in time and registered, and he again averred that the Assistant Examiner had fallen into error and that "a Judgment Mortgage cannot take priority over a first legal charge, particularly in circumstances where the former has also had the benefit of prior registration over the latter" (para. 7). It is worth noting that in these affidavits Mr. Murphy makes no express mention of "special circumstances", and does not attempt to explain how they could arise.

32. The second motion was issued by Michael Nugent & Co. on behalf of ADM Mersey on 26 October 2018 and sought an order "to allocate the funds herein as in the Payment Schedule a copy of which is annexed hereto". The Payment Schedule referred to funds in court of €110,000 (being the proceeds of sale), and prefaced the request for certain payments with the following –

"It appearing that all proper payments which would fall to be made out of said funds in Court have been satisfactorily provided for save as provided for hereunder. Encash said fund with accrued income thereon and pay the proceeds thereof, after deduction for court fees if any, as follows:"

33. The Schedule then sought payment of the following: -

"1. Court duties on Examiner's Certificate/result of sale etc. €2,750.00

2. Auctioneers fees and expenses (inclusive of VAT) €2,706.00

3. Valuer's Fee inclusive of VAT €922.50

4. After making the above payments the balance, if any, to be paid to the plaintiff [ADM Mersey] on account of the amount found to be due to the plaintiff to the defendant for principal together with interest from the 28th day of June 2011 on foot of the Order of the High Court dated the 3rd day of October 2012 which said principal sum comprising €157,306. 63 further interest from the 28th day of June 2011 and costs not being calculated, the proceeds of sale being insufficient to discharge the said sum in full."

34. That application was vouched by an affidavit of Michael Nugent solicitor sworn on 25 October 2018 in which he stated that all the costs and expenses related to the sale of the lands, save for the costs of the auctioneers, the valuer and the court fees had been paid. Mr. Nugent confirmed that court counsel's fees had been paid, and exhibited a receipt, and that the purchaser's solicitors had confirmed that the purchaser made no claim against the funds in court.

35. It is apparent from this that substantial costs related to the sale had already been borne by Michael Nugent & Co. and would, if the balance of the €110,000 proceeds were paid out to that firm, be used to reimburse that firm in respect of those costs and also to enable them to discharge the costs due to them in the main proceedings, before paying over any balance to their client, now ADM Mersey. It does not appear that any order of the court permitting disbursement from the fund of €110,000 has been made on foot of the application of Michael Nugent & Co. on behalf of ADM Mersey pending the outcome of AIB's motion and this appeal.

36. An affidavit was sworn on 31 October 2018 by Sarah Brophy, an in-house solicitor in ADM Mersey, in response to Mr. Murphy's two affidavits. Having set out to the history of the matter Ms. Brophy avers at para. 8 that AIB "did nothing to advance its claim, nor to appeal the ruling of the Examiner, nor to challenge the decision that its claim was not admitted at any time since 8 October 2013". She goes on to aver that at all material times AIB was represented by the firm of Barry C. Galvin & Co., and that they were during the process served with all Notices of Motion to which they were entitled, and that they were represented before the High Court on 19 May 2014 when the order for

possession was made against Mr. Flynn. Ms. Brophy avers that notwithstanding such legal representation AIB: -

> "did nothing at all to advance or to state any claim to the proceeds of sale from October 2013 to October 2018"

during which time the plaintiff –

> "was engaged in consistent and continuous efforts to sell the lands at issue in these proceedings, against considerable opposition from [Mr. Flynn] and practical difficulties thrown up by [Mr. Flynn], at considerable trouble and expense to the plaintiff, and at all times relying on the fact that the claim of Allied Irish Banks plc had not been admitted, and that Allied Irish Banks plc had not challenged or appealed that decision." (para 10)

Ms. Brophy refers to the earlier affidavit of Mr. Murphy sworn on 9th October 2018 and his averment at para. 6 that the application to settle the Examiner's Certificate was made by Michael Nugent & Co. Solicitors for the plaintiff, which firm of solicitors had previously indicated that they have no instructions from ADM Mersey in the matter. She states at (para. 11) –

> "I am not sure that anything turns on the point, but I can confirm that at the time of that letter from Michael Nugent & Co. which is exhibited in Mr. Murphy's affidavit (being 6th February 2017) it was correct that Michael Nugent & Co. had no instructions in the matter, and that I was dealing with the matter as the in-house solicitor for the plaintiff. As the pleadings herein show, Michael Nugent & Co. was subsequently instructed to take up this matter on behalf of the plaintiff again."

Ms. Brophy further states that during the five year period AIB had full knowledge of the fact that their claim was "not admitted by the Examiner". She then avers that –

> "The plaintiff has already expended in excess of €54,000 in legal and sale costs and expenses in pursuit of the sale of this property, and continues to incur further costs." (para.13)

Although not entirely clear, this would suggest that ADM Mersey have incurred some €54,000 *in addition* to the three items referred to ADM Mersey's Notice of Motion, which total in excess of €9,000, and that of course is before any account is taken of costs incurred in the High Court on foot of the motion, and costs of the appeal to this court.

37. To this Mr. Murphy swore a replying affidavit on 14 November 2018. He reiterates that Mr. Flynn executed the Mortgage, and that AIB obtained judgment against Mr. Flynn for €550,853.14 on 20 April 2011 and that this is registered as a judgment mortgage against his interest in Folio 684 on 15 February 2013. He refers to the first listing of the matter before the Assistant Examiner on 13 September 2013, and the affidavit of Mr. Patrick McNamara sworn to prove AIB's claim. He then avers: -

"9. The Assistant Examiner felt dissatisfied with the affidavit of Patrick McNamara in circumstances where he stated that it did not clearly set out the debt. He directed that a supplemental affidavit be filed on behalf of Allied Irish Banks plc. touching on three distinct matters. A copy of the Mortgage Deed was to be exhibited, a copy of the Judgment obtained was to be exhibited and which entry on the Folio the claim related to was to be clarified. The Assistant Examiner directed that the supplemental affidavit be filed by the 16th September, 2013. The hearing was adjourned to the 18th September, 2013.

10. I say that the supplemental affidavit was sworn on behalf of the Claimant herein by John O'Brien, solicitor with this Deponent's firm of solicitors. I say that the said affidavit, which was sworn on the 13th September, 2013 in my respectful opinion dealt with all three matters arising in that it exhibited a true copy of the Mortgage Deed, it specified which entry on the Folio the claim related to and it exhibited a copy of the judgment obtained on behalf of the Claimant.

11. Nonetheless, I say and believe and am so informed that although the Assistant Examiner admitted the claim relating to number 4 on the Folio, the Judgment Mortgage of the Claimant, however further issues were raised by the Assistant Examiner regarding the documentation regarding his understanding of the correct party to whom the Claimant's debt was owed."

38. Mr. Murphy then exhibits a letter dated 12th May, 2014 from Michael Nugent & Co., solicitors for ADM Mersey, notifying AIB and AIBM of their client's application for possession which was adjourned to 19th May, 2014. He then avers –

"13. I say that the Claimant was represented at the adjourned date and it was stated on behalf of the Claimant that it held a first legal charge over the Defendant's interest in Folio 684, County Waterford and, as such, priority was being claimed over Mr. Nugent's application to execute his Judgment Mortgage. The Court noted the Claimant's position."

39. Mr. Murphy then avers that there was "extensive correspondence" between his office and Mr. Nugent's office with regard to the sale of the property, and he avers that "at no stage did any correspondence suggest that [AIB] would not be relying on their charge. In fact, I say that at all times, in correspondence and in Court, [AIB's] position has been maintained throughout that it would be relying on its charge."

40. ADM Mersey objected to this correspondence being referred to on the basis that it was "without prejudice". While it does refer to certain discussions that took place between the parties, it is not expressly stated to be "without prejudice". While it is described as "extensive" by Mr. Murphy, it is in fact quite brief, and is only evidence of engagement between Ms. Brophy and Barry C. Galvin & Son over the period 29 June 2017 to 9 November 2017. It is exhibited in an affidavit sworn by Mr. David Galvin on 14 November 2018, and prefaced by the following averment: -

"4. Firstly, I say that I had a telephone conversation with Ms. Brophy prior to her correspondence of the 29th June, 2017 and I say that during the said telephone conversation, Ms. Brophy accepted and acknowledged that the Claimant [AIB] herein had a first legal charge which ranked in priority to the Plaintiff's Judgment Mortgage. I further say that the said correspondence in fact corroborates this fact wherein it is stated '*The predicament for ADM [Mersey] is that it would appear that we may only be entitled to circa 20% of the sale proceedings with AIB.*' I say that it is difficult to reconcile the tone and content of Ms. Brophy's affidavit with the content of the correspondence."

I note that the figure of 20% correlates approximately to the area of additional land contained in Folio 684 not secured to AIBM or AIB under the Mortgage, but covered by ADM Mersey's judgment mortgage.

The correspondence starts with the letter of 6 February 2017 in which Mr. Nugent wrote to AIB's solicitors indicating that his firm was no longer instructed in the matter. It was then taken up between Ms. Brophy as in-house solicitor, and Barry C. Galvin & Son, following the conversation between Ms. Brophy and Mr. David Galvin on 29 June 2017. In that letter Ms. Brophy expressed her client's fear that "their share would be wiped out with legal fees and as such, there is very little incentive to invest any more time, effort or funds", and she requested that AIB enter into an agreement –

> "whereby the costs would be apportioned in proportion to the amount our respective clients can expect from the proceeds, i.e. 20/80. The advantage for your client is that we have buyer ready to go and with contracts already drafted and approved by the Court, same can issue immediately upon receipt of your client's agreement re. fees. This purchaser is already getting anxious and I feel that by the time we notify the Court of our intention to step aside and thereafter for your client to bring their own application, appoint a valuer and auctioneer etc., etc., this purchaser may well have walked away. Given that your client will incur costs in any event, I feel it makes commercial sense for us to do a deal whilst we still have an interested purchaser."

41. There followed in July 2017 an exchange of emails. Ms. Brophy on 18 July 2017 sought a response to her letter of 29 June, and on 25 July Barry C. Galvin & Son responded stating they were still awaiting the Bank's instructions. Ms. Brophy again prompted a response by reminders sent on 27 July 2017, 30 August 2017 and 4 October 2017, in which she expressed a concern that "we may lose the sale". On 25 October 2017 Barry C. Galvin & Son responded saying that AIB had "finally reverted and have asked us to seek a Marketing Report from your Auctioneer in the matter together with details with the proposed costs and outlays." Barry C. Galvin & Son sent a reminder email on 9 November 2017.

42. In a replying affidavit sworn by Ms. Brophy on 21 November 2018 she objects at the outset to the reference by Mr. David Galvin to "off-the-record discussions between the parties" exploring the possibility of an agreement between their respective clients to the

sharing of costs of sale "in the event of the claim, or potential claim, of Mr. Galvin's client being admitted by the Court in these proceedings". Ms. Brophy refutes that in the telephone conversation with Mr. Galvin she "accepted and acknowledged" that "the claimant herein had a first legal charge with ranked in priority to the Plaintiff's judgment mortgage". She says "this is not true and it did not happen". She avers that the validity and priority of that charge has always been in doubt, and that while she "may well have accepted and acknowledged that the charge of the AIB Bank was registered in the Land Registry before that of the plaintiff in time, I have never, nor could I, agree that the charge is valid or enjoys priority over that of the Plaintiff [ADM Mersey]". She avers that her letter of 29th June, 2017 was merely exploring the possibility of agreement with AIB. She states –

> "For the avoidance of any doubt, I say that there was no agreement or engagement and, on the contrary, Mr. Galvin failed to engage or respond in a meaningful manner over the following fourteen weeks, and he failed to accept or return several telephone calls from me, saying only … that he had no instructions." (para. 8)

She states that eventually on 25 October 2017 a Marketing Report was sought, and as at that stage the handing of the matter had been given back to the firm of Michael Nugent & Co. she did not respond and had no further engagement with Mr. Galvin. She says her total involvement in the matter was over a period of fourteen weeks in 2017 in which "I sought in vain to engage with Mr. Galvin, but during which time he came to have no instructions, and during which time no concessions, agreements or assurances were given."

43. The last piece of evidence is an affidavit sworn by Michael Nugent, solicitor for ADM Mersey, on 21st November, 2018. At paragraph 4 Mr. Nugent refers to Mr. Murphy's affidavit and states –

> "Mr. Murphy fails to mention that the Assistant Examiner directed that a supplemental affidavit be filed to address the execution of the Mortgage Deed, which appeared to be defective, and also to address the amount claimed to be due on foot of the charge and also to address the relationship between the two mortgagee parties to the Mortgage Deed and the entitlement or correctness of one or other of them making a claim without the other and as to which of them might be entitled to make a claim."
>
> He avers that the supplemental affidavit sworn on behalf of AIB by John O'Brien solicitor "failed to address the additional issues which I describe above".

At paragraph 6 Mr. Nugent avers –

> "Insofar as Mr. Murphy says at paragraph 11 of his Affidavit that the Assistant Examiner raised 'further' issues at the adjourned hearing (which in fact took place on 8th October, 2013 and not on the date stated), I say that this is not a fair description, as the Assistant Examiner only raised the same issues which he had

already raised at the initial hearing and in relation to which he had already directed a supplemental Affidavit be filed.

7. What is utterly missing from Mr. Murphy's Affidavit is that he fails to mention that the Assistant Examiner disallowed the claim of AIB Bank plc on 8th October 2013."

44. Mr. Nugent also refers to the hearing before Barrett J. on 19 May 2014 which he emphasises was a motion for possession and that the court was not dealing with the matter of charges or encumbrances or priorities and "no application was made in relation to same and no order or acceptance or ruling or consideration of the claim, or potential claim, of Allied Irish Banks plc took place."

45. In paragraph 9 Mr. Nugent contests that there was "extensive correspondence", and avers that having checked his files and papers he has no correspondence other than the letters sent by his firm on 12 May 2014 notifying of the court hearing before Barrett J., and on 6 February 2017 notifying that his firm were not instructed at that time, and a letter of 25 September 2018 which enclosed to Barry C. Galvin & Son the Notice of Motion to settle the Examiner's Certificate as a result of the Account and Inquiry, together with a copy of the draft certificate. He explains that following an in-house takeover of ADM Mersey in October 2015 an in-house solicitor reviewed all litigation and disputes and as part of that process instructions to his firm were withdrawn, although later restored. Mr. Nugent avers that there was never any agreement between the parties, and this was only tentatively discussed by Ms. Brophy in June 2017, and was "a matter of a 'without prejudice' nature". He refutes the suggestion that AIB did anything to advance its claim over the five years from October 2013 up to the date in which the Examiner's Certificate was contested.

Findings on the affidavit evidence

46. I find from reviewing the correspondence, such as it is, and the affidavit evidence, that AIB effectively did nothing to advance or reassert its claim to priority on foot of the registered charge, between 8th October, 2013, the date of the Assistant Examiner's adjudication that AIB's claim was "not admitted on the grounds that evidence of the charge has not been produced", and 10th October, 2018, when a motion was brought to vary the Examiner's Certificate. The mere attendance before Barrett J. on 19 May 2014 on the occasion of the application for possession by ADM Mersey against Mr. Flynn, even if priority was asserted by AIB, cannot assist its cause because no application was before the court and no ruling or adjudication made in relation to AIB's claim or potential claim.

47. As to the interaction between Ms. Brophy and Barry C. Galvin & Son from 29th June, 2017 until November, 2017, I find that that was a tentative approach with a view to agreement, but no agreement ever transpired. What is evident is that AIB were dilatory and did not in any real sense engage, and their belated request for a Marketing Report and the prospect of further delay enhanced the risk that a proposed sale would be lost. Fortunately the sale went through.

48. I noted from para. 21 of the judgment in the High Court that Ms. Brophy's letter of 29th June, 2017 was relied upon by AIB as acceptance and acknowledgment that it had a first legal charge which ranked in priority to ADM Mersey's judgment mortgage – an estoppel argument. The trial judge rejected this argument stating "In fact the letter notes that such a position was 'subject to the various claims being admitted' ". In relation to [?] this I am of the view that the trial judge was correct, and that it is not open to the appellant to rely on any form of estoppel or acceptance and acknowledgment as a basis for their claim to priority. I am satisfied, as was the trial judge, that nowhere in the communications between the parties is there evidence that ADM Mersey released or waived its claim in favour of AIB's claim on foot of its legal mortgage. Furthermore, in the absence of cross-examination of Mr. Galvin or Ms. Brophy on their affidavits it was not possible for the High Court, and is not possible for this court, to determine the dispute of fact as to what was said or meant in the telephone conversation between Ms. Brophy and Mr. Galvin. However it is not necessary to do so as it is clear that there is no evidence of a concluded agreement between them/their respective clients.

49. For the sake of completeness I find - and this is not contested - that at no stage between October 2013 and October 2018 did AIB make any further application to or before the Assistant Examiner, or submit any further proofs to support their claim or to contest his adjudication.

50. I note some discrepancy between what the parties say took place on 4 September 2013 and 8 October 2013, and what is recorded in the Assistant Examiner's notes. The Assistant Examiner on 4 September 2013 notes that the mortgage document exhibited was unsigned by the mortgagor, that a supplemental affidavit is to be filed "addressing this point and, also, clarifying what claim is being entered – whether it is in respect of a judgment mortgage (Burden 3 on the Folio, or in respect of the charges (Burdens 2a and 2b)". He again records on 8 October 2013 that the affidavit of John O'Brien was filed on 16 September 2013 and considered, that it was filed on behalf of AIB, and not AIBM and that no claim had been entered on behalf of AIBM; and that the Mortgage Deed at Exhibit A "Does not appear to be signed by the Mortgagor", and that "the claimant on foot of a mortgage described in paragraphs 2 and 3 of the affidavit is not admitted on the grounds that evidence of the charge has not been proved."

51. By comparison, Mr. Nugent in his affidavit at para. 4 says that the Assistant Examiner directed that a supplemental affidavit be filed not only to address the execution of the Mortgage Deed but also –

> "to address the relationship between the two mortgagee parties on the Mortgage Deed and the entitlement or correctness of one or other of them making a claim without the other and as to which of them might be entitled to make a claim."

If this was a further element that the Assistant Examiner directed to be covered by the supplemental affidavit, it does not appear to have been the ground upon which the Assistant Examiner refused to admit the claim, which was limited, according to the Note of 8 October 2013, to the "grounds that evidence of the charge has not been produced".

52. Mr. Murphy in his affidavit sworn on 14 November 2018 says "I say and believe and am so informed" that although the Assistant Examiner admitted the claim relating to AIB's judgment mortgage which was Burden no. 4 on the Folio, "*further* issues were raised by the Assistant Examiner regarding the documentation regarding his understanding of the correct party to whom the Claimant's [AIB] debt was owed" (emphasis added), on 8 October 2013. This is not borne out by Mr. Nugent's affidavit where at para. 6 he says that the Assistant Examiner "only raised the *same* issues which he had already raised at the initial hearing" (emphasis added). On this detail it seems to me that Mr. Nugent's evidence is to be preferred as Barry C. Galvin & Son had engaged Town Agents to attend at both hearings and were dependent on the reports that they received, and did not file an affidavit from such Town Agents or exhibit any notes of their reports.

The judgment of the High Court

53. Having recited the facts and rejected any suggestion that ADM Mersey had released or waived it rights in favour of AIB's legal mortgage, and having referred to the relevant parts of O. 55 RSC, the trial judge delivered his decision and reasoning in the following three paragraphs: -

> "28. The fact of registration of the mortgage with the Property Registration Authority is not in dispute. However, this does not of itself relieve the Claimant from the obligation to prove its debt and security before the Examiner in these proceedings. The Claimant cannot simply assert that it was relying at all times on its security when it knew that for the purpose of these proceedings, the function of which is to determine the ultimate distribution of the sale proceeds, the Examiner, charged with the authority of adjudicating claims of encumbrances, had not admitted the claim.
>
> 29. Order 55 Rule 50 of the Rules of the Superior Courts requires the applicant to establish that after a certificate has become binding on the parties, there exists "special circumstances" warranting the Court to discharge or vary the Certificate. Neither the affidavits or the submissions of the Claimant refer the court to circumstances the Claimant characterises as special. Firstly, as regards the ruling of the Examiner, the Claimant refers the Court only to the fact of registration of the Mortgage relied on. That fact is not in dispute and was known to all parties, including the Examiner, when making his ruling on 8th October, 2013. Secondly, as regards other events referred to in the affidavit, I have already summarised the Court's conclusion that nothing in the communications between the parties relieves the Claimant from the requirement to prove the claim to the Examiner which the Claimant failed for five years to do whilst on notice of the ruling of the Examiner and the progression of the proceedings. The Claimant would also have known or been advised that the distribution of the sale proceeds following completion of the sale would be governed by the result of the adjudication of claims and encumbrances.
>
> 30. The Court has been referred to substantive case law regarding priorities as between a judgment mortgage and a prior charge, notably *Tempany v. Hynes* [1976] IR 101

and *Larianov Foundation v. Leo Prendergast and Sons (Engineering) Limited* [2017] IEHC 192, that a later judgment mortgage cedes priority to a prior charge is clear. However, in mortgage suits the regime whereby the proceeds of a court ordered sale are distributed in accordance with a Certificate which results from an examination of the claims and encumbrances by the Examiner of the High Court, requires that a Claimant submit his proofs to the satisfaction of the Examiner, and cannot simply assert that, while failing to advance the proofs before the Examiner, he relies on his security. The facts and events in this case do not amount to special circumstances which warrant the discharge or variation of the Certificate and accordingly the application is dismissed."

Grounds of appeal

54. AIB appealed on the basis that the trial judge erred in fact and in law in refusing to vary or discharge the Examiner's Certificate, in refusing to admit the first legal charge of AIB dated 21 October 2009 over ADM Mersey's interest in Folio 684, and in permitting the Examiner's Certificate to reflect that ADM Mersey's judgment mortgage should rank with priority.

55. In written and oral submissions Counsel for AIB referred the court to sections 116 and 117 of the Land and Conveyancing Law Reform Act, 2009. Section 116 is now the provision that enables a creditor who has obtained a judgment against a person to apply to the PRA to register a judgment mortgage against that person's estate or interest in land. Section 117(1) provides –

> "Registration of a judgment mortgage under section 116 operates to charge the judgment debtor's estate or interest in the land with the judgment debt and entitles the judgment mortgagee to apply to the court for an order under this section or section 31."

Section 117(3) then states –

> "(3) The judgment mortgage is subject to any right or incumbrance affecting the judgement debtor's land, whether registered or not, at the time of its registration."

56. AIB therefore claimed that at the time that ADM Mersey's judgment mortgage was registered, on 25 August 2011, it had a prior charge affecting (part) of Mr. Flynn's lands, in the form of the Mortgage executed on 18 January 2007 which was registered as a charge over the lands by the PRA on 21 October 2009.

57. Particular reliance was placed on s. 31 of the Registration of Title Act, 1964 which states:

> "31(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register *and* of any right, privilege, appurtenance or *burden as appearing thereon*; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual

fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just." [emphasis added]

58. Counsel argued that the registration of the Mortgage in favour of AIB at burden 2b on the Folio was conclusive evidence of its title to the Mortgage, and hence its right to priority over ADM Mersey's later registered judgment mortgage.

In support of this contention, and an argument that the Examiner is required to accept the conclusiveness of the register, counsel relied on *Tanager v Kane* [2018] IECA 352, where Baker J. on behalf of the court in commenting on s. 31(1) stated –

"29. The Register is, therefore, evidence of the title of the owner of the land, and evidence of the title to any charge that is registered against that title as a burden."

I will refer to that decision in greater detail later in this judgment.

Counsel also argued that the copies of the Mortgage exhibited before the Assistant Examiner were on their face executed by Mr. Flynn.

In addressing the question of whether AIB could show "special circumstances" within the meaning of that term in O. 55, r. 50 RSC, sufficient to justify discharge or variation of the Assistant Examiner's Certificate, counsel argued that the High Court has a supervisory jurisdiction that permits it to correct errors; he submitted that there was obvious error on the part of the Assistant Examiner as to whether the Mortgage was executed by Mr. Flynn, and that there was fundamental error in that the validity of the Mortgage once registered as a burden on the Folio cannot be queried (save in limited circumstances such as fraud or mistake). Reliance was placed on the decision in *National Irish Bank v O'Connor* [2007] IEHC 382 where Finlay Geoghegan J., at p. 7, accepted that the basis for an application under O.55, r. 50 "must be an error made by the Examiner in the Certificate of the account in enquiry, having regard to the claims lodged before him".

Grounds of Opposition

59. The Notice of Opposition joined issue with the Grounds of Appeal and in addition pleaded that the Assistant Examiner's Certificate was "in all respects correct and free of error".

60. In written and oral submissions counsel for ADM Mersey argued that AIB had never identified or addressed the concerns raised by the Assistant Examiner, and that the trial judge was correct to decide that the fact of registration of the mortgage with the PRA "does not of itself relieve the Claimant from the obligation to prove its debt and security before the Examiner in these proceedings". Counsel argued that AIB had not identified "special circumstances" which would warrant varying the Certificate, and also referred to *National Irish Bank v O'Connor* to suggest that "a clear mistake" would be required for the Court to intervene. Counsel also emphasised that the use of the word "may" in O55, r.50 RSC indicates that the Court has a discretion to vary or discharge if "special circumstances" warrant, and that this Court should be slow to interfere with the exercise of that discretion in the High Court. Counsel argued that the High Court had identified no

"special circumstances" in paragraphs 28 – 30 of the judgment which I have quoted earlier.

61. Counsel argued that the Examiner was entitled to require that AIB's charge be proved to his satisfaction, and to require production of further evidence. The essence of this argument was that the system of registration of title is designed to obviate the need to investigate the title to ownership of *land*, but the objective of Part 3 in a Folio is to put the reader on notice of a burden but *not* to establish the title to that *burden*. If a burden is not registered, then, apart from burdens which affect land without registration, the bona fide purchaser for value acquires the property free from incumbrances. Counsel submitted that the registration of a burden puts anyone dealing with the land on notice of the burden - it does not confer any additional rights or guarantee ownership of that burden, but merely provides notice of the possibility or probability of the existence of a burden. Such a burden may be cancelled if it was obtained through fraud, or it could have been released, but the fact that it remains listed as a burden in Part 3 does not necessarily mean it is still enforceable. For this reason, the Examiner is entitled to require encumbrancers to prove execution of a registered charge as part of the enquiry as to encumbrances, and must further enquire as to the sum due on foot of any monetary charge that is proven. Thus the questions an Examiner must ask in relation to a charge are –

(a) was it validly created;

(b) has it been released;

(c) what obligations are still outstanding on foot of the charge;

(d) if there is more than one mortgagee, which mortgagees are entitled to enforce the charge?

These arguments were stated in some further detail in Counsel's written submissions at paras. 26 – 32, which it is helpful to replicate: -

"26. The burdens registered at Ref Nos. 2a and 2b of Part 3 of Folio WD63684 are burdens which are registered in the register maintained under section 8(a)(i) of the Registration of Title Act. 1964 pursuant to section 69(1)(b) of that Act, which provides:

'69(1) There may be registered as affecting registered land any of the following burdens, namely,

(b) any charge on the land duly created after the first registration of the land.'

27. Rule 3(8) of the Land Registry Rules, 2012 provides for the registration of the ownership of a registered charge in Part 3 of the folio in respect of the land which it encumbers where the charge in question is not registered in a separate register maintained under section 8(b) of the Registration of Title Act, 1964. As such, the

burden is in respect of the asserted charge and the ownership of that charge are registered under different statutory provisions,

28. The burden in respect of the Plaintiff's judgment mortgage was registered on foot of an application made by the Plaintiff pursuant to section 116 of the Land and Conveyancing Law Reform Act, 2009. The effect of the registration of this burden was to create a new charge in favour of the Plaintiff over the registered lands where none had existed before.

29. It is submitted that this distinction is important. The burdens registered on behalf of the Appellant and AIB Mortgage Bank at Ref Nos. 2a and 2b are burdens registered in respect of an asserted *pre-existing* charge. The purpose of their registration is to put persons dealing with the lands in question on notice of the asserted entitlements of the Appellant and AIB Mortgage Bank so as to ensure that a purchaser for value will not acquire the Defendant's lands free of the same by virtue of section 52 of the Registration of Title Act, 1964 and to secure the priority of the asserted charge over any subsequent incumbrances. The act of registration does not create a new charge, nor does it have any impact on the validity of the asserted pre-existing charge.

30. That registration is concerned with notice and priority is evident from section 117 of the Registration of Title Act. 1964 which provides:

‘117(1) Registration of a burden under this Act <u>shall have the same effect as</u>, and make unnecessary, registration of any deed or document relating to such burden, in the Registry of Deeds...’

31. The fact that a burden has been registered in respect of an asserted charge and has not been cancelled does not prove either that the charge was validly created and enforceable at the outset or that it is subsisting and continues to encumber the lands in respect of which has been registered. It is easy to identify circumstances which illustrate this. For example, the burden may have been registered on the wrong folio in error or there may be some defect in the drafting or execution of the instrument of charge so that the lands in question were never, in fact, incumbered by it. Even if the charge was valid when created, it may have been formally released or the monies secured by the same may have been repaid in full. The charge may be statute barred.

32. This is why it is necessary to have an account and inquiry in relation to incumbrances. In this regard the Examiner is concerned with identifying subsisting incumbrances so that the owners thereof will be paid what they are entitled to out of the sale proceeds in the correct order of priority,”

In response to AIB’s argument based on s.31(1) of the 1964 Act, and its reliance on

Tanager v. Kane, counsel argued that in that judgment Baker J. was discussing the conclusiveness of ownership, and quoted *inter alia* at para. 37of the judgment in which Baker J. stated –

"[37] Registration is evidence of the 'title of the owner to the land as appearing thereon'. It is not, and was never intended to be, evidence of beneficial ownership and there can exist unregistered rights, under s. 72 of the 1964 Act, and even burdens, affecting the title registered. Such rights or burdens are not an issue in the present case stated. Rather, it is the nature and effect of the conclusiveness of the registration of ownership that is to be examined."

62. Counsel argued that the existence of a burden and the existence of a charge in respect of which it is registered are two distinct things. A charge may be released by the execution of a formal deed of release while the burden in respect thereof remains registered. Counsel submitted that in the same vein, a burden may be cancelled in error or on foot of a forged release without affecting the continued existence of the charge. As such, the suggestion by counsel for AIB that the simple fact that a burden has been and remains registered is sufficient, of itself, to establish that registered land is incumbered by a valid and enforceable charge does not withstand scrutiny. Counsel's written submission on this concludes –

"40. It is submitted. that the true position is that the registration of a charge as a burden over registered land is conclusive evidence that the lands in respect of which the same is registered are held by the registered owner thereof subject to such rights (if any) as the owner of the charge is able to establish under the instrument of charge. In order to establish the nature and extent of those rights and whether they are subsisting and remain exercisable it is necessary to examine the instrument of charge. The Examiner did not look behind the registration of the Appellant's burden. Rather, he sought to identify the nature and extent of the rights which were protected by that burden. The Appellant's failure to provide the information which he sought left him with no choice but to disallow the Appellant's claim. Had the Appellant provided the information required, assuming it was able to do so, it would have been accorded the priority to which it was entitled by virtue of having registered its charge as a burden."

Counsel for ADM Mersey was also critical of the absence of any explanation for AIB's failure to take issue with the Examiner's ruling in October 2013 for some five years, during which period ADM Mersey incurred significant expense in obtaining possession of the property and pursuing a sale.

Issues

I propose first to address the functions and powers of the Examiner when undertaking accounts and enquiries pursuant to a primary well-charging order. Secondly I consider what is meant by the phrase "special circumstances" in O.55 r.50, such that the court may vary or discharge an Examiner's certificate. Thirdly I consider the relevance of s.31 of the 1964 Act in proceedings

before the Examiner, and its application to the facts in this appeal. Fourthly I consider the issue of execution of the Mortgage. I then consider certain consequential issues that arise.

The powers and functions of the Examiner

The powers and functions of the Examiner were considered by McGovern J. in *Rockrohan Estate Limited and Anor. v Assistant Examiner Thomas Kinirons, and Ulster Investment Bank Limited and Ors.* [2007] IEHC 112. Ulster Investment Bank Ireland Limited, and the first named notice party, had obtained a well charging order and an order for sale pursuant to which the Assistant Examiner purported to settle the conditions and date of sale and to exclude Counsel from a hearing before him. The applicants sought judicial review, arguing that the Assistant Examiner acted *ultra vires* by settling the conditions on date of sale, functions it argued were reserved to the High Court. McGovern J. had to consider the origins and nature of the office of Examiner and I gratefully adopt what he states at para. 7-10 of the judgment:

> "The office of Examiner was created by s. 3 of the Courts Officers Act, 1926. This section provides that it '*shall be attached to the High Court*'. Section 13 (the Examiners Office) and s. 14 (the Examiner) make it clear that the Examiner in carrying out his office is the successor of the Chief Clerks of the Judges of the former Chancery Division of the High Court. The Eight Schedule of the Courts (Supplemental Provisions) Act, 1961 provides; at paragraph 10(1) that. The Examiners Office shall be under the management of the Examiner and at 10(2)
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> > *'There shall be transacted in each Examiner`s Office or in the Examiner`s Office(where there is only one Examiner) that all such business as shall from time to time be assigned thereto by statue or rule of court and in particular (unless and until otherwise provided by statute or rule of court) all such business as was formerly transacted in the offices attached to the respective Chambers of the Master of the Rolls and the ordinary judge of the Chancery Division of the High Court of Justice in Southern Ireland and also such business as was formerly transacted in the offices attached to the Land Judge of the said Chancery Division including the offices attached to that judge in his capacity of Receiver Judge.'*
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> *11(1) - "Each of the Examiners or the Examiner (where there is only one Examiner) shall have and exercise all such powers and authorities and perform and fulfil such duties and functions as shall from time to time be conferred on or assigned to him by Statute or Rule of Court and in particular (unless and until otherwise provided by Statute or Rule of Court) shall perform and fulfil such duties and functions as were formerly performed or fulfilled by the several Chief Clerks and Assistant Chief Clerks of the Master of the Rolls and the Ordinary Judge of the Chancery Division of the High Court of Justice in Ireland respectfully and by the Chief Receiver or the Receiver* – Examiner.'
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> Section 55 of the 1961 Act provides '*the provisions set out in the Eight Scheduled this Act shall apply in relation to offices and officers to be attached to the High Court, the Supreme Court and the President of the High Court respectively*'. It is to be construed as one with the 1926 Act. It is similar to the language found in Part V of the Supreme Court

of Judicature Act (Ireland) 1877 which is entitled '*Officers and Offices*'. Section 72 of the Act provides that the Officers '*attached to any Court or Judge whose jurisdiction is hereby transferred to the High Court, or to the Court of Appeal…shall, from and after the commencement of this Act, be attached to the Supreme Court of Judicature*'. The section also provides that '*all Officers who at the time of the commencement of this Act shall be attached to the Court of Chancery, or any Judge or Master thereof, shall be attached to the Chancery Division of the High Court of Justice.*' Section 73 provides that '*the Authority of the Supreme Court of Judicature and of the Court of Appeal and of the High Court of Justice, over all or any of the Officers attached to the said courts, or any of them generally, with respect to any duties to be discharged by such officers respectively, may be exercised by the Lord Chancellor, and over the Officers attached to any division of the High Court by the President of such Division, with respect to any duties to be discharged by them respectively*'.

While the 1926 [Act] does not refer to the position of '*Assistant Examiner*' paragraph 11(3) of the Eight Schedule of the 1961 Act, states '*(3) the powers, authorities, duties and functions of an Examiner or of the Examiner (where there is only one Examiner) may subject to any restrictions which the President of the High Court may think fit to impose, be executed, performed or fulfilled by an Officer (to be designated by the President of the High Court) who is employed in that Examiners Office or in the Examiners Office (where there is only one Examiner) and who is qualified to be appointed Examiner.*'

The respondent is an Officer employed in the Examiners Officer who has been designated by the President of the High Court to execute, perform and fulfil the powers, authorities, duties and functions of the Examiner, pursuant to s. 55(1) and paragraph 11(3) of the Eight Schedule of the Courts (Supplemental Provisions) Act, 1961. There are no restrictions imposed by the President of the High Court so the powers, authorities, duties and functions of the respondent in these proceedings are the same as those of the Examiner himself.

Order 55, r. 1 of the Rules of the Superior Courts 1986 states '*the Examiner shall take such accounts and conduct such inquiries as may be ordered by the Court, and may make such orders of an interlocutory nature as have heretofore been made by the Examiner, and shall perform and fulfil such other duties and functions as have heretofore being [sic] performed and fulfilled by the Examiner or as shall from time to time be conferred on or assigned to him by Statute or Rule of Court.*' I am satisfied from the submissions and authorities opened to me that the practice of the Chief Clerks attached to the Chancery Division of the Supreme Court of Judicature, and prior to that, to the Court of Chancery, was to settle particulars and conditions of sale when the court ordered the sale of lands on foot of a Well Charging Order. Order IV Rule 16 of the 1891 Rules of the Supreme Court (Ireland) states '*the Judges of the Chancery Division shall have power, subject to these Rules, to order what matters shall be heard and investigated by their Chief Clerks, and what matters shall be heard and investigated by themselves, and particularly if the Judge shall so direct, his Chief Clerks shall take such accounts and make such inquiries as had usually been taken and made by the Chief Clerks, and the Judge shall give such aid*

and direction as in every such encounter [sic] inquiry as he may think fit, but subject to the right hereinafter provided for the parties to bring any particular point before the Judge.'"

In that case McGovern J. found that the Assistant Examiner was not acting *ultra vires* in settling the conditions and date of sale.

63. The provisions of the Rules of the Superior Courts relating to the "Examiner's Certificate" are set out at O.55, r. 44 – 54: -

"**VIII. Examiner's certificate**

44. The result of any proceedings before the Examiner shall be stated in the form of a concise certificate to the Court. Unless an order to discharge or vary the same is made, the certificate shall be deemed to be approved and adopted by the Court.

45. The Examiner's certificate shall not, unless the circumstances of the case render it necessary, set out the order or any documents or evidence or reasons, but shall refer to the order, documents, and evidence or particular paragraphs thereof, so that it may appear upon what the result stated in the certificate is founded.

46. The Examiner's certificate shall be in the Form No 16 in Appendix G and shall be signed by the Examiner.

47. Where an account is directed, the certificate shall state the result of such account, and not set the same out by way of schedule, but shall refer to the account verified by the affidavit filed, and shall specify, by the numbers attached to the items in the account, which (if any), of such items have been disallowed or varied, and shall state what additions (if any) have been made by way of surcharge or otherwise, and where the account verified by the affidavit has been so altered that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the party prosecuting the order, and shall then be referred to by the certificate. The accounts and the transcripts (if any) referred to in the certificate shall be filed in the Examiner's Office.

48. Any party or other person interested may, before the proceedings before the Examiner are concluded, take the opinion of the Court upon any matter arising in the course of the proceedings upon notice given to all proper persons. Such notice shall be in one of the Forms Nos 14 and 15 in Appendix G.

49. Every certificate, with the accounts (if any) to be filed therewith, shall be filed in the Examiner's Office, and shall thenceforth be binding on all parties to the proceedings unless discharged or varied upon application by motion of which notice shall have been served within eight days of such filing; provided that in case of an application to discharge or vary any certificate to be acted upon by the Accountant without further order, or any certificate on passing receivers' or liquidators'

accounts, the notice shall be served within three days after the filing of the certificate.

50. The Court may, in special circumstances, upon an application by motion for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties.

IX. Miscellaneous

51. Notes shall be kept of all proceedings before the Examiner with proper dates, so that all such proceedings in each cause or matter may appear consecutively, and in chronological order, with a short statement of the questions or points decided or ruled at every hearing.

52. Every order of the Court in matters of bankruptcy or arrangement or in any other case in which an account or inquiry has been directed to be taken by the Examiner and a notice to proceed has issued in accordance with Order 55, rule 11, and all orders made by the Examiner, shall be issued out of the Examiner's Office.

53. Counsel shall not be heard in proceedings before the Examiner unless the Court shall otherwise direct.

54. The Forms Nos 17 to 31 in Appendix G shall be used for the respective purpose therein mentioned."

64. In *Rockrohan* McGovern J. accepted arguments put by the Attorney General as notice party in rejecting the applicant's contention that they were entitled to be represented by Counsel before the Assistant Examiner. McGovern J. stated, at p. 13: -

> "He does not make any decision which is decisive of the rights and obligations of the applicants but is merely exercising an administrative role at the direction of the High Court and is subject, at all times, to the overriding supervision of the High Court. … It was clearly open to the applicants to apply to the High Court under O. 55, r. 53 for a direction that counsel be heard on its behalf in proceedings before the Examiner but the applicants failed to make such an application. Alternatively the applicants could have taken "…*the opinion of the Court upon any matter arising in the course of the proceedings…*" before the respondent pursuant to O. 55, r. 48. Again the applicants choose not to do so. An applicant for relief under the European Convention on Human Rights is obliged to exhaust all domestic remedies in respect of the matter giving rise to his complaint. I accept the argument made by Counsel for the Attorney General that the respondent does not determine rights or obligations. At all times before the respondent the applicants had a solicitor present and if they were unhappy with the respondent refusing to admit counsel pursuant to O. 55, r. 53 there were remedies available to them which they choose not to exercise."

McGovern J. also addressed the applicant's argument that the Assistant Examiner had an obligation to give reasons. He stated, at p. 14: -

> "The applicants have failed to show what prejudice arises as a result of the alleged failure of the respondent to give reasons for his decision. If they were dissatisfied [with] any of his decisions they were entitled to bring the matter before the Court by way of an application under O. 55, r. 48. As I have already indicated they did not take this step. If they had done so then the decision of any Judge would supersede the decision (if any) of the respondent. It seems to me that the Examiner is not obliged to give reasons for his decisions although that does not mean that his decisions cannot be challenged in appropriate circumstances."

65. As was noted by McGovern J. the Examiner is a successor of the Chief Clerks of the Judges of the former Chancery Division of the High Court. Section 11 of the Chancery (Ireland) Act 1867 expressly provided for the appointment of Chief Clerks "… for the purpose of assisting the Judge in business *not of a judicial character*." Those words underscore the administrative role of the Examiner, although O.55, r. 2 does empower the Examiner to "issue advertisements, to summon parties and witnesses to administer oaths, to require the production of documents, to take affidavits and acknowledgments" and to direct taxation of a bill of costs "and when so directed by the Court, to examine parties and witnesses either upon interrogatories or *viva voce*", and, as determined in *Rockrohan*, to settle Conditions of Sale. It is apparent therefore that the Assistant Examiner in the present case exercised what was in essence an administrative role which did not extend to adjudicating or making determinations of a judicial nature. Thus it was not the function of the Assistant Examiner to reach determinations in relation to contested facts. It is also worthy of note that s. 138 of the Chancery (Ireland) Act, 1867 expressly excluded controverted questions of fact from investigation by the Chief Clerk.

66. Where a dispute arises in the course of an Examiner taking accounts and enquiries, there is clear provision in O. 55 for this to be referred to the Court. Order 55 does not limit references to matters of law – the referrals to the court for the exercise of its supervisory jurisdiction encompass issues of fact or law. Thus when it became apparent that there was an issue being raised as to the execution and validity of the mortgage, O.55, r. 48 empowered AIB to "take the opinion of the Court". Such a reference to the Court is simply initiated by the service of a notice in one of the Forms Nos. 14 and 15 in Appendix G to the RSC. That is a procedure that should have been adopted by AIB.

67. Not having adopted the O.55, r. 48 procedure in the period from October 2013 to October 2018, it was still open to AIB to refer the issue of the validity of the Mortgage to the High Court by utilising the procedure set out in O.55, r. 49. That rule provides that the Certificate completed by the Assistant Examiner is "binding on all parties to the proceedings unless discharged or varied upon application by motion of which notice shall have been served within eight days of such filing". Where the Certificate can be acted upon by the Accountant without further order, the Notice must be served within three days of the filing of the Certificate, but in the present case it would appear that the eight

day period applied. The Assistant Examiner's Certificate was filed on 3 October 2018. An attempt was made on behalf of AIB to bring an application pursuant to O.55, r. 49, but presumably because it was not served within the eight day period it was not proceeded with.

68. It is difficult not to be critical of AIB for again missing this deadline. The Certificate was published by the Assistant Examiner in draft form in September 2018, and on 25 September 2018 ADM Mersey's solicitors issued the "Notice to Settle the Examiner's draft Certificate" with a return date of 3 October 2018. AIB's solicitors therefore had ten days within which to consider the draft Certificate, which to all intents and purposes was in identical terms to the Certificate signed by the Assistant Examiner on 3 October 2018. From that draft, and from the attendance before the Examiner's Office on 3 October 2018, AIB/its solicitors should have been aware that the Assistant Examiner was finding that AIB's claim on foot of the Mortgage "has not been admitted pursuant to the Ruling of the Assistant Examiner dated the 8th day of October 2013" – something indeed of which they ought to have been aware since 2013.

69. Had AIB availed of rule 48 or rule 49 it would not have been necessary for them to make an application to Court pursuant to rule 50, and it would not have been necessary for them to demonstrate "special circumstances" to the Court. In my view had AIB applied to Court pursuant to rule 48 or rule 49 the decision for the Court in relation to the validity or enforceability of the Mortgage would have been straightforward, would have taken little Court time, and would not have merited a written judgment determining whether or not AIB could show "special circumstances" to justify variation of the Certificate.

Special Circumstances

70. The only recent authority in this area is *National Irish Bank v. O'Connor* [2007] IEHC 382. In that case the applicants sought to vary an Examiner's Certificate which provided for the payment of a judgment mortgagee out of the proceeds of sale of the subject property, asserting that the judgment debtor did not have a beneficial interest in the lands, the subject matter of the Judgment Mortgage. Finlay Geoghegan J. identified the approach which the Court should take in dealing with such applications: -

> "21. Counsel for Mrs. Kathleen O'Connor relies by analogy upon the decision in *Re Ryan (deceased) Field v. Ryan* (1916) 50 I.L.T.R. 11. That case concerned a certificate of the Clerk of the Peace on the taking of an account in a mortgage suit. Barton J. dismissed the appeal by the plaintiff from the order of the County Court judge confirming the certificate of the Clerk of the Peace and, in doing so, stated:
>
> > 'The case is in my opinion governed by *Mackintosh v. Great Western Railway Co.* (1864) 4 Giff. 683, where it was laid down that when on the investigation of a complicated demand the Chief Clerk's certificate after a laborious examination ascertains the amount due, the Court will not allow the amount to be varied unless a clear mistake or manifest abuse can be shown.'
>
> It is unnecessary on this application to consider whether 'clear mistake or manifest abuse', particularly having regard to the use of the adjectives, is a threshold which

> must be met by an applicant under O. 55, r. 50. Nevertheless, I accept that the basis for such an application must be an error made by the Examiner in the certificate of the account and inquiry, having regard to the claims lodged before him."

Finlay Geoghegan J. found that the Examiner had conducted his enquiry as to incumbrances in accordance with the title documents furnished, and she therefore dismissed the application to discharge or vary.

71. This statement establishes that at least *prima facie* there must be something in the nature of an error to form "the basis for such an application". This is not surprising as, absent an error or mistake, the Court is not going to vary or discharge a Certificate. However *Northern Irish Bank* provides limited assistance to the Court in determining what may be required to surmount the threshold of "special circumstances". *Re. Ryan* is of some assistance in showing the deference that the former High Court paid to the Chief Clerk's Certificate "after laborious examination" of the amounts claimed to be due, in which case it would only intervene if there was "a clear mistake or manifest abuse."

72. O. 55, r. 75 of the Rules of the Supreme Court (Ireland) 1905 contained virtually identical wording to O. 55, r. 50, and again only gave jurisdiction to the High Court in "special circumstances". Wiley on "*The Judicature Acts*" has the following commentary on the old O.55 r.75 (at p. 760) –

> "As to special circumstances, see *Howell v Keightly*, 8 de G.M. & G. 325; Martin, In Re, W.N. 1884, 112.
>
> As to re-opening a Certificate after it has become binding, see *Sinton v Rice*, 25 I.L.T.R. 5; r. 74, supra, and note.
>
> In *Re. Fisher* 9 T.L.R., 135, a mistake was rectified eight years after the date of Certificate."

Counsel did not have access to and were unable to source this case law, due to Covid-19 restrictions, but I have been able to access some of these older cases when preparing this judgment.

73. *Howell v. Keightly* was an appeal from the decision of the Master of Rolls refusing to vary the Chief Clerk's Certificate and concerned an appeal after the eight day period from a Certificate which found that a good title could not be made to certain leasehold property sold under the Decree. Knight Bruce LJ stated –

> "Upon the point of time, independently of any question of title, and howsoever the conditions of sale ought to be construed, I think that the order under appeal cannot be disturbed. At the end of eight days the Certificate was in the condition of a report confirmed absolutely, and therefore could not be discharged or varied except upon special grounds. Here no special grounds have been shewn; and from what has been stated by the plaintiff's counsel in the course of the argument it seems

> not probable that any grounds can be shewn sufficient for the purpose. If hereafter any such grounds can be shewn the Court will be disposed to listen to them, so far as reason and justice may require. But it will be well for those who may wish to make such an application to recollect that its object would be to force upon a purchaser a title depending on a special and particular condition of sale, upon which the opinion of a very able Judge has already been given."

Turner LJ gave judgment to similar effect stating –

> "Everyone knows that very special grounds were required to open a report so confirmed."

This does indicate the reluctance of the courts to interfere with a certificate that has become binding.

74. *Sinton v. Rice* concerned a Certificate of the Chief Clerk filed on 6th December, 1888 the Schedule to which erroneously failed to give proper priority to a judgement debt owed to an estate in the sum of £2,800 on foot of a Bond. In March 1889, one of the Executors discovered the judgment entered on foot of the Bond and on affidavit sought its proper priority and inclusion in the Schedule. The submission was made that under "special circumstances" the Court can re-open a Certificate, and it was argued that this power to correct a Decree where there was a mistake went back to rules promulgated in 1639. The Court acceded to the application.

75. *Re. Fisher* concerned a Chief Clerk's Certificate of July 1884 which was later found to be incorrect in that what was thought to be leasehold estate was in part found in November 1892, some eight years later, to be freehold. The error appeared to have been copied from a Trustee document. Chitty J. decided that pursuant to the inherent jurisdiction of the courts to correct mistakes the error should be rectified. However there is no reference to "special circumstances".

76. A case that was relied on by the Court in *Sinton v Rice* was *O'Brien v Creagh* (1845) 8 Ir. Eq. R. 557, and it is of some assistance. The head note reads –

> "Where, by mistake in the draft report under a Decree to Account, a judgment was entered as of 1834 instead of 1833, and the Master seeing it so entered found the priorities accordingly, and a final Decree was made confirming it. *Held*, that the error could not be corrected under the 103d General Order; but liberty was given to go before the Master to have the report amended *nunc pro tunc*."

This older case law demonstrates that, while the Court of Chancery and Landed Estates Court were reluctant to interfere with certificates that had become binding, there was nonetheless a willingness to correct errors in Certificates where the error was clear or manifest.

In my view the most helpful guidance remains that of the Court in *Re. Ryan* where Barton J. suggested that "a clear mistake or manifest abuse" would be required for the Certificate

to be varied. In *Re. Ryan* Barton J applied that high threshold to an account in a mortgage suit, but there is no reason in principle why a similar test should not apply where the error under consideration relates to enquiries as to incumbrances or priorities.

77. Counsel for AIB argued that an error is sufficient to give the High Court the power to vary under O.55, r. 50. Insofar as this is an argument that an error *per se* will always amount to 'special circumstances' I would reject this submission. If a simple error was sufficient the wording of the rule would have referred simply to 'error' or 'mistake'. In my view a minor error does not suffice. There must be something further, something more fundamental, or at least of material significance, for the error to constitute 'special circumstances'.

78. Counsel argued that the error of the Assistant Examiner in this case, in relation to the execution of the Mortgage by Mr. Flynn, was clear and obvious, and that this was sufficient. Alternatively, Counsel argued that having regard to s. 31 of the 1964 Act and the conclusiveness of the Register as to ownership of the Mortgage, the Assistant Examiner exceeded his powers. This was in the nature of a jurisdictional argument to the effect that it is the task of the Property Registration Authority to receive applications, examine documents and register a Mortgage as a burden, and that as the Register is conclusive as to ownership of that burden, the Examiner of the High Court when conducting accounts and enquires is not entitled to go behind the record appearing from the certified copy Folio and embark on an investigation of the validity of the Mortgage.

79. If AIB is correct in its reliance on s. 31 it follows that the Examiner must rely on the conclusiveness of the Register and is not entitled to further investigate the validity of the title appearing thereon as to ownership of land *or of a burden*. On this basis the O.55 r.50 motion in the present case is akin to an application for judicial review of an administrative decision where the applicant satisfies the court that the decision maker has acted ultra *vires*. It is an argument that is fundamental to the Examiner's function and powers, and goes beyond reliance on a mere error, and in that sense it may be considered to be "special". I am of the view therefore that in raising this issue AIB has presented, on a *prima facie* basis, "special circumstances" which in my view obliged the High Court, and now this Court, to consider whether the Assistant Examiner erred in failing to treat the Register as conclusive of AIB's title to the Mortgage. In that the trial judge failed to give sufficient attention to the centrality of s.31 and its importance to the Assistant Examiner's enquiry, and concentrated on other matters which he did not regard as amounting to 'special circumstances', he fell into error.

80. I have also considered whether, in assessing "special circumstances", the Court can or should take into account countervailing circumstances that might militate against the Court considering a motion under r. 50, or exercising a discretion not to discharge or vary the Certificate. However, in my view if the Assistant Examiner acted in excess of his statutory powers and function then countervailing circumstances such as significant delay are unlikely to defeat the special circumstances. Without doubt there was significant delay by AIB in applying to Court, from October 2013 to October 2018. While ADM

Mersey's efforts to obtain possession and sell the property was ongoing in this period, that does not provide any excuse. Nor in my view does the limited interaction between Ms. Brophy and Barry C. Gavin & Sons, by telephone and in correspondence, from June 2017, justify the delay. While the 8 day period for bringing a motion under r. 49 was narrowly missed by AIB, their solicitors knew from 23 September 2018, or thereabouts, the contents of the draft Certificate. In overall terms the delay was in my view inexcusable. Counsel on behalf of AIB did not seek to excuse this delay – and largely confined himself to arguing that the error on the part of the Assistant Examiner was so fundamental as to establish special circumstances notwithstanding delay.

81. In my view the Court is obliged in a case such as this to scrutinise the alleged error and form a view as to whether it goes to *vires*, or whether there has been a breach of natural or constitutional justice, or whether it is otherwise fundamental to the results of the accounts and enquiries appearing in the Certificate, before a judgment can be made to accept or reject the application on the basis of the presence or absence of 'special circumstances'. In other words, the Court should look to the substance of the application, and only having considered all of the circumstances can a decision be reached as to whether there are indeed "special circumstances" such that the Certificate should be discharged or varied. If it transpires for instance that there has been a significant delay and the Certificate is only in error in terms of minor accounting details, then it is hard to see how an application under r. 50 could succeed. The magnitude of the error, or the consequences of the error alleged, may well be a determining factor. It is therefore of significance that in the present case, having regard to the very limited funds realised on the sale of the property, and the expenses of sale, if the Certificate is incorrect but is not varied AIB will have no entitlement having regard to its loss of priority, and ADM Mersey will benefit from whatever funds remain – whereas if AIB succeed in their motion it will be entitled to 4/5th of those net funds. It is therefore necessary to consider the substance of AIB's claims.

Section 31 - Conclusiveness of the Register

82. Section 31(1) of the Registration of Title Act, 1964 provides –

> "31(1)– The Register shall be conclusive evidence of the title of the owner to the land as appearing in 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."

Also of note is s. 32(1) which provides –

> "Where any error originating in the Land Registry (whether of misstatement, misdescription, omission or otherwise, and whether in a register or in a registry map) occurs in registration –

(a) the Registrar may, with the consent of the registered owner of the land and of such other person as may appear to be interested, rectify the error upon such terms as may be agreed to in writing by the parties;

(b) the Court, if it is of opinion that the error can be rectified without injustice to any person, may order the error to be rectified upon such terms as to costs or otherwise as it thinks just."

83. Section 68(1) of the Act provides that –

> "Subject to the provisions of this Act, the registered owner of land shall alone be entitled to transfer or charge the land by registered disposition, and the registered owner of a charge shall alone be entitled to transfer the charge by registered disposition."

Section 69 of the Act lists burdens that "may be registered as affecting registered land" and these include –

"(b) Any charge on the land duly created after the first registration of the land."

Section 69(2) then provides –

> "A burden may be registered under this section on the application of the registered owner of the land or of any person entitled to or interested in the burden but, if the application is made without the concurrence of the registered owner of the land or such other person as may be prescribed, the burden shall not be registered except in pursuance of an order of the Court."

84. Section 8 of the Act provides that certain registers are to be maintained – a register of the ownership of freehold land and a register of the ownership of leasehold interests, and under 8(b) –

> "A register of ownership of –
>
> (i) land comprising incorporeal hereditaments held in gross;
> (ii) such other rights in land as may be prescribed."

Rule 3(8) of the Land Registry Rules, 2012 provides for the registration of the ownership of a registered charge in Part 3 of the Folio in respect of the land which it encumbers where the charge in question is not registered in a separate register maintained under s. 8(b) of the Registration of Title Act, 1964. In the present case the Mortgage is registered as a burden in Part 3 of Folio 684 Waterford, and it is recorded that "Allied Irish Banks plc is owner of this charge as tenant in common in undivided shares" (Entry 2(b)). There is no registration of the Mortgage in any separate register maintained under s. 8(b) of the 1964 Act, or as contemplated in r. 3(8) of the Land Registry rules 2012, although a separate register of charges does exist.

85. In *Tanager DAC v Kane and Property Registration Authority (Amicus Curiae) and Bank of Scotland (Notice Party)* [2018] IECA 352 the background facts were that Bank of Scotland

(Ireland) Limited ("BOSI") became registered as owner of a charge on Folio 91184F, County Dublin, having advanced money to Mr. Kane by way of charge. All the assets and liabilities of BOSI including the Mortgage in Charge were transferred to Bank of Scotland plc. ("BOS") pursuant to a Cross-Border Merger made under S.I. No. 157/2008, and BOS then sold a portfolio of securities to Tanager, including its interest in the charge on Mr. Kane's dwelling. Tanager became registered as owner of that charge, although BOS had never become registered as owner in succession to BOSI. The primary issue in the case was therefore whether BOS was entitled to transfer or assign the charge to Tanager.

86. Although the issue before the Court in that case was different to the issue before this Court, it nevertheless had to address the system of registration of title, and the significance of s. 31 in the context that Tanager had become registered as owner of the charge. Baker J. referred to the system of registration of title established under the Local Registration of Title (Ireland) Act, 1891, and stated: -

> "25. The establishment of the Register was intended to simplify and regulate the record of ownership and the means by which title to land could be passed. At p. 18, Glover [*A Treatise on the Registration of Ownership of Land in Ireland* (Falconer, 1933)] explains that, unlike with the system that operates in unregistered conveyancing, the entries in the Register 'are not registrations of documents, but of the effect of documents'. What is registered is the ownership or incumbrance created by a document, and thereafter, the documents 'cease to be the evidence of title, and the Register becomes the evidence of the ownership and the encumbrances on it.'
>
> 26. For that reason, and deriving precisely from that distinction, the Register is, by statute, declared to be conclusive evidence of title.
>
> 27. The conclusiveness of the Register has been a cornerstone of the system of registration. Section 34 of the 1891 Act provides as follows:
>
> > 'The register shall be conclusive evidence of the title of the owner to the land as appearing thereon; …"
>
> 28. The principle is continued in the modern legislation and the starting point is s. 31(1) of the 1964 Act: [section 31(1) was then set out]
>
> 29. The Register is, therefore, evidence of the title of the owner of the land, and evidence of the title to any charge that is registered against that title as a burden. Section 31(1) of the 1964 Act, in particular, provides that such title shall not be in any way affected 'in consequence of such owner having notice of any deed, document, or matter relating to the land'.
>
> 30. The seminal modern Irish text on the practice and principles governing registered title, McAllister, *Registration of Title in Ireland* (Incorporated Council of Law Reporting for Ireland, 1973) observes that s. 31(1) of the 1964 Act establishes the Register as an 'iron curtain' behind which it is neither appropriate nor necessary to penetrate. …

31. McAllister also notes the 'curative effect' of registration, described in Curtis and Ruoff, *The Law and Practice of Registered Conveyance* (2nd ed., Stevens & Sons, 1965):

> 'Past defects of title no longer vex each successive owner after the date of first registration with absolute title because henceforth, in the case of freehold land, the proprietor is deemed to have vested in him the fee simple absolute in possession subject to the incumbrances that appear on the register or title and subject to those well-recognised incumbrances, interests, rights and powers known as overriding interests, which do not necessarily always appear on the register, but free from all other estates and interests whatsoever. These are not idle words. The whole essence of the matter is that after the date of first registration of absolute title it is neither necessary or permissible to go behind the impenetrable curtain of the register.'

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

And at para. 36 Baker J. stated –

> "It is important to note also that the Register does not necessarily identify the ownership of a charge registered upon a folio as ownership may, but does not require to be registered in a subsidiary Register maintained pursuant to s. 8(b)(ii) of the 1964 Act and r. 186 of the Land Registration Rules 2012 to 2013 ('the Land Registration Rules'). Absent a subsidiary folio, the registration of a charge as a burden on a freehold or leasehold title is conclusive of the existence of the burden."

87. Baker J. then referred to the decision of the Supreme Court in *Kavanagh v McLaughlin* [2015] IESC 27, and in particular the judgment of Laffoy J. where she considered the effect of s. 62(6) of the 1964 Act which states that –

> "On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge."

In discussing crucial requirements for the enforcement of a charge on registered land Laffoy J., at para. 111 of her judgment stated –

> "… That requirement is contained in s. 62(6) and it is that the owner of the charge be registered as such and when registered, subs. (6) provides that the owner 'shall for the purpose of enforcing his charge, have all the rights and powers of a mortgagee.'"

88. Importantly, at para. 67 Baker J. concluded –

> "A plaintiff seeking an order for possession must adduce proof, *inter alia*, that he or she is the registered owner of the charge. It is registration that triggers the entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification."

89. As to the power to rectify for fraud or mistake, or for the PRA to rectify its own errors, Baker J. stated –

> "74. It is clear that, under s. 31 of the 1964 Act, the conclusiveness of the Register is not absolute and a court of competent jurisdiction may direct the rectification of the Register in such manner and on such terms as it thinks just, based on the ground of 'actual fraud or mistake'. Section 32 of the 1964 Act, in addition, provides for the rectification of any errors in registration originating in the Land Registry, and the PRA has a broad power to rectify the Register by agreement, or if it is satisfied that the error can be rectified without loss to any person.
>
> 75. In essence, then, the Register remains conclusive, notwithstanding the power of both the PRA or the court, as the case may be, to rectify the Register to correctly reflect the title of the registered owner."

90. In that case Mr. Kane had challenged the manner in which Tanager had become registered as the owner of the charge. Baker J. stated at para. 84: -

> "Insofar as the question may be formulated as asking whether, in the present proceedings, the court must have regard to the circumstances in which the plaintiff became registered owner of the charge, the answer must be in the negative. The civil bill for possession is one brought by a person or body who claims as registered owner of the charge, and the conclusiveness of the Register means, for the purposes of those proceedings at least, that the court may not hear argument that the registration was wrongly made. The court, in other words, may not, in possession proceedings, 'look behind' the Register."

91. While the present case is not one in which AIB seeks possession, in my view that is not a material distinction, or one that renders any less applicable the import of s.31(1) and the principles enunciated by Baker J. in *Tanager*. It follows that, upon registration of the Mortgage, that registration became conclusive as to the *effect* of the Mortgage on the relevant part of the lands in Folio 684 and it was not open to the Examiner to go behind the Register and examine the document of title that led to registration of the Mortgage as a burden owned by AIB.

92. Nor do I see any significance in the fact that AIB's mortgage is registered as a burden in Part 3 of the Folio, but is *not* registered in a separate register maintained under S. 8(b) of the 1964 Act. It was suggested by Counsel, but without any firm evidence, that the investigation of title prior to the registration of burdens in Part 3 on a Folio is less thorough or rigorous than the investigation that would lead to a separate registration in a register maintained under s. 8(b). I cannot accept that submission. The particulars of AIB's charge entered on Part 3 of Folio 684 are clear and unequivocal, naming AIB as an owner as tenant in common. It is quite clear from *Tanager* that the conclusiveness of the Register extends not just to the ownership of the land, but also to "any right, privilege, appurtenance or *burden* as appearing thereon". The entry in Part 3 is therefore conclusive evidence as to the ownership of the Mortgage. It follows too that, as a register records the effect of the documents presented on an application for registration, the effect of the Mortgage dated 21 October, 2009 shown in Part 3 as Instrument D2009LR192582J is to create a charge on Mr. Flynn's interest in the property so far as Plan 684 only is concerned.

93. The conclusiveness of the Register is expressly subject to "actual fraud or mistake". However, there is no suggestion in the present case that the registration by AIB was obtained by fraud or mistake, or that there was any error in registration of the Mortgage as a burden on Folio 684 originating in the PRA (s.32(1)).

94. Counsel for ADM Mersey argued that the fact that a burden has been registered in respect of an asserted charge and has not been cancelled does not prove either that the charge was validly created and enforceable at the outset, or that it is subsisting and continues to encumber the lands in respect of which it has been registered. Counsel gives examples to illustrate this. The first is that the burden may have been registered on the wrong Folio in error. But if that were the case, doubtless Mr. Flynn, or perhaps ADM Mersey, would have applied to the PRA to rectify the error pursuant to s. 32(1). Indeed, if there were such an error, an application could still be made for rectification. There has of course never been any suggestion of any such error on this case.

95. The second example given is that there may have been some defect in the drafting or execution of the instrument of charge so that the lands in question were never in fact encumbered by it. This is precisely the point that is covered by the judgment in *Tanager*. It is for the Property Registration Authority to investigate the title where there is an application for registration of title, whether as owner of the land or as the owner of some right, appurtenance or a burden, including a charge. The documents submitted may or may not achieve the creation of the right appurtenance or burden in question, but once registration takes place, the Register becomes conclusive as to the existence and ownership of the right or burden – in this case a charge. This is what conclusiveness as to title means. As Baker J. held in *Tanager*, a Court hearing an application for possession may not determine a challenge to the correctness of the Register, absent proof of fraud or mistake. A *fortiori* the same must apply to an Examiner or an Assistant Examiner conducting enquiries as to incumbrances; the starting point must be taking the certified

copy Folio as conclusive as to the effect of an instrument registered as a charge and as to the ownership of that charge where this appears in Part 3.

96. In my view, the same considerations apply to the next example given where it is suggested that if the charge was valid when created it may have been formally released or the money secured by the same may have been repaid in full. While the charge remains registered the Examiner/Assistant Examiner must accept it as being valid and subsisting. If it has been formally released, or the monies secured and same had been repaid in full, then the onus must be on either the registered owner of the land, or the registered owner of a charge with a later priority, to demonstrate release or payment in full. In practice this may arise by default, if the registered charge holder who has furnished a release or been repaid in full simply fails to attend the advertised hearing before the Examiner to prove their encumbrance or the amount owing.

97. The final suggestion is that the charge, or recovery on foot of it, may be statute barred. That is certainly an issue that could arise before an Examiner/Assistant Examiner, but again in my view it would fall to be raised by the registered owner of the land or the registered owner of charges with a later priority. If it was a contested issue it would not, in my view, fall within the power of the Examiner to determine it, and it would need to be referred to the Court either as an issue arising on the Examiner's Certificate, or on an application brought pursuant to O. 55, r. 48, 49 or 50.

98. ADM Mersey in their submissions also seek to draw a distinction between the burdens registered on behalf of AIB and AIBM, at numbers 2a and 2b in Part 3 – which it is said were registered in respect of an "un-asserted *pre-existing* charge" – and the registration of ADM Mersey's judgment mortgage which occurred pursuant to s. 116 of the Land and Conveyancing Law Reform Act, 2009, the effect of which was to "*create*" a new charge in favour of ADM Mersey over registered lands where none existed before. Section 116(1) provides that a creditor who has obtained a judgment against a person may apply to the PRA to register a judgment mortgage against that person's interest in land, and subs. 2 "a judgment mortgage shall be registered in the Registry of Deeds or Land Registry, as appropriate." This provision was designed to simplify the formalities of registration of a judgment mortgage, particularly the requirements of the affidavit formerly set out in s. 6 of the Judgment Mortgage (Ireland) Act, 1850. Counsel argues that the purpose of registration of AIB and AIBM's pre-existing charges is to put persons dealing with the lands in question on notice of the asserted entitlements of AIB and AIBM so as to ensure that a purchaser for value will not acquire the lands free of those charges, and to secure their priority over any subsequent incumbrance. It is argued "The act of registration does not create a new charge, nor does it have any impact on the validity of the asserted pre-existing charge". Counsel also calls in aid section 117 of the 1964 Act which provides –

> "117.—(1) Registration of a burden under this Act shall have the same effect as, and make unnecessary, registration of any deed or document relating to such burden, in the Registry of Deeds. …"

Counsel argued that the words "shall have the same effect as" emphasised that the registration by AIB and AIBM was concerned with notice and priority, but did not create a new charge.

99. In my view this argument flies in the face of the provisions of the Act of 1964. Under s. 69(1)(b) a charge on land duly created after first registration of the land can be registered as a burden. Under s. 69(1)(i) "any judgment mortgage… whether existing before or after the first registration of the land" may be registered as affecting the registered land. Under s. 69(2) a burden may be registered under that section "on the application of the registered owner of the land or of any person entitled to or interested in the burden…". Neither section 69 nor section s.117 of the Act of 1964 draw any distinction between charges "duly created" by deed and those "duly created" by judgment mortgage. They both effect charges on land. Moreover, this submission ignores s. 74 which provides as follows: -

> "74.—Subject to any entry to the contrary on the register, burdens which are registered as affecting the same land, and which if unregistered would rank in priority according to the date of their creation, shall, if created or arising since the first registration of the land, rank according to the order in which they are entered on the register and not according to the order in which they are created or arise, and shall rank in priority to any other burden affecting the land and created or arising since the first registration of the land, not being a burden to which, though not registered, the land is subject under section 72."

100. In my view the submission also does not withstand the plain wording of s. 31 which as we have seen provides that the Register is conclusive evidence not just of the title of the owner to the land but also the ownership of burdens appearing in Part 3. I cannot see any sound statutory basis for differentiating between registration of pre-existing legal charges and registration of judgment mortgages, even if it is accepted that the latter creates a new charge, in the context of priorities. To do so would in my view be contrary to the express provisions of the 1964 Act. Were any such fundamental change to have been made by the Land and Conveyancing Law Reform Act, 2009 it would have required express wording, and would almost certainly have involved amendment of the 1964 Act.

101. Accordingly, the Assistant Examiner was required to accept the conclusiveness of the Register in conducting his enquiries as to incumbrances and in making his rulings on 4 September 2013 and 8 October 2013. In completing his Certificate he fell into a fundamental error of law, in failing to regard the entry at 2b in Part 3 of the Folio as conclusive of the ownership by AIB as a tenant in common of the charge created by the Mortgage, which was registered on 21 October 2009 and which takes priority to the judgment mortgage registered by ADM Mersey on 25 August 2011.

102. It follows from this that the trial judge fell into error in his finding at para. 28 of the judgment that "The fact of registration of the mortgage … does not of itself relieve [AIB] from the obligation to prove its debt and security before the Examiner in these proceedings". It was correct to say that AIB still had to prove the *amount* of debt owing

on the security of the Mortgage, but AIB did not have to prove its security in the sense of proving validity *ab initio*, or the continuing validity of the Mortgage; it was entitled to rely on the up to date certified copy of Folio 684 which was in itself conclusive evidence of AIB's ownership of the charge described in Part 3 at 2b.

103. It also follows in my judgment that AIB identified a fundamental and manifest error on the part of the Assistant Examiner, and this of itself constituted a "special circumstance" for the purposes of O. 55, r. 50 sufficient to justify applying to the High Court for variation of the Certificate, and for an order varying the Certificate. In failing to accept the certified copy Folio as being determinative of AIB's title to the registered charge the Examiner failed to apply the law as set out in s.31(1) of the Act of 1964, and it follows that in proceeding to determine the enquiry based on a finding that he was not satisfied as to execution of the Mortgage the Examiner made a fundamental error and acted *ultra vires*.

104. At para. 29 of his judgment the trial judge cites three reasons for finding that "special circumstances" did not exist. The first of these was the rejection of AIB's claim that the fact of registration of the Mortgage was sufficient to prove its title to that incumbrance. That finding of the trial judge was incorrect in the light of s.31, and can no longer stand. Given the central importance of that error the further reasons cited by the trial judge – the absence of anything in the communications between the parties to justify the AIB's failure to prove the claim in a five year period, and the fact that AIB must have known that the distribution of the sale proceeds would be governed by the result of the Examiner's adjudication – cannot amount to countervailing circumstances sufficient to negate the Examiner's error.

Execution of the Mortgage

105. While the correct application of s.31 is determinative of this appeal, it is appropriate to refer to this further issue. At paragraph (2) of his Certificate the Assistant Examiner found that AIB's claim "has not been admitted pursuant to the Ruling of the Assistant Examiner dated the 8th day of October 2013". While the trial judge may not have had the advantage of viewing copy rulings of the Assistant Examiner resulting from the hearings before him on 4 September 2013 and 8 October 2013, this court has had the benefit of seeing copies of these rulings. The copy ruling from 4 September 2013 shows that the Assistant Examiner was concerned that the Mortgage "is unsigned by the Mortgagor". A supplemental affidavit was to be filed to address that point and "also, clarifying what claim is being entered – whether it is in respect of a judgment mortgage (burden 3) on the folio, or in respect of the charges (burdens 2a and 2b)".

106. The second ruling on 8 October,2013 refers to the supplemental affidavit of John O'Brien filed on 16th September 2013, and it will be recalled that at para. 3 it refers to the Mortgage being registered in the Land Registry in Part 3 of the Folio at numbers 2a and 2b, and exhibits a true copy of the Folio. The relevant part of the ruling states –

> "The mortgage deed at Exhibit A does not appear to be signed by the mortgagor (see page 6 of the Exhibit). The claim on foot of a mortgage described in

paragraphs 2 and 3 of the affidavit is not admitted on the grounds that evidence of the charge has not been produced."

107. It is therefore clear from this second ruling that the basis upon which the claim was not admitted was the Assistant Examiner's finding that the Mortgage did not "appear to be signed by the mortgagor".

108. It is hard to understand how the Examiner came to this conclusion. Certified copies of the Folio were exhibited in the affidavit of Patrick McNamara sworn on 15th August 2013 (Exhibit "A"), and in Mr. O'Brien's affidavit (also Exhibit "A"). On page 6 of each of these exhibits a signature appears which is identifiable as that of Aidan Flynn. Although it is placed above a pre-printed line opposite the printed words "Witness signature", it is on the right hand side of the page and just below where Mr. Flynn should have signed opposite the words "**SIGNED SEALED AND DELIVERED** by **the Mortgagor** in the presence of:". Just beneath this, opposite the pre-printed words "Witness name", is a scribbled signature which could be identified as that of William Cullen, and stamped partly across the face of that signature and covering the next couple of lines (opposite the pre-printed words "Witness address" and "Witness occupation") are the words and address: -

William M. Cullen

Solicitor

"Ash House"

Cove Roundabout

Dunmore Road Waterford

109. It may be remarked that the pre-printed lines on the exhibited mortgage are clearer from the exhibit in Mr. McNamara's affidavit, than in the exhibit in Mr. O'Brien's affidavit, but this presumably is merely a feature of the scanning in and electronic transmission of the exhibits. The actual signatures in both copies of the Mortgage appear to be identical, and it must be said that neither the Assistant Examiner nor any party raised any issue in relation to this.

110. In those circumstances there was clear evidence before the Assistant Examiner of execution of the Mortgage by Mr. Flynn, and the witnessing of that signature by a solicitor, Mr. William Cullen. The Assistant Examiner therefore fell into further error in refusing to admit AIB's claim on foot of the Mortgage on the basis that it was not signed by the mortgagor; quite clearly it had been signed by the mortgagor.

111. It so happens that the Mortgage does not appear to have been executed by AIBM, or by AIB, but this was not a point taken by the Assistant Examiner, nor was it a point taken by ADM Mersey. The reason for this presumably is that it is generally sufficient for the creation of a valid Mortgage for it to be executed by the party to be charged thereby – the grantor of the mortgagor; it is well established that execution of a deed by one party

who takes benefit under that deed is sufficient to bind that party even if the other party does not execute it; see Clarke J. (as he then was) in *Camiveo Ltd v. Dunnes Stores Ltd* [2015] IESC 43 .where he stated:

> "4.3 The legal position is, in my judgment, well settled and authoritatively stated in the leading text book, *Norton A Treatise on Deeds 2nd Ed. (London 1928)* at pp. 26-27, where the author says that "*Though execution of a deed is necessary to bind the grantor, yet a party who takes the benefit of a deed is bound by it though he does not execute it…*"

Thus by signing the Mortgage Mr. Flynn granted security over the relevant part of Folio 684 in respect of his borrowing from AIBM and AIB. The further terms in the Mortgage at Clause 5 concerning "Ranking of Security" and at Clause 6 "Declaration of Trust" set out earlier in this judgment concern relations between AIBM and AIB. The fact that neither AIBM nor AIB executed the Mortgage means that on the face of the document these provisions did not come into effect *inter se* (unless there were other documents or arrangements which were not put before the Examiner or the court), but this does not relieve Mr. Flynn of his obligations under the Mortgage, nor does it appear that any point to that effect was taken at any stage before the Examiner or the Court.

112. Accordingly, insofar as it may still have any relevance to this appeal, the Assistant Examiner made a significant error in rejecting AIB's claim on the basis of the copy mortgage put in evidence before him.

113. The trial judge does not expressly address this issue in his judgment, preferring to reject the O. 55, r. 50 motion on the basis of an absence of "special circumstances", but it may be that he addresses it indirectly when observing that no further proofs were submitted by AIB after 8 October, 2013 (para. 12 of his judgment), and in stating (at para. 29) that "the claimant refers the Court only to the fact of registration of a Mortgage relied on". Of course, on the argument based on s. 31(1) of the 1964 Act - which I find to be compelling – it was not necessary for the High Court to consider whether the Mortgage was duly executed by Mr. Flynn, and I only address it in this judgment for the sake of completeness. However, had the trial judge considered it, and come to the view that the Mortgage was duly executed, as I believe he would have done, it is likely that he would also have come to a different view as to whether "special circumstances" existed. A decision to vary the Certificate on that basis might have obviated the need for this appeal.

Variation of Certificate

114. Accordingly I would allow this appeal. Subject to hearing from Counsel, rather that remitting the matter to the High Court, I would vary the Assistant Examiner's Certificate dated 3 October 2018 by the substitution of paragraph (2) in the Schedule thereto by the following: -

> "(2) the Charge appearing by entry no. 2b of Part 3 of the said copy Folio in this Certificate mentioned to have been registered by Allied Irish Banks p.l.c. against

the interest of the Defendant in that part of the said Folio shown in Plan 684 in the Land Registry on the 21st day of October 2009 on foot of which there is due to Allied Irish Banks p.l.c. the sum of €550,853.14 for Principal together with the amount of €315.98 making together €551,169.12 together with interest at 8% per annum from the 20th day of April 2011 up to the 31st day of December 2016 and thereafter at the rate of 2% per annum on foot of which a claim has been entered and proved."

The revised wording is intended to reflect the judgment obtained by AIB against Mr. Flynn (and Geraldine Dunne) on 20 April 2011 – in respect of which no payments were made by the debtors – and the variation of the interest accruing on judgments that rested at 8% per annum in 2011 up to 31 December 2016 but was varied to 2% by virtue of the Courts Act 1981 (Interest on Judgments) Order 2016 with effect from 1 January 2017.

Costs of sale and distribution of monies lodged in Court

115. Consequent on this variation an issue arises in relation to the costs arising from the primary order and the costs of sale incurred by ADM Mersey/its solicitors. Ms. Brophy in her first affidavit deposes to the gross amount of money realised from the sale of the land as being in the order of €110,000, and that ADM Mersey "has already expended in excess of €54,000 in legal and sale costs and expenses in pursuit of the sale of this property, and continues to incur further costs…" (para. 13). I do note that this is not a figure that has been vouched or the subject of scrutiny by AIB or the Examiner. It will be recalled that ADM Mersey initiated these proceedings, and its judgment mortgage is registered against all of the property comprised in Folio 684, whereas AIB's Mortgage relates only to, approximately four fifths of the property being that shown in Plan 684.

116. In the affidavit sworn by Mr. Michael Nugent on 26 October 2018 he refers to the sum of €110,000 standing lodged to the credit of this action, being the proceeds of sale of the premises, and he notes that "such sum shall be €107,250 after deduction of Stamp Duty of €2,750" (para. 4). Mr. Nugent also avers as follows: -

"2. I am informed by the Plaintiff and believe that all the costs and expenses in relation to the sale of the lands and comprised in Folio 684 of the Register of Freeholders for County Waterford, save for the costs of the Auctioneers, William Quinlan (in the amount of €2,706.00) and those of the Valuer, Timothy Hutchinson (in the amount of €922.50) have been paid." (para. 2).

He exhibits an invoice. These two figures aggregated make in total €3,628.50, and appear to be expenses over and above the €54,000 mentioned by Ms. Brophy as having already been paid out by ADM Mersey. On those figures the total sum of €57,628.50 should be paid out of the monies held to the credit of the action to ADM Mersey, and the further sum of €2,750 falls to be deducted in respect of Stamp Duty. By my calculation that would leave €49,621.50 available for distribution to secured creditors. On the basis that one fifth of this figure is attributable to the sale of land in Folio 684 over which AIB does not hold a security, and in respect of which ADM Mersey has priority by virtue of its Judgment Mortgage (in the Certificate Schedule this appears at item (3), and on foot of it

ADM Mersey is due €157,306.63 together with interest), approximately €10,000 would fall to be paid out to ADM Mersey, and the balance to AIB on foot of its registered charge.

117. These figures are not final, and they may well be inaccurate, but they are set out above in order to facilitate the parties in agreeing what further orders should be made in relation to entitlements and the distribution of the monies held to the credit of the action. I would emphasise that ADM Mersey has shouldered all of the costs of pursuing possession and sale, and must be entitled to all of its reasonable costs and expenses arising out of the primary order, and the process of recovering possession and carrying out the sale of the property, including attending before the Assistant Examiner up to and including the 3rd October 2018 when the Certificate was finalised by him.

118. The parties should endeavour to agree these figures. Should they fail to reach agreement, I would propose that the matter be remitted to the Assistant Examiner to decide, but I would not close off the possibility that this court might decide any residual issue and I would be prepared to hear the parties further in relation to the most expeditious way to achieve final distribution.

Dividing the net proceeds of sale proportionately

119. On the basis of the Assistant Examiner's Certificate ADM Mersey were entitled to all the net proceeds of sale and therefore no issue arose as to the proportion of the proceeds of sale attributable on the one hand to the land subject to the Mortgage and on the other hand to the small section of land in Folio 684 not subject to AIB's security but subject to ADM Mersey's judgment mortgage (as a first charge), which is about 1/5th the area of the whole. That issue does now arise. I would hope that the parties can agree, for distribution purposes, that the proportion which the land subject to the Mortgage bears to the small section of land over which ADM Mersey's judgment mortgage holds priority is 4:1, and I would propose to make an order based on that expectation. If agreement is not reached this is an issue which can only be decided on valuation evidence and I would remit it to the Examiner.

Costs

120. In the Notice of Appeal AIB seek the costs of its motion in the High Court, and the costs of this appeal. The Court has not yet been addressed in relation to these costs, but I will follow the usual practice of this Court in remote hearings of addressing costs and proposing an order subject to receiving submissions from the parties.

(i) High Court

121. At the time the costs were incurred in the High Court the right to costs was governed by O.99, r. 1 of the RSC. While sub-rule (1) provides that the costs of every proceeding in the Superior Courts "shall be in the discretion of those Courts respectively", the "normal rule" that follows from established case law on O. 99 is that costs follow the event. The High Court ordered that ADM Mersey be entitled to its costs to be paid by AIB.

122. It will be clear from remarks made earlier in this judgment that AIB's application by motion to the High Court pursuant to O. 55, r. 50 would not have been necessary if AIB had utilised the procedures provided for in O. 55, r. 48 or r. 49 i.e. serving the

appropriate notice to take the opinion of the Court, or, before the Certificate became binding, serving the appropriate application by motion within eight days of the filing of the Certificate, respectively. Had AIB followed either of these procedures it would not have been necessary for the High Court to consider the question of whether "special circumstances" arose such as to warrant an application under r. 50. To this I would add that had AIB/its solicitors made appropriate legal submissions to the Examiner at the hearings before him in September and October 2013, or, if AIB had, after that date, requested the Examiner to hold a further hearing before which legal submissions could have been made in respect of s. 31(1) and/or the validity of the exhibited copy Mortgage, it might not have been necessary for AIB to make any application to the Court under O. 55, r. 48, 49 or 50. It is not unreasonable to suggest that the necessity for a court hearing and a written judgment in the High Court was in a large part caused by AIB's failure to make appropriate legal submissions to the Assistant Examiner at an earlier stage.

123. Apart from this there is an unusual feature of this case namely that ADM Mersey hold the benefit of a registered judgment mortgage which has priority in respect of approximately one fifth of the land and premises comprised in Folio 684 of the Register of Freeholders for County Waterford. As the party taking these proceedings and having the responsibility for securing possession and selling the premises, it had no alternative but to attend before the Assistant Examiner and in due course before the High Court and this Court as the party having carriage of sale and also as *legitimus contradictor* in respect of AIB's motion. Its position in this regard is to be differentiated from that of an incumbrancer who does not have carriage of proceedings, but who appears before an Examiner in response to advertisement pursuant to accounts and enquiries ordered by the Court.

124. It is helpful to consider what the outcome in relation to costs might have been if the trial judge had held in AIB's favour. I suggest that, for the reasons that I have just outlined, the High Court would have considered it appropriate to depart from the normal rule and would either (a) have made no order as to AIB's costs and ordered that ADM Mersey's costs be paid out of the money in court, or (b) would have declared both ADM Mersey and AIB entitled to their costs of the motion to be paid out of the funds standing to the credit of the action. On balance I consider (b) to have been the more likely outcome, and I would regard that as a reasonable and appropriate departure from the normal rule, and, subject to hearing from the parties, that is how I would propose that the costs before the High Court be disposed of on this appeal.

(ii) Appeal

125. So far as the appeal is concerned the costs are governed by section 169 of the Legal Services Regulation Act, 2015, subs. (1) and (2) of which provide: -

> "169(1) – A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –

(a) conduct before and during the proceedings,
(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
(c) the manner in which the parties conducted all or any part of their cases, and
(d) whether a successful party exaggerated his or her claim,
(e) whether made a payment into court and the date of that payment,
(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstance of that offer, and
(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."

126. It is fair to say that in terms of outcome AIB was entirely successful on this appeal, and is therefore *prima facie* entitled to its costs against ADM Mersey. However, having regard to the particular nature and circumstances of the case, and the conduct of AIB before the appeal, I would propose to make a different order. The nature of this appeal was that ADM Mersey's solicitors had carriage of sale, and ADM Mersey had an interest in the net proceeds of sale even if the appeal succeeded, and it was therefore a *legitimus contradictor*. My further reason for departing from the normal rule is that much of the argument before this Court related to the issue of whether there were "special circumstances" within the meaning of O. 55, r. 50, an issue that would never have arisen had AIB at an earlier point in time followed different procedures. It can therefore be said that AIB by its conduct raised an issue which was determinative (against it) in the High Court and which featured in the Notice of Appeal, the respondent's notice, and written and oral submissions before this court. Furthermore the effect of s.31 of the Act of 1964 is barely mentioned by the trial judge yet was central to the argument pursued on appeal; it appears that this may not have been fully argued in the High Court.

127. It can be said that ADM Mersey need not have contested this appeal, and could have consented to an order varying the Assistant Examiner's Certificate. While that is so, it was not unreasonable, having regard to the delay factor and the fact that the trial judge's decision revolved around what constituted "special circumstances", to contest the appeal. I note also that the judgment of Baker J. in *Tanager* was delivered on 31 October, 2018, and may not have been published until sometime after that date – the official report is at [2018] IECA 352, but it also appears in [2019] 1 IR 385. Moreover, *Tanager* is not mentioned in the judgment of the High Court (or in the last round of affidavits sworn in November 2018).

128. In these circumstances my provisional view is that it would not be doing justice if ADM Mersey, the party having carriage of these proceedings and of the sale of the property were, to be penalised to the point of having to make net payments by virtue of a costs

order against it, and for these reasons I would propose to make no order as to the costs of the appeal.

If either party disagrees with this proposal they will be at liberty to make written submissions.

129. In summary, therefore: -

(a) I would allow this appeal and vary the Certificate of the Assistant Examiner in the manner set out at paragraph 115 in this judgment.

(b)(i) I would further vary the Certificate to include certification of all the reasonable costs and expenses incurred by ADM Mersey under the primary order, including attending before the Assistant Examiner, seeking possession and arranging the sale, such costs and expenses to be determined in default of agreement by the Assistant Examiner.

(ii) I would make an order for distribution to ADM Mersey's solicitors Michael Nugent & Co from the monies held to the credit of these proceedings to discharge/reimburse such costs and expenses.

(c) As to costs in the High Court I would propose to vary the Order of that Court and order that ADM Mersey and AIB be entitled to their costs of the motion to be agreed or in default of agreement to be adjudicated by the Legal Costs Adjudicator, such costs to be paid out of the monies lodged in Court standing to the credit of this action.

(d) As to the costs of this appeal I would propose to make no order as to costs.

(e) As to distribution of the net proceeds of sale (if any) thereafter I would, subject to the parties' agreement on this issue, direct payment out as to 4/5ths to AIB and as to 1/5th to ADM Mersey.

130. If either party wishes to contend that some different orders or costs order(s) should be made, then within 28 days of this judgment they should make written submission to that effect, not to exceed 1,500 words, such submissions to be sent to the other parties' solicitors and to the Court of Appeal Office, and thereafter the party receiving such submissions will have a period of 28 days to respond, again subject to a 1,500 word limit. In the absence of any submissions within the time indicated, the Court will proceed to make orders in the terms indicated. If the terms of the order or costs orders are contested the Court will issue its ruling electronically after considering the submissions made to it, unless in all the circumstances it is persuaded or considers that a further short oral hearing is warranted.

In circumstances where this judgment is being delivered electronically, Murray J. and Power J. have indicated their agreement with it.