

THE HIGH COURT

**[2021] IEHC 786
[2020/6225P]**

BETWEEN

TARBUTUS LIMITED

PLAINTIFF

AND

CONOR HOGAN

DEFENDANT

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JUDGMENT of Mr. Justice Holland delivered on the 15th of December, 2021

INTRODUCTION & THE FOLIO

1. The Plaintiff (“Tarbutus”), an English-registered company, seeks in these proceedings by plenary action on oral evidence, various orders relating to a duplex apartment comprising Folio 8118L County Limerick and known as Apartment 9B Ballycummin Village, Ballycummin, County Limerick (“the Apartment”). Tarbutus sues as registered owner of the Apartment. The reliefs sought are essentially and in substance various forms of injunction against trespass by the Defendant (“Mr Hogan”).
2. Also sought in the pleadings were an order for the delivery up by Mr Hogan of certain books and records and damages for trespass but these reliefs were not pursued at trial. Mr Hogan resists the claim, asserting his ownership and continued possession of the Apartment. The dispute, essentially, is as to who owns and is entitled to possession of the Apartment.
3. By the Statement of Claim,
 - Mr Hogan is sued as a former mortgagor and former registered owner of the Apartment.
 - Tarbutus acquired title by Transfer dated 30 July 2019 from Tanager DAC exercising its power of sale pursuant to a charge on the Apartment which transfer resulted in the registration by the Property Registration Authority (“PRA”) of Tarbutus as full owner thereof.
 - In August to October 2019 the Plaintiffs found the Apartment tenanted. The Plaintiff served a termination notice on the tenants, who vacated the Apartment in early July 2020. I should say that the Plaintiff led little evidence of detail in this regard but the Defendant admitted he had had tenants in the Apartment and it was clear in the Plaintiff’s evidence, and I so find, that they were no longer in occupation as at 14 July 2020.
4. The trial took place on 15 October 2021 and 20 October 2021. Tarbutus appeared by counsel. Mr Hogan appeared in person with a McKenzie friend.
5. A certified copy Folio 8118L County Limerick, tendered in evidence by Tarbutus, records the history of the registered ownership of, and charges on, the Apartment as follows:
 - It identifies the lands as *“the apartment known as No 9 Block B Ballycummin Village situate in the townland of Ballycummin and the Barony of Pubblebrien”*, in two parcels described as the second floor and the mezzanine floor.
 - Mr Hogan was registered as full owner from 26 July 2001.
 - The ownership of Bank of Scotland (Ireland) Limited (“BoSI”) of a charge for present and future advances repayable with interest (“the Charge”) was registered with effect from 15 January 2007.
 - Tanager Limited (since “Tanager DAC” - hereafter “Tanager”) was registered as owner of the Charge from 25 April 2014.
 - On 9 September 2019 the following occurred, as the copy Folio records:
 - Mr Hogan’s ownership was cancelled
 - The Charge was cancelled

- Tarbutus was registered as full owner.
6. So, the Folio identifies Tarbutus, not as assignee or owner of the Charge, but as full owner of the Apartment and it records the cancellation of Mr Hogan's ownership. In the ordinary way, that is conclusive of its title and entitles Tarbutus to possession and occupation of the Apartment as against Mr Hogan.
 7. No evidence was tendered by either side of any history of payments in discharge or part-discharge of any advances or debt underlying the Charge or of any default in such payments.
 8. Mr Hogan sought to adjourn the case as not ready for trial. This was first, on the ground that interrogatories, which Mr. Hogan had delivered to Tarbutus on 11 October 2021 (4 days before trial) but for the administration of which he had got no order, remained unanswered and second, because he had, in September 2021, issued a motion returnable to 6 December 2021 to consolidate the proceedings with two other proceedings. The first of these were proceedings 2020/5335P, in which Mr Hogan by plenary summons issued on 24 July 2020 sought, inter alia, to establish against various parties, including Tarbutus, his ownership of the Apartment. Other than the motion to consolidate it is not apparent that Mr Hogan has taken any steps to advance those proceedings since issuing them. The second were plenary proceedings 2017/8017P in which Tom Kavanagh (as receiver) and Tanager DAC sought possession of the Apartment and in which proceedings, Mr Hogan says, an interlocutory injunction application by the Plaintiffs was adjourned 13 times until, on 17 February 2020, it was adjourned generally for Covid-19 reasons. Apropos his adjournment application he also pointed out that there was no certificate of readiness in the present proceedings.
 9. I refused that adjournment application for reasons given at the time, but which included observing that, though I was entitled to adjourn the trial if I thought it proper, Allen J had, in July 2021, instead of deciding an interlocutory injunction application by Tarbutus, assigned the present trial date in the knowledge of Mr Hogan's desire to administer interrogatories and pursue consolidation and, presumably, the absence of a certificate of readiness. Also, Allen J, managing the Chancery list, had at the callover on 15 October 2021 at which the matter was sent to me for trial, been addressed by Mr Hogan on those issues and nonetheless sent the matter for trial by me. I also considered that, while I was not familiar, save in outline, with proceedings 2017/8017P, Mr Hogan had not demonstrated their relevance to the present action: indeed, it seemed to me that in practical terms it was likely that those proceedings had been overtaken by the transfer of the Apartment to Tarbutus, at least insofar as concerned questions of entitlement to possession and occupation of the Apartment. As to proceedings 2020/5335P, Counsel for Tarbutus did not oppose my taking a liberal view of Mr Hogan's pleaded Defence in the present action as encompassing issues he raised in those proceedings – in particular his argument, in reliance on **Kavanagh v McLoughlin**¹, that Bank of Scotland plc (BoS") had had no power to transfer the Charge to Tanager and, accordingly Tanager had had no title to sell to Tarbutus. Counsel also accepted that Mr Hogan could ventilate his allegations of fraud – but only allegations against Tarbutus – and while denying that such fraud had occurred. I

¹ [2015] IESC 27

also expressed my willingness to canvass the question of amendment of Mr Hogan's Defence if needs be to seek rectification of the Register by way of Counterclaim.

10. During the trial, Mr Hogan also pointed out, correctly, that the Plenary Summons dated 8 September 2020 and Statement of Claim dated 12 November 2020 in these proceedings both purported to identify the Apartment by reference to a schedule, but no schedule was attached to either document. However, the Statement of Claim identified the property at issue as "9B Ballycummin Village, Ballycummin, County Limerick" and as a "domestic dwelling/an apartment". I considered that, despite the omission of the schedules, the Statement of Claim had adequately identified, and apprised Mr Hogan of the identity of, the property at issue such that he would not be unfairly prejudiced by Tarbutus's being permitted to amend its pleadings by the addition of the schedule. So, I gave Tarbutus liberty to amend the Plenary Summons and Statement of Claim by the addition of a schedule identifying the property at issue by reference to its folio number. I directed that Tarbutus provide the terms of the proposed Schedule to the Court and Mr Hogan over lunchtime on 15 October 2021 and gave Mr Hogan liberty to apply in the event he objected to the schedule by reference to its terms. The schedule proffered read "The property comprised within land Registry Folio 8118L County Limerick". I did not alter the order I had made permitting the amendment and remain of the view that Mr Hogan was not prejudiced thereby.

SECTION 62 OF THE REGISTRATION OF TITLE ACT 1964

11. Section 62 of the Registration of Title Act 1964 ("S.62") provides for the creation, registration and transfer of charges. Significantly, it also provides for the sale of title to the charged lands themselves by the registered owner of a charge. As S.62 effectively gives the owner of a registered charge the same power of sale as that of a mortgagee and as the power of a mortgagee to sell differs as between mortgages created before and after the commencement on 1 December 2009 of the Land and Conveyancing Law Reform Act 2009 (see generally, Lyall on Land Law², Wylie on Land Law³ and the Land and Conveyancing Law Reform Act 2013) and as the Charge here was created in 2007, I set out S.62 in its pre-2009 content with 2009 amendments indicated. However, the 2009 Act amended S.62(6) in a minor respect but the 2013 Act did not reverse that amendment as applicable to mortgages created before 1 December 2009 and so I have set out S.62(6) in its "post-2013" form.

"62.— (1) A registered owner of land may, subject to the provisions of this Act, charge the land with the payment of money either with or without interest, and either by way of annuity or otherwise, and the owner of the charge shall be registered as such.

(2) There shall be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form (or an instrument in such other form as may appear to the Registrar to be sufficient to charge the land, provided that such instrument shall expressly charge or reserve out of the land the payment of the

² 4th Ed'n §24-122 et seq

³ 6th Ed'n §§14.43 et seq, 14.49

money secured)⁴ but, until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land.

(3) & (4) & (5)⁵ (irrelevant)

(6) *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 Acts⁶, 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 such a mortgage⁷, including the power to sell the estate or interest which is subject to the charge.*

(7) *When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession.⁸*

(8) (irrelevant)⁹

(9) *If the registered owner of a charge on land sells the land in pursuance of the powers referred to in subsection (6), his transferee shall be registered as owner of the land, and thereupon the registration shall have the same effect as registration on a transfer for valuable consideration by a registered owner.*

(10) *When a transferee from the registered owner of the charge is registered, under subsection (9), as owner of the land, the charge and all estates, interests, burdens and entries puisne to the charge shall be discharged.*

(11) (Irrelevant)

12. By S.62(6) the right of sale of a registered owner of a charge is that of a mortgagee by deed¹⁰.

Lyll on Land Law¹¹ observes, as to mortgages predating 1 December 2009, that the power of

⁴ Words in brackets deleted (1.12.2009) by Land and Conveyancing Law Reform Act 2009

⁵ Repealed (1.01.2007) by Registration of Deeds and Title Act 2006

⁶ i.e. Conveyancing Acts 1881 to 1911. "mortgage by deed within the meaning of the Conveyancing Acts" replaced (1.12.2009) by Land and Conveyancing Law Reform Act 2009 by "legal mortgage under Part 10 of the Land and Conveyancing Law Reform Act 2009"

⁷ "under a mortgage by deed" replaced (1.12.2009) by Land and Conveyancing Law Reform Act 2009 by "under such a mortgage". This was not reversed as to mortgages created before 1 December 2009 – presumably as reversal was deemed unnecessary as the amendment in 2009 had not changed the substance of S.62(6)

⁸ The repeal of S.62(7) by Land and Conveyancing Law Reform Act 2009 was reversed as to registered charges created before 1.12.2009 by the Land and Conveyancing Law Reform Act 2009. See Wylie on Land Law 6th Ed'n §§14.41 – 14.4414.49

⁹ Repealed (1.12.2009) by Land and Conveyancing Law Reform Act 2009 (27/2009)

¹⁰ "under a mortgage by deed" replaced (1.12.2009) by Land and Conveyancing Law Reform Act 2009 by "under such a mortgage"

¹¹ 4th Ed'n 2018, §24-124

sale will almost always be under section 19 of the Conveyancing Act 1881¹². Notably, that section permits sale by private contract and section 20(2) of the Conveyancing Act 1881¹³ protects the purchaser's title in the case of irregular exercise of the power of sale: the aggrieved mortgagor must look to the mortgagee/vendor. Lyall¹⁴ also observes that the power of sale under section 19 must first arise by default in payment of an instalment and must become exercisable by reference to criteria listed in section 20 of the Conveyancing Act 1881¹⁵. It seems to me that, given the role of the PRA in verification before registration of title and given the conclusivity of the Register to which I refer below, it was for Mr Hogan to assert any deficiency in these respects: he did not do so.

PLAINTIFF'S CLAIM, SECTION 31 REGISTRATION OF TITLE ACT 1964 & CONCLUSIVITY OF REGISTER

13. Tarbutus essentially rests in the first instance on its proof of the certified copy Folio as establishing its full ownership of the Apartment and, hence, entitlement to the relief claimed. Tarbutus relies on Section 31(1) of the Registration of Title Act 1964 ("S.31(1)" and "the Act of 1964") which provides for the conclusivity of the Register of Title and on the explanation of that section in the decision of the Court of Appeal in **Tanager DAC v Kane**¹⁶.

14. S.31(1) provides as follows:

"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."

15. In **Tanager DAC v Kane**¹⁷ Baker J. considered the judgment of Laffoy J in **Kavanagh v McLoughlin**¹⁸ and analysed S.31 and the conclusivity of the register in terms worth citing in extenso - not least for the benefit of Mr Hogan as a lay litigant.

16. In **Tanager v Kane**, BoSI had registered a charge on Mr Kane's home. Baker J. records that by cross-border merger made under S.I. No. 157/2008, the European Communities (Cross-Border Mergers) Regulations 2008 of Ireland and The Companies (Cross-Border Mergers) Regulations 2007 of the United Kingdom, all the assets and liabilities of BoSI transferred to Bank of Scotland plc. ("BoS") - whereupon BoSI was dissolved. BoS thereafter sold a portfolio of securities to Tanager - including its interest in the charge on Mr Kane's home. Accordingly, on 25 April 2014, Tanager became registered as owner of the charge previously registered in favour of BoSI.

¹² Preserved as to mortgages created before 1 December 2009 by the Land and Conveyancing Law Reform Act 2013.

¹³ Preserved as to mortgages created before 1 December 2009 by the Land and Conveyancing Law Reform Act 2013.

¹⁴ 4th Ed'n 2018, §24-126

¹⁵ Preserved as to mortgages created before 1 December 2009 by the Land and Conveyancing Law Reform Act 2013.

¹⁶ [2018] IECA 352

¹⁷ [2018] IECA 352; [2019] 1 IR 385

¹⁸ [2015] IESC 27

Indeed, Property Registration Authority (“PRA”) records showed that there were 1,768 registrations, mostly on foot of applications by Tanager, of onward transfers of former BoSI charges where BoS had not previously been registered as owner. The primary issue in that case was Mr Kane’s contention that, because BoS never became registered as owner of the charge, it was not entitled to transfer or assign the charge to Tanager. Mr Kane argued accordingly that Tanager never acquired title to the charge and so was not entitled to enforce it against him. Mr Kane contended that Tanager’s registration as owner of the charge was a mistake by the PRA. Mr Kane’s argument failed. As will be seen, Mr Hogan makes a similar argument. But at this point Tanager v Kane is of interest for its account of the effect of S.31.

17. Baker J described the statutory system by which title to land may be registered. Abbreviating her account, inter alia, she observed that what is registered is the ownership or encumbrance created by a document rather than the document itself - *“the entries in the register are not registrations of documents, but of the effect of documents”*¹⁹ - and thereafter the document ceases to be the evidence of title. The Register becomes the evidence of the ownership and the encumbrances on it²⁰. For that reason, the Register was declared by Section 34 of the Local Registration of Title (Ireland) Act 1891 and is declared by its replacement, S.31, to be conclusive evidence of title. Baker J describes the conclusiveness of the Register as a *“cornerstone of the system of registration”*²¹ and cites **McAllister, Registration of Title in Ireland**²² as a “seminal” text on the law of registered title, and to the effect that s.31(1) establishes the Register as an *“iron curtain”*²³ behind which it is neither appropriate nor necessary to penetrate. McAllister cites Watson L.J. in, in *Gibbs v. Messer*²⁴: *“The object [of the registration of title] is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title, and to satisfy themselves of its validity.”* McAllister also cites Curtis and Ruoff, *The Law and Practice of Registered Conveyance*²⁵ inter alia to the effect that *“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.”* Baker J cites that as the principle underlying *“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”*²⁶ And she cites **Deeney on Registration of Deeds and Title in Ireland**²⁷, on s.31(1) to the effect that:

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

Baker J cites Gannon J. in **Guckian v. Brennan**²⁸, to the effect that S.31 affords

¹⁹ §25

²⁰ §27

²¹ §27

²² Incorporated Council of Law Reporting for Ireland, 1973

²³ McAllister was written during the Cold War.

²⁴ [1891] AC 248, at p. 254: an appeal from the Supreme Court of Victoria, Canada to the Privy Council.

²⁵ 2nd ed., Stevens & Sons, 1965

²⁶ §32

²⁷ 1st ed., Bloomsbury Professional, 2014, at para. 6.01

²⁸ [1981] 1 IR 478, at p. 489

“... sufficient protection of the vendor and the intending purchaser in relation to all prior transactions affecting the registered ownership as appearing on the title. The duty of ensuring that any instrument of transfer is valid and effective, so as to enable a transmission of ownership to be duly registered, falls upon the registrar at the time of the registration²⁹. Thereafter, in the absence of fraud, the register affords conclusive evidence of the validity of the title.”

18. Also of some significance in this case is Baker J’s observation that registration “... is not, and was never intended to be, evidence of beneficial ownership ...”³⁰ and

“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.”³¹

19. Tarbutus cites also **ADM Mersey PLC v. Flynn**³² in which AIB successfully challenged the Examiner’s refusal, in undertaking accounts and enquiries on foot of a well-charging order and order for sale, to certify its first legal charge registered in the relevant folio in priority over the judgment mortgage of ADM Mersey registered later. AIB, citing s.31 and *Tanager v Kane*, argued that registration of its charge was conclusive evidence of its title to the charge and hence its right to priority over ADM Mersey’s later-registered judgment mortgage. Having considered *Tanager v Kane* in extenso as to Baker J’s consideration of the system of registration of title, the significance of s. 31 and *Kavanagh v McLaughlin*, Haughton J held, inter alia:

“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”.³³

“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.”³⁴

“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

²⁹ Emphasis added

³⁰ §35

³¹ §36

³² [2020] IECA 260

³³ §92

³⁴ §91

*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 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.*³⁵

20. The following text appears in the same paragraph of ADM Mersey but I isolate it for emphasis as, I hope, explaining to Mr Hogan the role of the PRA in registering a charge: the same may be said of its role in registering the charge in the name of a transferee (in this case Tanager) – and of its role in registering the ownership of a purchaser of the land (in this case Tarbutus) from the holder of a registered charge (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.”*³⁶

Haughton J held that:

*“ ... 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 ... ”*³⁷

21. It will have been seen that S.62(6) provides, inter alia, that the owner of the registered charge (here Tanager) can sell the land – or more accurately, has *“the power to sell the estate or interest which is subject to the charge”* such that the buyer (here Tarbutus) becomes owner of the land. As Deeney says – *“Thus the registered owner of a charge for the repayment of any money advanced on the security of the property has power to sell the property on which the charge is registered. In the usual case, if A is registered as owner of freehold property and B is the registered owner of such a charge, then B can sell the full ownership provided the date for repayment has arrived.”*³⁸
22. Given the role of the PRA, described above, to verify an application for registration and the conclusivity of the Register, it was not, in my view, incumbent on Tarbutus to address the question whether the date for payment had arrived. And as Mr Hogan did not raise the issue, I need consider it no further. The same is true of all other requirements which the PRA is obliged to investigate and so presumed to have investigated before registering Tarbutus as owner of the Folio.

³⁵ §94 & 95

³⁶ §95

³⁷ §102

³⁸ Registration Of Deeds And Title In Ireland 2014 §21.28

23. On proof of the Folio and Tarbutus's status as registered owner of the Apartment it appears to me that, failing Mr Hogan's providing a defence to the claim, Tarbutus's proofs are in order and I am bound by S.31 - the conclusivity of the Register - to recognise and vindicate Tarbutus's full ownership of and right to possession and occupation of the Apartment and grant relief accordingly.
24. I should add that Tarbutus called three witnesses. Mr Craig Havard, sole director of Tarbutus, testified remotely. Richard Murray, solicitor and Enda Hanrahan of Chartered Assets, a property manager also testified. But it is convenient to deal with their evidence in the context of consideration of Mr Hogan's case.

DEFENDANT'S CASE

25. The Defence is a difficult document to precisely understand but its broad arguments were apparent and as the trial proceeded, and though it was at times difficult to grasp the arguments he made, it appeared that Mr Hogan orally and by written submission made on 20 October 2021, agitated the following propositions:
- a. These proceedings were an abuse of process in that he, Mr Hogan, had already issued Plenary Proceedings 2020 5335P seeking rectification of the Register.
 - b. In reliance on **Kavanagh v McLoughlin**³⁹, that BoS had had no power to transfer the Charge to Tanager and, accordingly Tanager had had no title to sell to Tarbutus and so it was a fraudulent transaction.
 - c. The sale of the Apartment from Tanager to Tarbutus was vitiated in that the contract for sale was not produced at trial and the Transfer identified the transferee as "Tarabutus" and referred to "the Bank" selling as mortgagee.
 - d. The sale of the Apartment from Tanager to Tarbutus was vitiated as at that time Tarbutus was a "dormant" company and so it was a deceitful and fraudulent transaction. In this respect he calls in aid the Statute of Frauds 1695.
 - e. He relied on the lack of progress in, or conclusion to, the 2017 proceedings by Tanager and Mr Kavanagh against Mr Hogan and alleged deception by them.
 - f. The sale of the Apartment by Tanager to Tarbutus for €24,000 was not made on the open market and was at an undervalue and so a fraud on Mr Hogan and an unjust enrichment of Tarbutus.
 - g. As to that sale, the receiver appointed by Tanager, Mr Kavanagh, was in breach of his duty of care to Mr Hogan.

³⁹ [2015] IESC 27

- h. The transfer from Tanager to Tarbutus was vitiated and/or Tarbutus' claim in these proceedings was otherwise undermined by the refusal of Tarbutus to identify the beneficial owners of the apartment.
- i. Mr Hogan remained at all relevant times and remains in lawful possession of the Apartment. So, Tanager did not sell as mortgagee in possession.
- j. The outcome of the proceedings was affected by the events of 14 July 2020 in which agents of Tarbutus unsuccessfully attempted to take possession of the Apartment in some confrontation with Mr Hogan.
- k. The first Mr Hogan knew of the sale to Tarbutus was as a result of the events of 14 July 2020.
- l. The outcome of the proceedings should be affected by fact that the original deed of charge had not been returned to Mr Hogan.

PROCEDURAL POSSIBILITY OF RECTIFICATION OF THE REGISTER FOR FRAUD OR MISTAKE

26. *Tanager v Kane* came to the Court of Appeal by case stated by the High Court in an appeal from the decision of the Circuit Court in a statutory and summary action for possession by the asserted owner of a registered charge.

27. The first question posed was procedural: whether Mr Kane could, in such proceedings, challenge the registration of Tanager as owner of the charge on his folio having regard to the statutory provisions by which the Register is to be treated as conclusive – whether the court should entertain in those proceedings an argument, by way of defence or counterclaim, that the Register does not correctly reflect title to the charge or, in other words, whether the court should “look behind” the Register.

28. Baker J held that a court hearing a statutory and summary application for possession – a procedurally particular type of action - may not determine a challenge to the correctness or conclusivity of the Register. She held that s.31(1) makes the Register conclusive evidence of title subject to the jurisdiction of the court to direct rectification of the Register on the ground of actual fraud or mistake. And she noted that s.31(1) expressly excludes from the power of rectification any argument that might derive from the knowledge of the registered owner of any “*deed, document, or matter relating to the land*”. Baker J, noting the summary nature of a statutory action for possession on foot of a charge, held that “*The jurisdiction to rectify is exercisable in an inter partes action grounded on alleged mistake or fraud, and not in a summary action on affidavit.*”⁴⁰ She held that, in consequence of the statutory conclusiveness of the register, and of the statutory limits to its rectification, in “*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.*”⁴¹ “*The court, may not, in*

⁴⁰ §63

⁴¹ §67

possession proceedings, “look behind” the register.”⁴² “The challenge to registration is brought by other types of proceedings inter partes ...”⁴³ and “may be determined only in equity proceedings brought in accordance with the relevant procedural rules of the Circuit Court or the High Court.”⁴⁴

29. However, it is clear that Baker J’s concern was procedural not substantive. She explicitly termed it procedural and did not envisage thereby shutting out a genuine defence. Baker J considered it clear that, under s.31 “... *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”*”⁴⁵ and that the PRA need not be joined as a party to proceedings to that end (leaving aside the question, not relevant here, of their joinder in proceedings for rectification under S.32 for error by the PRA). Baker J observed that S.31 permits the court “*in a suitable case to direct the rectification of the register on the statutory grounds of fraud or mistake or error originating in the Land Registry. In such proceedings, the persons entitled or claiming to be entitled to the land have every right to be heard ...*”⁴⁶ Her reference to such proceedings is to “equity proceedings” as opposed to the possession proceedings then before the Court.

30. That Baker J did not envisage shutting out a genuine defence is reflected in her view, obiter, that

“..... the court hearing the proceedings for possession must be considered to have the inherent jurisdiction, in a suitable case, to adjourn the proceedings or stay the enforcement or implementation of an order for possession, or to postpone the date of delivery of possession, pending the determination of rectification proceedings, if it considered that those proceedings are reasonably likely to offer a defence to the claim for possession.”⁴⁷

Baker J made a similar observation in **Bank of Ireland Mortgage Bank v Cody**⁴⁸.

(An obiter is an observation in a judgment addressing an issue the resolution of which is unnecessary to the decision at hand. While not binding in later cases obiters are often persuasive – especially when emanating from the Supreme Court.)

31. It appears to me that Baker J’s procedural view is grounded not merely in the conclusiveness of the Register but also, and procedurally, in proceedings which have three particular characteristics: they are proceedings in reliance on a charge for which proceedings provision is made by statute; they are proceedings stipulated by statute to be summary; they are proceedings asserting a specifically statutory right to possession pursuant to s 62(7) of the 1964 Act. That seems to me a very different context, both substantively and procedurally, to the present action by a registered full owner seeking injunctions against trespass. I do not see that

⁴² §86

⁴³ §70

⁴⁴ §87

⁴⁵ §76

⁴⁶ §81

⁴⁷ §47 – emphasis added

⁴⁸ [2021] IESC 26 §51

the factors militating against a defendant's seeking rectification of the register in summary, statutory, possession proceedings similarly militate in a plenary action in trespass by a registered full owner. I do not see that a defendant, here Mr Hogan, should be prevented from seeking rectification for fraud or mistake by way of Defence and Counterclaim in such a plenary action. Nor has the Plaintiff, in my view correctly, suggested otherwise. Accordingly, I do not see that *Tanager v Kane* requires that I further review my decision as to the terms on which I refused an adjournment of trial. Accordingly, I will consider the matters raised by way of defence by Mr Hogan.

POSITED DEFENCES

The Evidence

32. Within the limits of my obligation of neutrality between the parties, I endeavoured to explain to Mr Hogan the difference between giving evidence at trial and making submissions at trial and that facts are to be given in evidence. He gave evidence – but, in chief, only as to the events of 20 July 2020, which I address below. He was cross-examined as to the location of his home and accepted that it was not the Apartment but was in County Clare.

Abuse of Process

33. Mr Hogan argued that these proceedings were an abuse of process in that prior to their commencement he had issued plenary proceedings 2020/5335P seeking rectification of the Register to upset the registration of Tarbutus as owner of the lands. Though the Defence in these proceedings pleads that a misleading Defence had been delivered in proceedings 2020/5335P by reference, it seems, to a misidentification of the Tarbutus entity, that argument was not pursued or developed at trial before me – though the underlying point of legal personality was, and is considered below.

34. Mr Hogan's essential case in this regard appeared to be that because his proceedings issued first in time, the proceedings now at trial were necessarily an abuse of process. He clearly thought the proposition self-evidently correct as he did not develop it or submit authority for the proposition in law or for the consequence which, in his view should follow: namely the dismissal of these proceedings. In my view he has failed to demonstrate an abuse of process.

That BoS had no power to transfer the Charge to Tanager

35. In reliance on *Kavanagh v McLoughlin*, Mr Hogan argues that BoS had no power to transfer the Charge to Tanager and, accordingly Tanager had no title to sell it to Tarbutus and so it was a fraudulent transaction. In consequence, he argues, Tanager's sale of the Apartment to Tarbutus was ineffective to convey title to Tarbutus.

36. The point is not a good one - as is most easily seen through the lens of *Tanager v Kane*. In that case, as recorded above, Mr Kane contended, also in reliance on *Kavanagh v McLoughlin*, that, because BoS never became registered as owner of the charge it received from BoSI, it was not entitled to transfer or assign the charge to Tanager. His contention failed – essentially because of the passage of title from BoSI to BoS by defeasance pursuant to statute.

37. In *Tanager v Kane* Baker J considered *Kavanagh v McLoughlin* – in which the present issue had not arisen as necessary for decision but was addressed obiter by Laffoy J. in terms, it must be

said, supportive of the argument made by Mr Kane and now by Mr Hogan, that BoS had no power to transfer the charge in that case to Tanager. Laffoy J., discussing requirements for the enforcement of a charge on registered land, said that s.62(6) required *“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.’”*⁴⁹

38. However, Baker J held, and I am bound accordingly, that in the merger to which I have referred above, BoS had become entitled, by defeasance under an enactment within the meaning of Section 60 of the Act of 1964, to the interest of BoSI in the registered charge such that BoS was entitled to be registered as owner of the charge and so, by Section 90⁵⁰ of the Act of 1964, BoS was entitled to transfer the charge to Tanager despite its not having been so registered. That disposes of the same argument now made by Mr Hogan.

39. However, in *Tanager v Kane* Baker J made a further point which also disposes of the argument now made by Mr Hogan:

*“Tanager argues that, as the defendant is a third party to the transfer from BoSI to BoS, he has no standing to challenge the register, as the challenge would be confined to a challenge of either Tanager or BoS on account of a fraud or mistake in the transaction or instrument on foot of which Tanager became registered, and I agree. The argument could not be raised in the action between Tanager and the defendant.”*⁵¹

The absence of the Contract of Sale from Tanager to Tarbutus

The Tanager to Tarbutus Transfer identified the Transferee as “Tarabutus” and “the Bank” as selling as mortgagee.

40. As a matter of fact, the contract for sale of the Apartment by Tanager to Tarbutus was not produced in evidence. The absence of the contract is irrelevant to these proceedings as the Folio is conclusive evidence of Tarbutus’s title.

41. By Transfer dated 30 July 2019 Tanager sold the Apartment – not the Charge – to Tarbutus, expressly in exercise of Tanager’s power of sale as owner of the registered charge, and for €24,000. Mr Murray in evidence identified and provided a copy of the Transfer - the original is, as is normal, held by the PRA. He acted for Tarbutus in the purchase and passed the Transfer drafted by the solicitors for the vendor to Mr Havard for execution but Mr Murray was not a witness to its execution. The Transfer is generally in the form of Form 24 of the Land Registry Rules – the form prescribed for transfer of property by a registered owner of a charge in exercise of a power of sale.

42. The operative part of the Transfer identified the transferee as “Tarabutus” – not “Tarbutus”. But as the Register is conclusive of Tarbutus’s title any errors in the Transfer are irrelevant to these proceedings and out of sight behind the “iron curtain”.

⁴⁹ §111

⁵⁰ As Inserted by Registration of Deeds and Title Act 2006 s. 63

⁵¹ §64

43. However, as a miss-spelling of the name of the purchaser did occur and troubles Mr Hogan, I will address the matter further. The copy transfer disclosed two occasions of use of the word “Tarabutus”: one in the body of the Transfer, identifying it as “the purchaser” and one in the execution clause which, but for the matter next mentioned, contemplated signature of the transfer on behalf of “Tarabutus”. However, it was apparent on the copy transfer that the second “a” in “Tarabutus” had been obliterated by hand such that it read “Tarabut~~a~~utus” – i.e. “Tarbutus” – the correct name of the Plaintiff. Near the obliteration appeared the handwritten initials “CH”. On its face the Transfer was executed for the purchaser – though the signature was illegible. Albeit the earlier iteration of the error in the body of the Transfer was not corrected, this was clearly a correction of a spelling error in the Transfer as drafted – a correction by the person executing it for the purchaser (who can have been expected to know the correct spelling of the name of the transferee) of a minor typographical error as to the name of the transferee. And so, reading the Transfer as a whole, it is clear that it was to “Tarbutus”. In that light I consider it entirely unremarkable that the PRA was content to register Tarbutus as owner on foot of that transfer. There was no fraud or mistake in this respect.

In addition, Mr Havard testified that it was he who had executed the Transfer for the transferee, acting for Tarbutus in that capacity, and that he had himself made and initialled the correction described above – thus confirming the inference clearly to be drawn from the face of the document by the PRA.

So, even assuming (contrary to the law) that the conclusivity of the Register is not conclusive of Tarbutus’s title, I find against Mr Hogan on this issue.

44. The operative part of the Transfer identified the transferor as Tanager. It was signed and delivered as a deed for Tanager. Though the point he made was not pursued to a conclusion as to its supposed effect on Tarbutus’s claim, Mr Hogan cross-examined Mr Murray on the fact that the Transfer stated that “*the Bank is executing this Transfer in its capacity as mortgagee of the property in sale only*”. Mr Murray initially stated that “the Bank” referred to was BoS but later clarified, that Tanager executed the deed and the reference to the Bank was to Tanager to whom BoS had sold the charge and that when initially stating it was BoS he had not had a copy of the Transfer before him, which I accept. While it was suggested for Tarbutus that Tanager is a Bank, I had no reliable evidence to that effect. And Tarbutus was described in the Transfer as “the vendor” – not as “the bank”. Doubtless there is an infelicity of drafting of the Transfer in this regard but, again reading the Transfer as a whole, the reference makes sense only if one reads it as asserting that Tanager sold as mortgagee – which accords with the known facts as disclosed on the Folio. The first paragraph of the Transfer describes Tanager as “the registered owner of the charge” rather than as “mortgagee” but nothing turns on that difference for present purposes. Mr Murray described Tanager as selling as mortgagee in possession but that is not precisely what the Transfer says. Conclusiveness of the register apart, this infelicity does not, to my mind, vitiate the Transfer. More importantly, to give weight to Mr Hogan’s point in this regard would be to look behind the “iron curtain” of the Folio, which I may not do. And so, I must hold against Mr Hogan on this point also.

45. I should add that in written submissions Mr Hogan referred to supposed admissions by Mr Murray in cross examination that Tanager was not the transferor pursuant to the Transfer. I did not so understand Mr Murray's evidence. On the contrary, I understood Mr Murray to confirm that Tanager was the transferor, in which capacity, indeed, it is identified in the Transfer.

Tarbutus was "dormant" and lacked legal personality at its purchase of the Apartment

46. Mr Hogan alleged that the sale of the Apartment from Tanager to Tarbutus was vitiated as, at the time Tarbutus was a "dormant" company as far as the UK Companies Office was concerned and so it was a deceitful, ineffective and fraudulent transaction.

47. Mr Hogan gave no evidence that Tarbutus was in fact dormant at any specific time, no evidence as to the criteria in English Law or practice for deeming a company dormant or as to the legal consequences of such a designation and no evidence or argument as to how and upon whom such a purchase by a dormant company was a fraud. His Defence asserted that the Tarbutus accounts for 17 June 2019 to 30 June 2020 filed in the UK Companies Office in June 2021 identified Tarbutus as dormant, but those accounts were not tendered in evidence at trial.

48. Mr Hogan asserts that at the date of the Transfer Tarbutus was a dormant company and thus had no extant legal personality – did not exist - and so there is no executed written contract to satisfy the Statute of Frauds 1695. I reject this submission. Whatever "dormant" may specifically mean - the word itself connotes sleeping rather than non-existence - I have no reason to believe it means that Tarbutus, if described as dormant, did not exist or lacked legal personality at any time material to these proceedings.

49. But Mr Havard testified that he had caused Tarbutus to be set up and was its sole director. He verified copy "Gov.UK" Companies House downloads with which I was provided as to "Tarbutus Limited", giving its date of incorporation as 17 June 2019, its status as "Active", a London address of its registered office and its business as "buying and selling of own real estate" and identifying Mr Havard as its sole director.

50. In cross-examination Mr Havard did not dispute that the company was "dormant" at the time of the Transfer of the land to it. He explained that Tarbutus was dormant for accounting purposes as it was not trading and that the purchase was funded by the beneficial owners of the Apartment but Tarbutus owns the legal title to the Apartment. The Register is conclusive that Tarbutus owns the legal title to the Apartment. As Mr Hogan had provided no evidence or rationale for his assertion that Tarbutus's dormancy rendered the transfer fraudulent or mistaken, I consider that, on the case before me, his proposition was unstateable. Accordingly, no question arises, on this account, of looking behind the "iron curtain" of the Folio and I hold against Mr Hogan on the point.

The 2017 proceedings & alleged deception by Tanager and Mr Kavanagh.

51. Tarbutus was not party to the 2017 proceedings. My knowledge of them is limited to Mr Hogan's assertion that an interlocutory injunction application by Tanager and Mr Kavanagh in those proceedings was adjourned 13 times, including three times after the sale to Tarbutus, until on 17 February 2020 it was adjourned generally for Covid-19 reasons. He accuses Tanager and Mr

Kavanagh of deceiving the Court in this respect but gives no detail and tenders no evidence in support. Mr Hogan says Tanager and Mr Kavanagh did not advance their case even after “the Court of Appeal determined on 31st October 2018”. I take this to be a reference to the date Baker J gave judgment in *Tanager v Kane* and to suggest that if Tanager and Mr Kavanagh believed that Baker J’s decision cleared the difficulty arguably posed to their proceedings by *Kavanagh v McLoughlin*, they should have prosecuted their action thereafter, instead of further adjourning it.

52. I have no evidence of why the interlocutory injunction application in the 2017 proceedings was repeatedly adjourned nor of any deception of the Court by Tanager and Mr Kavanagh. I have no evidence of why Tanager changed tack and decided to sell the land – though I note that Tanager sold a portfolio of distressed properties and not just this Apartment. There could be many commercial, strategic and/or legal reasons for Tanager’s decision to sell and I am not entitled to speculate as to what they may have been - either generally as to the portfolio or specifically as to the Apartment. Mr Hogan seems to submit that, in some way not clear to me, his assertions oblige me to infer from its alleged failure to prosecute the 2017 proceedings to a conclusion that Tanager’s position as to the registered charge was defective in a way not specified (save on foot of the obiter in *Kavanagh v McLoughlin*, if one ignores *Tanager v Kane*) and, further, that such defect amounts to a fraud or mistake within S.31 such as would justify me in upsetting the conclusiveness of the register as to Tarbutus’s title. I see no basis in evidence or in law for such an inference.
53. If it were the case – and I do not find that it was – that adjournments of the interlocutory injunction application in the 2017 proceedings by Tanager after it had transferred the Apartment to Tarbutus represented a deception of the Court and if Mr Hogan has cause for complaint or entitlement to remedy in that regard – and I do not find that he has – it must be against Tanager and Mr Kavanagh. I do not see how such complaints impugn Tarbutus’s title.

Tanager to Tarbutus sale of off-market at undervalue

54. Mr Hogan argued that the sale of the Apartment by Tanager to Tarbutus for €24,000 was not made on the open market and was at an undervalue and a fraud on Mr Hogan. Mr Hogan asserted, on the basis it seems of a written valuation in his possession, but he produced no admissible evidence, that the market value of the Apartment was in the order of €180,000. That said, the Plaintiff sensibly accepted that the market value of the Apartment with title clear of litigation was likely a considerable multiple of €24,000, so I do not consider any evidential deficit in that regard to have disadvantaged Mr Hogan.
55. Mr Hogan asserted a “loss” to him and an unjust enrichment of Tarbutus in an amount in the region of €156,000 - i.e. €180,000 - €24,000. I am unclear how this subtraction is a calculation of either a loss to Mr Hogan or an unjust enrichment of Tarbutus. I have no evidence of the quantum of any equity of redemption Mr Hogan may have or have had in the Apartment at any relevant point in time. I have no evidence of what might have been, on foot of an open market sale at any point in time, the surplus realised over any debt outstanding on foot of the Charge. I have no evidence of the expenses which Tarbutus have incurred in the matter but it seems safe to observe that if the Apartment sells for €180,000 they will be enriched – whether unjustly or

not - in a quantum appreciably less than €156,000. Again, Mr Hogan seemed to consider that the injustice of any enrichment was self-evident from the facts. He did not develop the point or refer me to the law on unjust enrichment. He has not made out his argument in this regard.

56. Mr Hogan cross-examined Mr Harvard at some length on this question. Mr Harvard explained that Tarbutus and he are in the business of trading in “distressed” loans and properties. Mr Harvard and Mr Hogan had different understandings of the word distressed in the present context. Mr Hogan understood it to refer to the condition of the Apartment (which he says, and I accept, was always generally good). Mr Harvard explained, and I am paraphrasing him, that as he used the word it refers to the fact that a property is encumbered by a non-performing mortgage loan and that efforts to recover the loan and/or enforce the mortgage had proved difficult. Both usages of the word seem to me legitimate as a matter of ordinary usage. While I had no evidence of the loan underlying the charge, its repayment or of default by Mr Hogan, in that regard as the receiver appointed by BoS had launched proceedings against Mr Hogan seeking an interlocutory injunction for possession - which application had never been concluded - it seems a fair inference that the Apartment was a distressed property in the sense in which Mr Harvard used the word distressed. However, even if my inference is incorrect, nothing turns on it for present purposes as I cannot look behind the Folio and, even if I did, I do not see how the argument that the property was not distressed in the sense in which he uses the word would avail Mr Hogan.
57. Mr Harvard testified, and I accept, that in 2018 he had been approached by Deloitte, acting for Tanager, to ascertain whether he would be interested in bidding to purchase a portfolio of distressed loans (and presumably the charges securing them) from Tanager and, ultimately, his bid had been accepted from amongst others. Due to a change in the law, Tanager decided to re-run the bidding process – but selling the properties themselves rather than the loans and charges. He bid again, and his bid was again accepted and a contract to purchase resulted in June 2019. Mr Harvard agreed it was not a public sale but there is no evidence that this was anything other than an arms-length transaction. And, as noted earlier, section 19 of the Conveyancing Act 1881 permits sale by private contract. The bids and purchase had been preceded and informed by what Mr Harvard called “due diligence”. He investigated, inter alia, factors bearing on the price he should bid, including, no doubt, the fact that he was not to buy vacant possession, risk thereby revealed to him of litigation, delay and cost in recovering possession and the risk that he might never do so. (I note for example that the proceedings by Tanager and Mr Kavanagh against Mr Hogan had been in existence since 2017). No doubt his bid was pitched accordingly. Having done due diligence, he did not bid what would, ignoring such risks, have been the market value of the properties. Though he did not put it quite that way, it is clear that Mr Harvard was of the view that he bid for the properties what he thought they were worth as investments having regard to the risks involved. He pointed out that, having bought the Apartment, Tarbutus is still seeking possession 2½ years later. Mr Harvard also described the tenants in the Apartment as aggressive – though my understanding of the evidence was that Tarbutus may have discovered this only after their purchase and so, while the fact of a tenancy may have informed their bid, any aggressiveness of the tenants did not – save presumably that the fact of a tenancy implies the possibility of difficulty. Mr Harvard confirmed that if he succeeded in this action and got possession of the Apartment, he hoped to sell it for what I

might call its “ordinary” market value as opposed to its value discounted for the risks just described.

58. Though he did not so specify, I consider that, on the evidence before me and the fact of these proceedings, I am entitled to infer that Tarbutus will, if it gets possession and in realizing their asset, have incurred expenses which may well have to be paid out of any ultimate proceeds of sale - even if a costs order is made in its favour in these proceedings. These include, presumably, management time and cost, legal expenses and the fees and expenses of such as the property management agency represented by Mr Hanrahan and the like.
59. As stated above, while Mr Hogan alleged a loss of equity to him in the region of €156,000 he tendered no evidence of the value of his equity of redemption at any point in time having regard to any balance owing on the loan underlying the Charge. In any event if he has any complaint of sale at undervalue, and I do not say he does, it would be against Tanager, for selling what had been his apartment.
60. While I can readily understand Mr Hogan’s chagrin that what had been his apartment was sold for €24,000, I do not see any evidence of fraud in that regard. While Mr Hogan repeatedly alleged “unjust enrichment” he made no submissions on the law in that regard. And so, again, the Iron Curtain of the Folio prevents my looking behind its conclusivity to investigate the sale from Tanager to Tarbutus.

Receiver in breach of duty of care to Mr Hogan.

61. This is briefly dealt with – Mr Kavanagh, though receiver for Tanager, did not sell the Apartment to Tarbutus: Tanager did. Tarbutus has no responsibility for any breach of duty by Mr Kavanagh.

The Anonymous Beneficial Owners

62. Mr Havard testified that while Tarbutus held the legal title, four other persons were the beneficial owners of the Apartment. As they wished to remain anonymous, for fear he said of unwanted attention as investors in a distressed property, he declined to identify them. Mr Hogan asked me to and I declined to require Mr Havard to identify them. I took and take the view that their identity was irrelevant as Tarbutus brought this action and would succeed or fail in virtue of their registered legal title. And as Baker J said in *Tanager v Kane*, registration “... *is not, and was never intended to be, evidence of beneficial ownership ...*”. I cannot see how either the identity of the beneficial owners or Mr Havard’s refusal to identify them avails Mr Hogan in his defence of these proceedings or permits him to impugn the conclusivity of the register.

Mr Hogan remains in possession & the events of 14 July 2020

63. It is convenient to deal with both these issues together.
64. Mr Hogan insisted that he remained at all relevant times and remains in lawful possession of the Apartment as owner. He seems to be under the impression that this upsets the sale to Tarbutus and Tarbutus’s claim now, in that Tanager was not in possession (pursuant to proceedings under S.62(7) of the 1964 Act or otherwise) when selling to Tarbutus. He appears to consider that a mortgagee (or Tanager as assignee of the mortgagee) can sell only as “mortgagee in possession”.

Mr Hogan cited no authority to that effect. He cited **Noyes v Pollock**⁵² as to the circumstances in which a mortgagee will be considered in possession – but that does not advance his contention that to sell the mortgagee must be in possession. Such a sale is, of course, usually preferable from the mortgagee’s point of view. As Wylie⁵³ and Lyall⁵⁴ point out – it will be easier to sell and to get a better price. But that is not to say that the mortgagee must be in possession to sell. That possession is not necessary was not at issue in, but is apparent from, **Irish Permanent Building Society v Ryan**⁵⁵. Wylie suggests that ordinarily the mortgagee not in possession “*will find considerable difficulty in selling it, for a few purchasers will buy property in the possession of a mortgagee. That is by an application for a court order for possession is often a preliminary step towards exercise of the power of sale out of court.*” The words “*difficulty*” and “*often*” in this passage reflect the fact that the mortgagee will usually want, but is not legally obliged to have, possession in order to sell.

65. It became apparent as the trial proceeded that Mr Hogan accepted that he lived at an address in County Clare, the Apartment was not his home and he had had tenants in it. When they departed, he took to sleeping overnight in the Apartment as a means of resisting possession being taken of it on foot of the charge – presumably in the context of the interlocutory injunction proceedings by the receiver for BoS as he says he was, as yet, unaware of the sale to Tarbutus.
66. I find as a fact that after his tenants left and since at least July 2020 Mr Hogan has been and remains in occupation of the Apartment – but, given Tarbutus’s registered ownership, not lawfully at least since service of these proceedings. He is a trespasser there. In his argument to the contrary he ignores the fact that his title has been conclusively cancelled and conclusively replaced on the Folio by that of Tarbutus. His assertion of possession does not advance any argument for going behind that conclusivity.
67. The first he was aware of the sale to Tarbutus was, Mr Hogan says, on foot of the events of 14 July 2020. Mr Hanrahan of Chartered Assets, a property management company retained by Tarbutus, gave evidence of these events. So too did Mr Hogan. Though Mr Hogan and Tarbutus have very different views of the significance of these events, in truth they differed little in their description of the events themselves – not least as neither of Mr Hogan and Mr Hanrahan was physically present when the other was.
68. At about 14:30 on 14 July 2020. Mr Hanrahan attended at the Apartment with a locksmith. He found the door open and he entered and took photographs which he tendered in evidence. They, I find, support what he described as his conclusion that the Apartment was clearly vacant – that no one was living there. Mr Hogan cross-examined him to the effect that indicia not photographed should have alerted Mr Hanrahan to the fact that someone was staying in the Apartment. I accept Mr Hogan’s evidence that he was, as it were, overnighing on a couch in the Apartment as means of resisting possession being taken of it but the photographs are entirely

⁵² (1886) 32 Ch. D. 53

⁵³ Land Law 6th Ed’n §14.54

⁵⁴ Land Law 4th Ed’n §24-124

⁵⁵ [1950] IR 12

consistent with Mr Hanrahan's evidence that no one was, in a real sense, living there as a home. Indeed, that is consistent with Mr Hogan's acceptance that his home at all material times was at an address in County Clare. Mr Hanrahan says that the locksmith decided a stronger lock was needed and to return that evening to the apartment. Meanwhile Mr Hanrahan left for Dublin.

69. Mr Hogan says, and I accept, that he went to the Apartment that evening and found the locksmith there. A phone call to Mr Hanrahan resulted and Mr Hogan spoke with him. They differ in that Mr Hogan says Mr Hanrahan was aggressive and claimed to be the owner. Mr Hanrahan denies aggression and says he said he was acting for the owner. Mr Hogan then asserted and continues to assert that he is the owner of the property and he refused to leave. Mr. Hanrahan called the Gardai who arrived. Again there is dispute as to whether Mr Hanrahan claimed to the Gardai to be the owner of the apartment. In any event the Gardai decided the dispute was a civil matter and they and the locksmith left, leaving Mr Hogan in situ, where he in effect remains. I do not find it necessary to resolve the disputes as to what exactly was said by whom on this occasion. Nothing turns on them for the purpose of the decision I have to make – nor did Mr Hogan make any submissions to me as to any legal basis on which his version of these events entitled him to resist Tarbutus's claim. It is clear that Tarbutus sought and failed to take possession of the Apartment on that occasion because Mr Hogan refused to leave and asserted that he was the rightful owner of the Apartment and has remained in possession and occupation of the Apartment since.

Mr Hogan's belated knowledge of the sale.

70. Though he had long since been aware that Tanager and Mr Kavanagh were pursuing him, I accept as a matter of fact, as he was not challenged on the point, that the first Mr Hogan knew of the sale of the Apartment to Tarbutus was as a result of the events of 14 July 2020. He pointed out that the sale in July 2019 had occurred unbeknownst to him. Had the charge in this case been created on or after 1 December 2009, I might have had to consider S.100 of the Land and Conveyancing Law Reform Act 2009, but as it was created in 2007 neither Mr Hogan's consent to, nor a court order permitting the sale, were required – see Deeney⁵⁶. While S.20 of the 1881 Act required one of three conditions to be satisfied before a mortgagee could exercise a power of sale, notice of intention to sell is not one of them and in any event, by ss.21 & 22 of the 1881⁵⁷ Act and S.5(1) of the Conveyancing Act 1911⁵⁸ a sale on foot of a power which has not become exercisable still conveys good title to the purchaser, who is not obliged to enquire whether money remains due on the mortgage: the mortgagor's remedy is against the Mortgagee⁵⁹.

Deed of charge not returned to Mr Hogan.

71. I do not see that the fact (which I accept) that the original deed of charge has not been returned to Mr Hogan affects the case. The Folio records conclusively that the charge has been cancelled, albeit in the context of the sale of the lands to Tarbutus.

⁵⁶ Registration of Deeds And Titles in Ireland §21.28

⁵⁷ Preserved as to mortgages created before 1 December 2009 by the Land and Conveyancing Law Reform Act 2013.

⁵⁸ Preserved as to mortgages created before 1 December 2009 by the Land and Conveyancing Law Reform Act 2013.

⁵⁹ See generally, Wylie §14-59 – 4.62

Further issue

72. I should mention that at §8 of his Defence Mr Hogan in essence denies that he mortgaged the Apartment. However he lead no evidence to that effect and so the question of looking behind the “iron curtain” of the Folio does not arise.

Fraud and Deception Allegations – General Observation

73. Mr Hogan repeatedly and insistently alleged fraud. I have addressed such allegations at various points above. However, and for the avoidance of doubt, I saw no evidence of fraud or deception by Tarbutus, and so I find there was none, or by anyone else.

Landmark Case

74. Mr Hogan in written submissions suggests that this is a landmark case such that if the Plaintiff succeeds no one’s mortgaged property is safe from sale by the mortgagee acting on any pretext. I disagree. That submission ignores the power of sale explicitly arising under S.62 and that, as was said in **ADM Mersey PLC v. Flynn**⁶⁰, “It is for the Property Registration Authority to investigate the title” on any application for registration of such a sale.

CONCLUSION

75. For the reasons set out above I find that, having proved its registered title and the Register being conclusive as to title, Tarbutus is presumptively entitled to the orders which it seeks. Mr Hogan having failed to show a good defence, Tarbutus’s presumptive entitlement translates to an actual entitlement and, generally, I will grant the injunctive reliefs which Tarbutus seeks.

76. This judgment is delivered electronically. On 24 March 2020 the following statement issued from the High Court in respect of the delivery of judgments electronically: *“The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”*

77. Having regard to the foregoing, I will direct the Plaintiff to send a draft order, including as to costs, to the Defendant by registered post, ordinary post and the parties should correspond forthwith, regarding the appropriate form of orders. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days of the delivery of this judgment.

DAVID HOLLAND

⁶⁰ [2020] IECA 260