



THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 29

Record Number: 2019/13

**Baker J.
Whelan J.
McGovern J.**

BETWEEN/

THE GOVERNOR AND COMPANY OF BANK OF IRELAND

PLAINTIFF/RESPONDENT

- AND -

PATRICK O'BRIEN

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 19th day of February 2020

Introduction

1. This is an appeal against the decision of the High Court (Allen J.) dated the 7th December, 2018 refusing to exercise its discretion and set aside a judgment obtained in the Central Office against the appellant in default of appearance.
2. By way of background, ICS Building Society, the respondent's predecessor, advanced sums in the total amount of €1,468,545 pursuant to six loan facility letters to the appellant between the 4th April, 2001 and 1st September, 2008.
3. As appears from the grounding affidavit of Sean Buckley, a manager in the Arrears Support Unit of the respondent, the Governor and Company of Bank of Ireland, dated 27th February, 2018, pursuant to S.I. No. 257/2014, the Minister for Finance, under the powers granted to him pursuant to s. 33 of the Central Bank Act, 1971, as amended, made an order entitled the Central Bank Act, 1971 (Approval of Scheme of Transfer between ICS Building Society and the Governor and Company of the Bank of Ireland) Order 2014 transferring all of the assets and liabilities of ICS Building Society, including the loans the subject matter of these proceedings, to the respondent with effect from the 1st September, 2014.
4. For ease of reference, both ICS Building Society and the Governor and Company of Bank of Ireland will hereafter be referred to as the "respondent".
5. The repayments due on foot of the loans fell into arrears. On the 12th March, 2013 the respondent issued six separate demand letters seeking payment of the arrears in default

of which proceedings would be issued for recovery of the full balance together with interest.

6. On the 26th March, 2013 this was followed by the issue of a summary summons seeking the amount then outstanding in the sum of €1,373,676.11.
7. The summons was served on the appellant on the 3rd April, 2013. By email dated the 10th April, 2013 sent to the respondent's former solicitor, the appellant acknowledged receipt of the summons. The email stated "I have an appointment this coming Friday with a solicitor. Can you refrain from any actions until I have had time to meet my solicitor? Thank you." This email was ignored by the solicitor and no further correspondence between the respondent's solicitor and the appellant took place. The solicitor entered judgment against the appellant in the Central Office of the High Court on the 10th June, 2013 for the sum of €1,373,676.11.
8. In the appellant's grounding affidavit dated the 11th December, 2017 he avers that his understanding of the summons was that "... it had something to do with the appointment of a Receiver".
9. The conduct of the respondent towards the appellant, and in particular the relevance of simultaneous parallel engagement by the respondent's personnel directly with him during the weeks from 10th April, 2013 which culminated in a negotiated agreement concluded in early July 2013, is considered further below. For reasons which remain unexplained on the part of the respondent, the appellant was never informed that judgment had been procured in the Central Office against him and he proceeded with the negotiations and concluded a settlement agreement oblivious to the fact.
10. The existence of the judgment was first divulged by the respondent to the appellant on 10th July, 2017, a delay of over four years.
11. It is common case that on the 5th July, 2013, the parties concluded an alternative repayment arrangement in respect of two of the six loans and that this arrangement was adhered to throughout by the appellant until it expired in July 2018, leaving a residual debt owing to the respondent. The said agreement involved the sale of a property in Dublin on which three of the six mortgages were secured. The letter of the 5th July, 2013 referred to the appellant's "... recent proposals requesting discharge of Receiver on the above listed properties" and notified the appellant of a decision by the ICS Building Society's Credit Committee that one of the properties should be sold, and the receiver on the other two discharged upon terms that "fixed repayments at €2,200 per month between both accounts for a period of 5 years."
12. The appellant was informed that further paperwork would issue under separate cover outlining the repayment arrangement on those two accounts, and that paperwork was duly issued on the same day. A further significant aspect of the alternative repayment arrangement was the obligation on the part of the appellant, which he performed, to sell

a property in Dublin on which three of the six mortgages were secured and the application of the proceeds towards the reduction of the debt.

13. On the 20th December, 2017 the appellant issued a motion seeking to have the judgment set aside pursuant to the provisions of Order 13, Rule 11 of the Rules of the Superior Courts ("RSC") and/or the inherent jurisdiction of the court.

Decision of the High Court

14. In his written judgment the trial judge firstly outlined the background to the application and the arguments put forward by both parties. The appellant had argued that judgment was irregularly obtained, suggesting that this was unfair and unjust, and amounted to sharp practice. He contended that at the time the judgment was marked against him he was not mentally capable of defending the proceedings and was in the process of seeking legal advice.
15. The appellant further argued, referring to the revised loan agreement concluded on the 5th July, 2013, that he had been in negotiations with the respondent, which negotiations were successfully concluded, and had assumed that the respondent was not progressing the proceedings. In relation to this assumption, the trial judge considered at para. 6 that the appellant: -

"...had assumed that the plaintiff was not progressing the proceedings but does not suggest that that assumption was based on anything done or said by or on behalf of the plaintiff."
16. The appellant's case was that he only became aware of the judgment by letter dated the 10th July, 2017 and was never served with an affidavit of debt by the respondent which is required to be filed under the rules of court before judgment is entered in default of appearance.
17. The trial judge referred with approval to the analysis on O. 13, r. 11 and O. 27, r. 14(2) of the RSC in *Delany and McGrath on Civil Procedure* (4th edition, 2018) at paras. 4-38 to 4-42 which was agreed by the parties to correctly set out the law. He observed that while the application had been moved on the basis that the judgment was obtained irregularly, a search of the court file immediately showed that there was on the file an affidavit of debt of Lorcan McCluskey sworn on the 10th June, 2013 and accordingly, the application fell to be determined as an application to set aside a judgment regularly obtained.
18. The trial judge stated at para. 15 of his judgment that:

"While there is no evidence of any engagement between the defendant and his solicitor, I am prepared to deal with this application on the basis that the judgment was obtained by reason of mistake on the part of the defendant as to whether, in view of the ongoing negotiations, the plaintiff was entitled to, or would, mark judgment."
19. The trial judge referred to the summary summons served on the appellant on the 3rd April, 2013 which required that he should enter an appearance within eight days after

service and warned that failing the entry of an appearance, the respondent might proceed and judgment be given in his absence, without further notice. The trial judge held that the appellant was not entitled to impose any additional obligation of notice on the respondent. The trial judge did not accept the argument of the appellant that his request to seek time to take legal advice was "somewhat ignored", finding that the email of 10th April, 2013 did not ask the respondent "to do any more than stay its hand until the following Friday or shortly thereafter". In any event, there was no evidence that the appellant met with his solicitor as planned but if he did, the solicitor never corresponded with the respondent's solicitors and the appellant himself never followed up on his email.

20. The trial judge rejected the contention of the appellant that the respondent moved with "lightning speed" to mark judgment two months after the summons had been issued, considering at para. 14 that:

"...It is perfectly proper in a case in which no appearance is entered, that the plaintiff may swiftly lodge his judgment papers, and that the application to mark judgment should be dealt with swiftly and efficiently by the office."

21. The trial judge was satisfied that on an application of this nature the relevant date is the date on which judgment was marked – the issue being whether the defendant at that date could demonstrate that he had a defence to the plaintiff's claim which had a reasonable prospect of success. As the alternative repayment arrangement post-dated the judgment by a number of weeks, it could not form the basis of any defence to the claim. For this reason, the trial judge also rejected the appellant's further argument that had he been given further warning or notice of the respondent's intention to mark judgment he would have entered an appearance, triggering the requirement that the respondent should bring a motion for liberty to enter final judgment, and that any such motion would have post-dated the alternative repayment arrangement so that the appellant might have had a defence, or a partial defence, by the time any such motion could have been heard.

The notice of appeal

22. The notice of appeal encompasses the following grounds: -

- i. That the trial judge erred in refusing to set aside the judgment obtained by the respondent in default of the appellant's appearance and in finding that the speed at which the respondent progressed to judgment was not unfair to the appellant. (Grounds 1 & 2)
- ii. That the trial judge erred in failing to consider, or fully consider, the medical evidence of the appellant and its effect on the fairness of the proceedings as well as the reason for why the appellant failed to enter an appearance. (Ground 3)
- iii. That the trial judge erred in failing to find that the respondent was estopped from arguing that the appellant did not have a good defence on the merits based on the positive actions the appellant had taken with regard to his engagement in the negotiations with the respondent and the fact that the respondent had not alerted

the appellant to the fact it was pressing on with its application for a default judgment during same. (Ground 4)

- iv. That the trial judge erred in finding that the appellant had incorrectly assumed that the respondent was not progressing the proceedings and that this incorrect assumption could not be attributed to actions on the part of the respondent; this assumption was based on the ultimately successful negotiations that were ongoing at the time judgment was taken and were referred to by the trial judge at para. 15 of his judgment as being the basis of the appellant's mistaken belief. (Ground 5)
- v. That the trial judge erred in failing to find that there were special circumstances which required that the default judgment be set aside in the interests of justice and in failing to consider whether any terms could be imposed that would do justice between the parties. (Grounds 6 & 10)
- vi. That the trial judge erred in failing to consider, or fully consider, the grounds of mistake and/or surprise in deciding whether or not to set aside the judgment, despite his statement referring to mistake at para. 15, and erred in failing to apply the principles applicable to an application to set aside a default judgment on the grounds of mistake. (Ground 7)
- vii. The trial judge erred in failing to consider the fact that the respondent did not notify the appellant that it had taken judgment against him for a period of 4/5 years. (Ground 8)
- viii. That the trial judge failed to consider the prejudice to each party when making his decision, in particular the absence of prejudice to the respondent if the judgment was set aside. (Ground 9)

The respondent opposed the appeal.

Submissions of the appellant

23. The appellant submits that the respondent took judgment against him in a manner that was unjust and at a pace that was unfair, being only 2 months after the summons was served upon him, at a time when he was not mentally capable of defending these proceedings, and in circumstances where he informed the solicitors for the respondent that he was in the process of seeking legal advice. The appellant notes that email dated the 14th March, 2013, sent from a case manager with the respondent to the respondent's then solicitor, exhibited with the respondent's first affidavit of 27th February, 2018. The case manager states:

"I advised him to engage his solicitor regarding the High Court Judgement [*sic*] proceedings, but that we will proceed until or unless we receive proposals which will otherwise be agreed to by the Society....

In any event, I will allow a short time to lapse to allow borrower opportunity to return the documents..."

24. The appellant argues that once he received the request for documentation he did return these documents but was afforded no such forbearance by the respondent, or their agent/solicitor, which, he argues, seems to be contrary to the respondent's instructions to their solicitor.
25. The appellant also contends that the fact that the judgment procured had been concealed by the respondent during the period of negotiations concerning the alternative repayment arrangement, which concluded on the 5th July, 2013 is a material factor. This concealment, the appellant submits, was the reason why he had mistakenly assumed that the respondent was not progressing the proceedings against him, an assumption which was reasonable in circumstances where the respondent had not replied to his email of the 10th April, 2013 in which he had sought time to consult with a solicitor. The appellant submits that this concealment alone was a sufficient ground to warrant the default judgment being set aside in the interests of justice and that the High Court should have taken notice of the respondent's silence during the negotiations as to the fact that it had already procured judgment against him.
26. The appellant, referring to a medical note from his general practitioner dated the 27th October, 2017 exhibited with his first affidavit of the 11th December, 2017, contends that he was mentally and psychologically unwell at the time that judgment was taken against him, suffering from anxiety, depression and severe psychological distress due to financial pressures, which explains why he failed to deal with these proceedings within the exceptionally short time-frame afforded to him. He cites Delany and McGrath at para. 4-62 that: -
- "...depression, if sufficiently severe, could give rise to sufficient incapacity for the court to exercise its discretion in favour of setting aside a default judgment".
- He submits that the trial judge failed to consider the impact of these conditions on him.
27. The appellant argues that the trial judge erred in focusing on whether or not the respondent had followed the correct procedure in the method by which it took their default judgment on the 10th June, 2013 rather than considering the balance of justice between the parties, or the prejudice that would be suffered by either party, as necessitated by O. 13, r. 11 and the jurisprudence – the requirement that the interests of justice be considered remains the legal test to be applied and has not been changed to a test where a good defence to the claim is a prerequisite to have a default judgment set aside.
28. The appellant relies on the decision of Peart J. in *Allied Irish Banks Plc v Lyons* [2004] IEHC 129 wherein the breadth of the discretion conferred by O. 13, r. 11 and the necessity for the Court to seek to achieve justice for both the plaintiff and the defendant was emphasised, and on the Supreme Court decision in *McGuinn v Commissioner of An Garda Síochána* [2011] IESC 33, where it was stated that the courts in the interests of justice generally lean in favour of a determination of litigation on the merits of the issues.

Special Circumstances

29. The appellant further submits that the principle in O. 27, r. 14(2) is engaged and ought to be applied. The appellant contends that in regard to the operation of O. 27, r. 14 (2) the test is one of "special circumstances" and not one of a "good defence". The appellant relies on *Fabri-Clad Engineering Ltd v Stuart t/a Stuart Steele Fabrications* [2019] IEHC 259 wherein Binchy J. at para. 24 stated that:

"...where the Court is satisfied that there are special circumstances that caused the default giving rise to the judgment, O. 27, r. 14(2) makes it very clear that the Court must, before exercising that discretion, first be satisfied as to the existence of such special circumstances, and must identify those circumstances, before then going on to exercise its discretion on the merits of the application."

The appellant relies on the decision of this Court in *EMO Oil Ltd v Willowrock Ltd* [2016] IECA200 wherein Irvine J. at para. 34 stated that:-

"...It is clear that each case is decided upon its own facts and that the court has a relatively unfettered discretion as to the terms upon which it will set aside any judgment obtained regularly."

30. The appellant cites Delany and McGrath at para. 4-51 to support a contention that it is only after irregularity (O. 13, r. 11) and special circumstances (O. 27, r. 14(2)) have been considered, and where it is found there are no special circumstances, that it falls to be considered if there is a defence on the merits: -

"The jurisdiction to set aside a judgment seeks to avoid the injustice that might otherwise result if a defendant with a good defence on the merits was precluded from contesting a claim made against him. It follows logically that, absent exceptional circumstances, the court can only exercise its discretion in favour of setting aside the default judgment where it is satisfied that the defendant may have a good defence and, for this reason, an affidavit of merits setting out that defence is essential. Otherwise, the court will be making an order that is futile and facilitating a waste of court time."

31. The appellant contends that the trial judge failed to consider whether there were special circumstances to warrant setting aside the judgment, as he was required to do. The special circumstances existing in the present case, it was contended, were: -

- (i) the speed in which the judgment was taken;
- (ii) the appellant's medical and personal circumstances;
- (iii) the temporally proximate, if not contemporaneous, agreement concluded between the parties,
- (iv) the considerable prejudice to the appellant, especially in circumstances where the respondent is now refusing to extend the loan again due to these proceedings;

- (v) the fact that respondent would suffer no prejudice if the judgment was set aside;
and
 - (vi) the fact that the respondent delayed for over 4 years to disclose the existence of the judgment.
32. Counsel argued that it was noteworthy that bank statements exhibited by the respondent show that the respondent was treating this as an unexceptional tracker mortgage within its mortgage department in the years following actual procurement of judgment in the Central Office of the High Court, as opposed to an exceptional judgment debt or bad debt within its debt management division.
33. The appellant submits that in any event, the fact that the parties concluded an agreement on the 5th July, 2013 would have given rise to an arguable/*bona fide* or real chance of success had a summary judgment hearing taken place. The effect of the 5th July, 2013 compromise was that the respondent would have been unable to argue that the debt was in default or remained due and owing. He contends that the trial judge was incorrect in finding that the relevant date is the date on which judgment was marked, it being submitted that the relevant date is the date on which the court considers the matter, in this case the date that the motion was issued, the 20th December, 2017 or, in the alternative, the relevant date should have been the hypothetical summary judgment hearing.
34. The appellant argues that the trial judge erred in not considering the prejudice to each side and did not “weigh the consequences for both parties of granting or refusing the relief sought” (*EMO Oil Ltd v Willowrock Ltd* at para. 30) when making his decision despite the issue of prejudice being expressly referred to at para. 11(7) of the appellant’s second affidavit dated the 9th April, 2018.
35. The appellant, relying on *McGrath v Godfrey* [2016] IECA 178 and *Fox v Taher* (High Court, 24th January, 1996) submits that mistake grounds a basis to set aside a default judgment and that the trial judge erred in failing to consider that the judgment was entered as a result of a mistake on the part of the appellant, despite making a reference to mistake at para. 15 of his judgment. The appellant contends that if the trial judge considered that the judgment was marked as a result of a mistake on the part of the appellant, then he should have set aside the default judgment.
36. The appellant further submits that the respondent will suffer no prejudice as a result of being required to follow the standard procedure to take a judgment as set out in the Rules of Court nor does the respondent set out any prejudice on affidavit – setting aside the judgment will do nothing to undermine their loans or their security.

Submissions of the respondent

37. The respondent contends that the appellant selectively quotes part of para. 4-40 of Delany and McGrath to support his submission. It asserts that the remainder of para. 4-40 and its succeeding paragraph, as set out in full in the judgment under appeal, clearly

indicates that the legal test as to whether the court should grant an application to set aside a judgment regularly obtained includes, as a prerequisite, consideration of the merits of the intended defence.

38. The respondent relies on the decision of this Court in *McGrath v Godfrey* wherein Irvine J. suggested at para. 44 that where a judgment is obtained regularly: -

“...the onus was on the defendant to demonstrate the existence of a defence which had a real prospect of success and thereafter to establish the existence of some special circumstances such that, having weighed the interests of both parties, would have warranted the trial judge setting aside the judgment...”

39. The respondent contends that the decisions of *Fabri-Clad Engineering* and *EMO Oil v Willowrock Ltd* do not support the appellant’s proposition that the sole test to be applied is one of “special circumstances” and not one of a “good defence”.
40. In *Fabri-Clad Engineering*, Binchy J. considered in light of the jurisprudence that the test to be applied is whether a defendant had a real or reasonable prospect of success. Binchy J. also referred to *McGrath v Godfrey*, finding at para. 27 that the court must be satisfied that there were special circumstances to grant an application to set aside a judgment regularly obtained and that this would be the case whether such consideration was given before or after a determination of whether the applicant might have a defence to the proceedings. Binchy J. refused to set aside the judgment despite finding that the applicant would have had a reasonable prospect of defending the proceedings as he had untruthfully averred on affidavit that the only reason judgment was obtained against him was because he had not been served with the proceedings and also noted that it was significant that, “faced with the judgment, his response was to make proposals for payment in a manner that suggested he accepted the debt was due by him to the plaintiff.”
41. In *EMO Oil v Willowrock Ltd*, Irvine J. at para. 28 found that where a judgment is obtained in a regular manner, the burden of proof is on the defendant to establish a *bona fide* defence to the proceedings and that, having regard to all of the relevant circumstances and the interests of both parties, the interests of justice would favour the granting of the relief sought.
42. The respondent submits that the alternative repayment arrangement post-dated the judgment and therefore could not possibly have given rise to an arguable defence open to the appellant on the date that judgment was marked. Further, in any event, the agreement amounts in its essence to no more than an agreement to pay what was already due and is unenforceable as constituting a variation of the original loan agreements as it was not accompanied by good consideration. To support this proposition, the respondent relies on the rule in *Pinnel’s* case [1602] 5 Co Rep 116A as upheld in *Foakes v Beer* [1884] UKHL 1, and followed in this jurisdiction in *Truck & Machinery Sales Ltd v Marubeni Komatsu Ltd* [1996] 1 IR 12, *The Barge Inn Limited v*

Quinn Hospitality Ireland Operations 3 Limited [2013] IEHC 387 and *Harrahill v Swaine* [2015] IECA 26. In *The Barge Inn Limited*, Laffoy J. stated at para. 62 that: -

“...the introduction of a new element into the relationship of the debtor and creditor, such as the collateral advantage to the creditor, may remove the relationship from beyond the scope of the rule.”

43. The respondent submits that the appellant has not asserted, nor was there, any new element introduced into the relationship of debtor and creditor by the alternative repayment agreement nor is it asserted that any such agreement conferred any collateral advantage to the respondent and thus, that there was no enforceable agreement to vary the terms of the loan agreements at issue herein such as might amount to even a partial defence, much less an absolute one.
44. In response to the appellant’s submission that special circumstances existed in the present case to warrant setting aside the judgment, the respondent argues that: -
 - (i) there was nothing unusual in the speed with which the respondent moved to mark judgment in circumstances where no appearance had been entered nor any indication had been given by the appellant that he was contesting the claim;
 - (ii) that the medical note from the appellant’s general practitioner does not speak to any exceptional circumstance that a person in the appellant’s precarious financial position might find themselves; and
 - (iii) it is not exceptional or unusual for a judgment creditor to enter into an agreement with a judgment creditor shortly after judgment is obtained.
45. The respondent contends that the question of the balance of prejudice is only a matter that should be considered after establishing that (a) the defendant has demonstrated the existence of a defence which had a real prospect of success, and, thereafter (b) established the existence of some special circumstances such that, having weighed the interests of both parties, would have warranted the trial judge setting aside the judgment. The respondent submits that there was no evidence before the trial judge as to the level to which the respondent was secured or that the respondent was refusing to extend the appellant’s loans and the matters cannot therefore be a consideration in this appeal, notwithstanding the fact that any such refusal in a situation of admitted ongoing default could not be considered in any way exceptional.
46. The respondent accepts that mistake can be accepted as a valid ground to set aside a judgment but that in the current case, the appellant’s misunderstanding as to the onus on him is not in itself a sufficient ground to have a default judgment set aside. Further, where there is no defence to the respondent’s claim, the appellant would be asking the court to make an order that is futile, and a waste of court time.
47. The respondent submits that since the appellant has failed to meet the first step of the legal test, the issue of prejudice does not arise but in any event, that the respondent

would suffer a severe prejudice in terms of wasted legal costs and time if it were forced to relitigate a matter in which the debt is admitted on affidavit. There is no evidence that the respondent is fully secured and as these proceedings arise out of circumstance in which the appellant appears unable to pay his admitted debts as they fall due, an award of costs, if the respondent were ultimately successful following the re-litigation of the proceedings, is unlikely to be of any practical comfort.

48. The respondent submits that the trial judge took into account all significant issues raised by the appellant and that contrary to what is asserted by the appellant, the trial judge was prepared, notwithstanding the absence of any evidence that the appellant ever engaged with his solicitor, to deal with the application on the basis that the judgment was obtained by reason of mistake on the part of the appellant. However, the trial judge found that no possible defence had been made out and the test had therefore not been met and for this reason, the balance of prejudice did not arise.

Discussion

49. O. 13, r. 11 provides that: -

“Where final judgment is entered pursuant to any of the preceding rules of this Order, it shall be lawful for the Court to set aside or vary such judgment upon such terms as may be just.”

- O. 27, r. 14(2), as amended, provides that: -

“Any judgment by default, whether under this Order or any other of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that at the time of the default special circumstances (to be recited in the order) existed which explain and justify the failure, and where an action has been set down under rule 8, such setting down may be dealt with by the Court in the same way as if a judgment by default had been signed when the case was set down.”

O. 13, r. 11

50. A judgment is a solemn order of the court and in normal circumstances is final subject to appeal. A plaintiff derives substantial rights of property from a judgment. The first issue to be determined is whether the judgment marked in the Central Office by the respondent on the 10th June, 2013 was obtained regularly or irregularly. It is apparent from the authorities cited that a primary consideration behind that distinction is that a party who suffers an irregular judgment should not be placed in a worse position by reason of the fact that a judgment was irregularly obtained than he would have been had no judgment been secured in the first place.
51. On the other hand, a party against whom a regular judgment has been obtained, who seeks to have the judgment set aside in order to defend the proceedings, is in a different position and must meet certain criteria, such as, for example, establishing an arguable defence, before the court will accede to an application to set aside the judgment. The underlying principle governing the distinction is that a party who obtains an irregular

judgment should not benefit by it and a party who suffers an irregular judgment entered against him should not be disadvantaged.

52. In general, where judgment is obtained irregularly the court will set aside the judgment without enquiring into the merits of any proposed defence. As Clarke J. (as he then was) held in *O'Tuama and Ors v Casey and Casey* [2008] IEHC 49 at para. 2.1: -

"The logic of this position is that the judgment should not have been obtained in the first place and a plaintiff who has obtained judgment irregularly should not have any benefit by reason of having obtained judgment in that fashion. On the other hand, where judgment is obtained regularly, the court may, nonetheless, be persuaded to set aside the judgment so as to permit the defendant to defend the proceedings but will only do so after considering the possible merits of the defence which the defendant would wish to put forward."

Clarke J. considered on the facts before him that the circumstances leading to the procurement of judgment were somewhat unusual but were more analogous to a regular than an irregular situation. He was satisfied that the defendant was well aware that the motion for judgment was before the court for hearing: -

"They must also have been well aware that without the agreement of the plaintiffs it could not be assumed that an extension of time for the filing of an appearance would be allowed."

53. Authorities such as *O'Tuama* illustrate that in reaching a conclusion as to whether a judgment was obtained regularly or irregularly the totality of the circumstances surrounding its procurement are to be considered to properly determine where along the spectrum the judgment should be considered to lie.
54. Such applications are substantially fact dependent. The conduct of the parties and events leading up to the procuring of the judgment which is sought to be set aside are highly material. To a limited extent, depending on the circumstances of the case, the conduct of the parties in the time immediately after the obtaining of the judgment may be considered relevant. As was observed by Lord Atkin in *Evans v Bartlam* [1937] AC 473 at p. 478 there is wide discretion vested in a judge in an appropriate case to set aside a default judgment: -

"The Courts... have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its

discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction."

55. The decision in *Alpine Bulk Transport Co Inc. v Saudi Eagle Shipping Co Inc. (Saudi Ambassador, Saudi Eagle)* [1986] 2 Lloyd's Rep 221 and in particular the principles enunciated therein are of assistance in carrying out the balancing exercise necessary to determine whether a judgment was in all the circumstances regularly or irregularly obtained: -
- (1) The rules give to the judge a discretionary power to set aside a default judgment which is in terms "unconditional" and a court should not "lay down rigid rules which deprive it of jurisdiction."
 - (2) The purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default.
 - (3) The primary consideration is whether the defendant "has merits to which the court should pay heed" not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown "merits".
 - (4) As a matter of common sense, though not making it a condition precedent, the court will take into account the explanation as to how it came about that the defendant found himself bound by a judgment regularly obtained to which he could have set up some serious defence.
56. The principles in *Saudi Eagle* were considered by Peart J. in *Allied Irish Banks plc v Lyons* [2004] IEHC 129, a decision which emphasised the breadth of the discretion conferred by O. 13, r. 11, where he stated at p. 4: -

"Clearly a wide discretion is given to the Court in its task of achieving justice between the parties, but the interests of both parties must be taken into account in the weighing exercise undertaken by the Court in considering the interest of each party, and not simply the hardship and distress pleaded on behalf of the applicant in this case."

The decision establishes the extent of the burden of proof which rests on a defendant who seeks to set aside a judgment which was obtained regularly. Peart J. adopted the principles set out by Sir Roger Ormrod in *Saudi Eagle* which established that a defendant needs to demonstrate more than "an arguable case" and must show that the proposed

defence has “a real chance of success”. Further, as was observed by Peart J. in carrying out the balancing exercise to arrive at a just determination the court must consider and weigh in the balance the consequences for both parties of granting or refusing the reliefs sought. That approach has been approved by this Court in a number of decisions including *Emo Oil Limited v Willowrock Ltd*. The appellant contends that the judgment was irregularly marked in the Central Office on the 10th June, 2013 and relies on several factors, which will be examined in more detail below.

Illness on the appellant’s part at the time judgment was taken

57. The appellant contends that he was psychologically and mentally unwell at the time judgment was taken and that the trial judge failed to consider the impact of these serious medical issues on the appellant. To that end a medical report is exhibited indicating treatment and psychiatric intervention for management of his condition with effect from November 2012. On the other hand, all litigation is stressful, none more so than that arising from financial pressures. Whilst there may well be circumstances where ill health substantially and significantly impairs the capacity of an individual to engage with litigation to a degree where a court is satisfied that it is in the interests of justice that an order obtained in default ought to be set aside; this is not such a case. The evidence does not support the appellant’s contention at para. 3 of his affidavit sworn on the 11th December, 2017 that he was not mentally capable of defending the proceedings.

Irregularly obtained

58. Whilst an appellate court enjoys the jurisdiction to overturn an order made by a High Court judge in the exercise of his or her discretion, it should nonetheless attach significant weight to the conclusions reached by the judge at first instance. It would be an incorrect approach for this Court to undertake a full reconsideration of all matters heard in the High Court and then proceed to substitute its own views for those of the High Court judge. Accordingly, it is proposed in this appeal to assess whether or not the approach and conclusions of the trial judge were reasonable and correct in light of the evidence which was before him in all the circumstances.

59. The right of access to the courts was identified by Kenny J. in *Macauley v Minister for Posts and Telegraphs* [1966] IR 345 as “...a necessary inference from Article 34, sect. 3, sub-sect. 1, of the Constitution...” Denning L.J. in *R v Appeal Committee of County of London Quarter Sessions; Ex parte Rossi* [1956] 1 QB 682 at p. 691 observed:

“... it is a fundamental principle of our law that no one is to be ... made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them.”

60. The summons issued on the 26th March, 2013 and was served on the 3rd April, 2013. Prior to that there had been letters of demand dated the 12th March, 2013 in respect of each of the six loans. The appellant communicated by email with the solicitor on the 10th April, 2013, approximately one week following service. This case is characterised by a number of unusual features; the respondent was communicating and engaging directly with the appellant, including by telephone, notwithstanding that it had retained a solicitor

and this approach continued after proceedings were served on the appellant. Tellingly, the solicitor never communicated directly with the appellant and failed to respond to email communication from him. At a time when the appellant was actively negotiating directly with the respondent in accordance with their requirements, the solicitor obtained judgment in the Central Office. The respondent and its solicitor appear to have been operating in strategic bifurcation in their dealings with the appellant who was throughout a litigant in person. It is noteworthy that both the respondent and its solicitor refrained from divulging the existence of the judgment or serving the appellant with a copy of same. The negotiations continued on after the entry of judgment on 10th June, 2013 culminating shortly thereafter in a concluded settlement which encompassed the same debts which were the subject matter of the proceedings. The appellant contends that he understood the negotiations in question were for the purposes of compromising the litigation and that the settlement of 5th July, 2013 effected such a compromise. The appellant was kept in the dark and remained ignorant of the existence of the judgment for over 4 years. Any assessment of the *bona fides* of the respondent is freighted by that fact.

Engagement immediately prior to the institution of proceedings

61. The respondent seeks to rely on email communication of 14th March, 2013 between an official of its predecessor and the solicitor who acted on its behalf and who procured judgment in the Central Office on the 10th June, 2013. This communication took place nine days prior to the institution of proceedings. Referring to the appellant it states: -

“I have spoken with him in the last few minutes. I advised that if he has any proposals these must be put to the receiver as the properties are all in receivership. ... As discussed with you this morning, I will forward the borrower a letter with a request for documentation (which will be required by the receiver if he wishes to provide proposals) and he will need to return this to them within a week. However, we will not be putting a stay on proceedings pending receipt of this. The borrower has been already afforded numerous opportunities to provide this information which he has provided to do resulting in the appointment of the receiver. In any event, I will allow a short time to lapse to allow borrower opportunity to return the documents. I will also advise Brid Daly in Grant Thornton who is managing this case.” (emphasis added)

62. It is evident from this email that the bank official, Ms. Quinn, was in direct communication with the appellant. It appears likely that this communication stemmed from the letters of demand received in respect of the six loans. The email makes reference to the receivership, a matter to which I will return presently. The respondent has not disclosed the contemporaneous record or note of the conversation held between Ms. Quinn and the appellant. However, it must be inferred that this email is reflective of what transpired directly between Ms. Quinn and the appellant in the course of the phone call earlier on the same morning. The email indicates as follows:

(a) An intention on the part of the respondent to institute proceedings against the appellant.

- (b) An intention to forward to the appellant a letter with a request for documentation to be returned within a week.
- (c) The respondent and the receiver were amenable to receipt of proposals which, if agreed, would resolve the intended litigation.
- (d) That the proceedings would not be stayed until receipt of the documentation.
- (e) That the proceedings would be stayed on receipt of the requested documentation.
- (f) The respondent would proceed with High Court proceedings then in contemplation "Until or unless we receive proposals which will otherwise be agreed to by the Society".

I am satisfied that there was evidence before the High Court that the respondent did leave the appellant with the clear impression that, so long as he engaged in negotiations on the respondent's terms and provided it with the requested documentation regarding the debts, the litigation which was shortly to issue and be served would not proceed to judgment.

Conduct of parties between the date of service of the proceedings on the 10th April, 2013 and the date of the default judgment obtained in the Central Office on the 10th June, 2013

63. It is common case that a significant process of negotiation took place from April 2013 onwards. Paragraph 8 of the affidavit of the respondent sworn by Sean Buckley states: -

"It is again not in dispute that following the commencement of proceedings without prejudice negotiations were entered into as between the Defendant and the Plaintiff."

Bearing in mind the email of the 14th March, 2013 which expressly articulates the representations made to the appellant -

"I advised him... that we will proceed until or unless we receive proposals which will otherwise be agreed to by the Society."

It can reasonably be inferred from the email of the 14th March, 2013, in the absence of evidence to the contrary, that Ms. Quinn did communicate with the appellant seeking documentation to be provided within a week. "... I will forward the borrower a letter with a request for documentation (which will be required by the receiver if he wishes to provide proposals) and he will need to return this to them within a week."

64. There is no evidence forthcoming for the respondent to suggest that the appellant failed to meet the requirements of the respondent and its receiver or failed to supply requested documents of the kind and in the manner and within the time-frame specified by the respondent.

Silence

65. The significance of silence always falls to be considered in the context in which it occurs. In the instant case I am satisfied that the surrounding facts as outlined above and which

characterised the course of dealings between the respondent directly and the appellant did give rise to a reasonable expectation in all the circumstances of this case that if the respondent were to take the view at any time in the negotiations that his co-operation fell below their requirements it would so inform him.

Events post 10th June, 2013

66. The settlement of 5th July, 2013 is only relevant insofar as it self-evidently stems from the negotiations referred to and contemplated in the respondent's email to its own solicitor dated the 14th March, 2013. The said email evidences the representations made earlier that day to the appellant. The respondent offered no evidence that at any time he failed to comply with their requirements. The continuation of the negotiations after the 10th June, 2013 in the circumstances are consistent only with the appellant remaining compliant with all the respondent's requirements including providing all the requested documentation and the provision of proposals. The failure of the respondent to indicate that the proposals were not acceptable to it or to terminate the negotiations on that or any basis results, on the facts of this case, in the respondent now being estopped by its conduct from being entitled to rely on its strict legal entitlement to mark judgment in default of appearance in the Central Office.
67. The revised loan agreements of 5th July, 2013 are inconsistent with the summary judgment. The terms of the revised loan agreements were performed by the appellant over its term in accordance with its tenor. They were concluded over a period of weeks from April 2013 when not alone had the appellant submitted proposals requesting the discharge of a receiver over properties at Eglinton Terrace in Cork and Churchtown Road, Dublin and Dunmanway in County Cork, but his proposals had been heard and considered by the Credit Committee of ICS Building Society which proceeded to make decisions regarding same.
68. The respondent proceeded to mark judgment in the Central Office against a background where it had led the appellant to understand, and he did reasonably believe, that provided he engaged with it and met its requirements such judgment would not proceed. The respondent never disabused the appellant of that understanding nor did it ever suggest that the proposals under negotiation would not result in the proceedings being stayed.
69. The agreement was entered into by the parties on the 5th July, 2013. The first agreement of that date pertained to mortgage account ending "495". The agreement expressly provides that the interest on the loan would be a standard variable rate of 4.49% per annum for the duration of the loan. This is fundamentally inconsistent with the judgment marked in the Central Office in respect of which court rate of interest would operate at 8% per annum from the date of judgment until the 1st January, 2017 when the rate of interest was varied to 2%. The agreement varied the maturity date of the loan to the 5th July, 2018 and was subject to review after three years. The second agreement in substantially similar terms was concluded in respect of loan ending "336" and the security property was Eglinton Terrace, Western Road, Cork. The sum due on foot of the said loan as specified in the summary summons was €670,027.09. The agreement acknowledges

an interest rate of 2.25% per annum. It was operative for a period of five years, reviewable after three years. With regard to loan ending "509" the agreement of the 5th July required disposition of the secured property at Lower Churchtown Road in Dublin.

Decision

70. I am satisfied that the trial judge fell into error in a number of respects which cumulatively led to him erroneously concluding that the orders were obtained regularly.

Basis of appellant's belief in respect of the summons

71. Insofar as he concluded that the appellant did not give any basis for his belief that the summons "... had something to do with the appointment of a Receiver..." I am satisfied that there was clear evidence before the court that such a belief was reasonably held by the appellant. The email of the 14th March, 2013 from Maria Quinn to the respondent's solicitor makes several references to a receiver. It is evident that she had previously had a conversation with the appellant concerning the receiver and the receivership: "I advised him that if he has any proposals these must be put to the receiver as the properties are all in receivership." Ms. Quinn was the conduit between the appellant and Brid Daly of Grant Thornton. As the affidavit sworn on behalf of the respondent demonstrates, once the proceedings were served on the appellant the parties actively engaged in negotiations and it is very evident that the discharge of the receivership was integral to same. - "I refer to your recent proposals requesting discharge of receiver over the above listed properties..." Therefore, I am satisfied that a clear basis for the appellant's misunderstanding is identified. It was induced by the respondent.

Appellant's assumption that the respondent was not progressing the proceedings

72. Whilst the trial judge observed regarding the appellant that - "He had assumed that the plaintiff was not progressing the proceedings but does not suggest that assumption was based on anything done or said by or on behalf of the plaintiff" (para. 6). I am satisfied, on the contrary, that three key elements in the evidence point in the opposite direction: -

- i. The references contained in the email of Ms. Quinn of the 14th March, 2013 addressed to the solicitor who then acted for the respondent as set out above. This pre-dated the institution and service of the proceedings. Since the respondent has not disclosed the contemporaneous record of the telephone conversation held with the appellant on the said date, this offers the best evidence of what transpired on that date. Ms. Quinn states "I advised that if he has any proposals these must be put to the receiver...I advised him to engage a solicitor regarding the High Court Judgement [sic] proceedings but that we will proceed until or unless we receive proposals which will otherwise be agreed to by the Society" (emphasis added).
- ii. The email further goes on to make clear that the appellant was to receive a letter with a request for certain unspecified documentation "... and he will need to return this...within a week...However, we will not be putting a stay on proceedings pending receipt of this" (emphasis added). Significantly, there is no evidence that the respondent ever suggested to the appellant that there was non-compliance with their requirements such as would warrant it carrying through on their threat that it would "...not be putting a stay on proceedings pending receipt of this..."

- iii. We have clear evidence in the affidavit sworn on behalf of the respondent in this application that following commencement of proceedings that "Without prejudice negotiations were entered into between the defendant and the plaintiff". It can reasonably be inferred that the respondent dealt with the appellant in the months of April, May and June 2013 consistent with the representations it made on 14th March, 2013 such as to positively lead him to understand that the contemplated litigation was effectively being stayed and the respondent would not proceed to judgment provided he furnished the documentation sought and put forward acceptable proposals acceptable to the respondent and the receiver – which he clearly did.

Respondent's negotiations with the appellant and agreement of the 5th July, 2013

73. The respondent's course of direct engagement with the appellant was governed by the terms agreed with him on 14th March, 2013 and precluded it from inconsistently instructing their solicitor to secure summary judgment in default of appearance when it had effectively agreed to stay the proceedings on certain terms which it never suggested the appellant had not complied with. It may well be that through inadvertence or otherwise that a misunderstanding or misapprehension arose between the respondent and their solicitors. The consequences of that cannot be visited on the appellant.
74. The agreement concluded on the 5th July, 2013 omits all reference to the judgment procured three weeks before. The compromise embodied in the said agreement cannot be characterised as confined to two of the loan agreements only as the respondent argued. It involved the sale and disposition of one property in Dublin over which three mortgages were secured. One mortgage was redeemed; another was partly redeemed on foot of the subsequent sale. The residual debt was cross-collateralised with a property at Dunmanway. A receiver was discharged in respect of two properties at Eglinton Terrace, Western Road in Cork and Dunmanway in Cork on terms for a period of five years. Thus, the agreement impacted on five of the six mortgages.
75. The process of negotiations engaged in from April 2013 onwards, culminating in the agreement concluded in early July, is consistent with an understanding on the part of the appellant that the respondent would be conditionally staying the proceedings and this was based on the representations of Ms. Quinn and the appellant together with the subsequent course of negotiations between the parties which were actively ongoing on 10th June, 2013.
76. The agreement of the 5th July, 2013 corroborates the appellant's position that he had actively engaged in a process of negotiation in the preceding months following service of the proceedings, a position which is clearly acknowledged in the respondent's own affidavit as referenced above at para. 8. Further, that the providing of requisite documentation as intended to be requested in writing by the respondent and the making of proposals of an acceptable nature by the appellant would lead to a resolution of the intended litigation is implicit from the substance of the email of the 14th March, 2013 when considered in its totality and is corroborated by the subsequent course of dealings between the parties culminating in the agreements concluded on the 5th of July, 2013.

77. The fact that the appellant never further adverted to the litigation is consistent only with him having been led to believe, arising from the conversation he had with Maria Quinn on the 14th March, 2013 which she subsequently outlined in an email to the respondent's own solicitor at 11.13am the same day that whilst High Court proceedings were intended to be instituted by the respondent, they would only proceed "... until or unless we receive proposals which would otherwise be agreed to by the Society."

Other points raised

78. Whilst the appellant asserted that there had been no affidavit of debt sworn in connection with obtaining judgment he was clearly mistaken in that belief and whilst there was no necessity to serve him with an affidavit of debt same was filed in the Central Office, being the affidavit of Lorcan McCluskey sworn 10th June, 2013. I am satisfied that merely because an affidavit of debt was filed in court same does not, in and of itself, result in the judgment being regularly obtained. Whilst the trial judge attaches weight to the email of the 10th April, 2013, in my view, of significantly greater import is the conversation between Ms. Quinn and the appellant evidenced in the email of the 14th March, 2013 to which the judgment makes no reference at all.
79. The trial judge was correct in observing that it is proper in a case in which no appearance is entered that a plaintiff may swiftly lodge his judgment papers and that an application to mark judgment should be dealt with swiftly and efficiently by the Central Office (para. 14 of the judgment). However, this principle requires to be modified in circumstances where, as here, in direct engagement between the respondent and the borrower, by conduct and representations, the bank reasonably causes the borrower to understand and believe that if certain steps and measures are undertaken by him judgment will not be proceeded with. The facts disclose such a state of affairs in this instance.
80. Events that occurred after the marking of judgment on the 10th June, 2013 are relevant only to the extent that they tend to corroborate one or other of the competing versions of events being advanced by the parties. The inadvertent failure of the respondent to ever serve a copy of the judgment or even disclose its existence for over four years is unusual and should not be visited on the appellant.
81. By letter of the 10th July, 2017 the respondent wrote in respect of one of the mortgages claiming recovery of the sum due stated to be €1,376,462.77 and further claiming interest at the rate of 8% simple interest per annum up to the 31st December, 2016 and 2% interest from the 1st January, 2017. The conduct of the respondent in omitting to disclose the very existence of the judgment for such an extensive period of time to the judgment debtor calls for an explanation and none is forthcoming. I am satisfied that contrary to the conclusions in para. 15 of the judgment the appellant had been led to understand that if the negotiations were proactively pursued the respondent would stay the proceedings and not proceed to judgment. It was accepted that for the five years of the revised loan agreements 2013- 2018 the appellant had paid and discharged the agreed amounts, and that the other terms of the agreement executed on the 5th July, 2013 have been complied with.

82. With regard to the judge's conclusion that the appellant had a possible defence at being removed from its tracker interest rate and forced onto a less favourable interest rate, in fact the marking of judgment in the Central Office resulted in interest operating at the court rate of interest. Section 50(2) of the Courts and Court Officers Act, 1995 provides that: -

"Where, in the case of a claim in the High Court for a debt or a liquidated sum, an application is made for judgement in default of appearance, the Registrar of the Central Office may exercise the discretion to award interest conferred on a judge by section 22 of the Courts Act, 1981."

83. Although subsequent documentation furnished to the appellant in 2018 indicates that all of the mortgages were maintained on tracker rates this is fundamentally at variance with the letter Exhibit POB2 referred to in the affidavit sworn by the appellant on the 11th December, 2017 which expressly claims interest on the entire sum of the judgment at court rate of interest being 8%, which was varied by statutory instrument to 2% with effect from the 1st January, 2017. It appears two inconsistent positions are being advanced by the respondent. One embodied in their letter of the 10th July, 2017 suggests that the appellant has indeed been removed from his tracker interest rates and forced onto a far less favourable rate which, in the first instance, was at 8%. That suggestion was refuted in the affidavit of Sean Buckley, and statements from the respondent were exhibited, identifying lower rates of interest. This gesture suggests fundamental doubts on the part of the respondent that it was entitled to rely on the judgment obtained in the first place which could only have flown from a consideration, properly held, that there were significant irregularities surrounding its procurement.

84. The evidence before the court adequately explains the failure on the part of the appellant to enter an appearance in all the circumstances of this case. Notwithstanding that there have been substantial delays, it is important to have regard to the fact that the respondent refrained for over four years from disclosing the existence of the judgment in the first instance.

Conclusion

85. I am satisfied that in their totality, all of the factors outlined above result in the circumstances in which judgment was obtained in the Central Office on 10th June, 2013, being closer to the irregular end of the spectrum, and as such it is appropriate to set aside the judgment *ex debito justitiae*. As is succinctly stated in Delany & McGrath on *Civil Procedure* (4th edn.) at 4.40:-

"...where there was some irregularity in the proceedings or the procedure by which the judgment which is sought to set aside or vary was obtained in which case the defendant will be entitled to have the judgment set aside *ex debito justitiae*."

In the instant case, the irregularity stems not so much from any non-compliance with the Rules of the Superior Courts, but rather by reason of estoppel arising from the conduct and representations of the respondent which led to the appellant reasonably

understanding that if he engaged in a certain course of conduct, the litigation would not be proceeded with, and on which representations he acted.

86. As such therefore, the provisions of O. 27, r. 14(2) do not require to be considered in the instant case.
87. For all the above reasons I would allow the appeal and set aside the order of the High Court.