**UNAPPROVED**

**THE COURT OF APPEAL**

**Record No.: 2022/34**

**Neutral Citation No: [2023] IECA 23**

**Whelan J**

**Donnelly J**

**Butler J**

**BETWEEN**

**TARBUTUS LIMITED**

**Respondent**

**AND**

**CONOR HOGAN**

**Appellant**

**Judgment of Donnelly J delivered on this the 8th day of February, 2023**

## Introduction

**1.** Tarbutus Limited ("Tarbutus"), the respondents to this appeal, brought plenary proceedings in the High Court against the defendant, Mr. Hogan who is the appellant in this appeal. In these proceedings, Tarbutus, as the registered owner of a duplex apartment comprising Folio ****L County Y and known as Apartment 9B, B… Village, B…, County Y ("the Apartment"), sought and obtained from the High Court various forms of injunction against trespass by Mr. Hogan. The Apartment was not the family home or private residence of Mr. Hogan.

**2.** In his written judgment [2021] IEHC 786, Holland J. noted that the folio records the history of the registered ownership of, and charges on, the property as follows:

- "It identifies the lands as "*the apartment known as No 9 Block B B…. Village situate in the townland of B…. and the Barony of P….*", 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." (para 5, [2021] IEHC 786)

**3.** Thus, as Holland J. stated, "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". Throughout the plenary hearing 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.

**4.** The evidence demonstrated that, at the time of the sale from Tanager to Tarbutus, Tanager was not in physical possession of the property. The sale price was €24,000. At the time of the sale, the open market value of the Apartment with title clear of litigation was a considerable multiple of that price.

**5.** By notice of motion issued on 3 November 2020, Tarbutus sought interlocutory injunctions compelling Mr. Hogan to vacate the premises but ultimately interlocutory relief was not

granted. Allen J. adjourned the application and directed that Mr. Hogan deliver a defence. On 22 July 2021 Allen J. listed the substantive matter for hearing.

**6.** On 15 October 2021, at the outset of the plenary hearing, Mr. Hogan made an application for an adjournment but that was refused. During the hearing, Tarbutus called three witnesses; their primary witness being its sole director, Mr. Craig Harvard. Mr. Hogan, who represented himself, gave evidence in his own defence and did not call any other witnesses. His evidence-in-chief related solely to what occurred on 14 July 2020 when one Mr. Hanrahan, acting on behalf of Tarbutus, arrived to change the locks on the Apartment. On cross examination, Mr. Hogan confirmed his home address was elsewhere at the time he issued his own plenary summons in 2020.

**Other Relevant Proceedings**

**7.** In 2017, Tanager and the receiver appointed by Tanager brought proceedings against Mr. Hogan and another person seeking possession of the Apartment. (Record No. 2017/8017P). Tarbutus are not a party to those proceedings.

**8.** Mr. Hogan also instituted proceedings against Tanager, the Receiver appointed by Tanager and Tarbutus (ref: *Hogan v Tanager Ltd & Others* (Record No. 2020/5335 P)). In those proceedings, Mr. Hogan sought to challenge the transfer of property by Tanager to Tarbutus. A defence was delivered by Tarbutus in those proceedings on 24 June 2021.

**Section 31 of the Registration of Title Act 1964; Conclusiveness of the Register**

**9.** The essence of Tarbutus' case was that on proof of the certified copy folio, it had established, pursuant to s. 31 of the Registration of Title Act, 1964 ("the 1964 Act"), its full ownership of the Apartment and therefore its entitlement to the reliefs claimed in trespass against Mr. Hogan.

**10.** 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."

**11.** S. 31(1) of the 1964 Act was considered by the Court of Appeal (per Baker J.) in the decision of *Tanager DAC v Kane* [2019] IR 385, [2019] IEHC 801 and has been applied in a number of subsequent decisions. The trial judge addressed that decision in his judgment as set out herein.

**The Defence in the High Court**

**12.** In his judgment, Holland J. identified the broad arguments made by Mr. Hogan in his defence as follows:

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 (sic)* [2015] 3 IR 555, [2015] IESC 27, that Bank of Scotland (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.

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 the fact that the original deed of charge had not been returned to Mr Hogan." (para 25)

**The Grounds of Appeal**

**13.** Again, in broad terms and with no little difficulty, it is possible to identify that similar arguments to those outlined above were ventilated in the grounds of appeal, which numbered 23 in total. In addition to those arguments, Mr. Hogan appealed on the ground that the trial judge had breached his rights to natural justice, procedural justice and right to a fair trial (primarily related to the trial being heard without interrogatories being answered and without

an adjournment being granted). He also appealed on the basis that the trial judge was wrong in law in repeatedly relying on the "iron curtain" of the register by reference to s. 31 of the 1964 Act. The phrase the "iron curtain" originated in McAllister, *Registration of Title in Ireland* (Incorporated Council of Law Reporting for Ireland, 1973) and was referred to by Baker J. in her judgment in *Tanager v Kane*.

**The High Court Judgment**

**14.** In his comprehensive judgment, the trial judge laid out the facts and the legal issues raised and addressed all the arguments of Mr. Hogan. He dealt first with the application by Mr. Hogan for an adjournment made on the basis that, as he submitted, the case was not ready for trial.

**15.** On 22 July 2021, the date for trial was fixed by Allen J as 15 October 2021. Four days prior to the date for hearing, on 11 October 2021, Mr. Hogan delivered interrogatories which remained unanswered. Mr. Hogan also issued, in September 2021, a motion returnable to December 2021 to consolidate proceedings with the two other proceedings. The trial judge refused the application for the adjournment at the time (a similar application having been refused by Allen J. at the call over earlier that morning). The trial judge's ruling included consideration of the fact that Allen J., in July 2021, having heard the interlocutory application, had assigned the present trial date in the knowledge of Mr. Hogan's desire to serve interrogatories and to seek to consolidate actions. He also considered that the relevance of those matters had not been demonstrated by Mr. Hogan. He said however, that he could take a liberal view of Mr. Hogan's defence as encompassing issues he raised in those proceedings; particularly, his argument in reliance on *Kavanagh v McLaughlin* that BoS had had no power to transfer the charge to Tanager and that Tanager had not had title to sell to Tarbutus. It was also accepted by Tarbutus that Mr. Hogan could ventilate allegations of fraud – in so far as they were made against Tarbutus - although any such fraud was denied by Tarbutus.

**16.** Holland J. referred to the relevant provisions (extant at the time of the transfer) of s.62 of the 1964 Act. At paragraph 12 of his judgment, he stated:

> "By S.62(6) the right of sale of a registered owner of a charge is that of a mortgagee by deed. Lyall on Land Law observes, as to mortgages predating 1 December 2009, that the power of sale will almost always be under section 19 of the Conveyancing Act 1881. Notably, that section permits sale by private contract and section 20(2) *(sic)* of the Conveyancing Act 1881 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. Lyall 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 1881. 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" *(Footnotes excluded) (Note: The reference to s.20(2) of the Conveyancing Act 1881 should have been to s.21(2) of the Conveyancing Act 1881).*

**17.** In dealing with s. 31 of the 1964 Act, Holland J. referred in detail (not least, as the judge said, for the benefit of Mr. Hogan as a lay litigant) to the explanation of that section given by the Court of Appeal in *Tanager DAC v Kane*. He also referred to the decision in *ADM Mersey PLC v Flynn* [2020] IECA 260 in which Haughton J. held:

"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." (para 95)

**18.** Thus, the judge held that on proof of the folio and Tarbutus' status as registered owner, then in the absence of Mr. Hogan establishing a defence to the claim, the proofs of Tarbutus were in order. He then proceeded to go through each defence raised by Mr. Hogan.

**19.** With respect to the question of whether it was procedurally possible to rectify the register for fraud or mistake in plenary proceedings such as the present ones, Holland J. said that the concern of Baker J. in *Tanager v Kane* about challenges to the register was a procedural one in relation to statutory possession proceedings and not in relation to shutting out a genuine defence in appropriate proceedings. He did not see that Mr. Hogan should be prevented from seeking rectification for fraud or mistake by way of defence and counterclaim in a plenary action for trespass and he did not see that Tarbutus suggested otherwise. Therefore, he considered the matter raised by way of defence.

**20.** Holland J. rejected each claim of the defendant, and to the extent that these are relevant to this appeal, they will be addressed in the context of the submissions received.

**The Appeal**

**21.** Of Mr. Hogan's 23 grounds of appeal, the first had eight sub-grounds. Mr. Hogan additionally sought rectification of the folio to its standing prior to 9 September 2019 as well as investigations to be ordered by the Property Registration Authority and the Revenue Commissioners.

**22.** There were two main strands of appeal. The first was process orientated and concerned primarily, but not solely, whether the trial of the action ought to have proceeded when, as Mr. Hogan claimed, he was not ready. The second strand reflected in large part the arguments he had made in the High Court as to the deficiencies in the proofs of Tarbutus, in reliance, primarily, on alleged deficiencies in the transfer from Tanager to Tarbutus and on his own right to possession of the property.

**The appeal against the refusal to adjourn the hearing**

**23.** Mr. Hogan's first ground of appeal alleged that, because the trial judge declined to grant the adjournment sought and proceeded to hear the case in October 2021, his rights to natural and procedural justice in accordance with the Rules of the Superior Court and his right to a fair trial were violated. In his sub-grounds of appeal, Mr Hogan made the somewhat confusing claim that there was "no consent between the parties as to a set down date of 15 October 2021 for trial notwithstanding Justice Allen giving such a set down date in July 2021 especially where that Judge was informed… that he was seeking to Deliver Interrogatories with a view to voluntary discovery…". Tarbutus, on the other hand, asserted that Mr. Hogan was present when the date was set and that he had made no application to adjourn the matter for trial until the morning of the hearing. At the hearing of the appeal, Mr. Hogan persisted with a claim that the matter had never been set down by Allen J. and claimed that counsel for Tarbutus had misled Holland J. when he had informed the court that this had occurred in open court and that Mr. Hogan was in court at the time. Mr Hogan said that he had never understood that the matter was in for hearing on 15 October 2021. Mr. Hogan was reminded that the Digital Audio Recording (DAR) would reveal whether that was so and went on to say that his point was that he had told Allen J. that interrogatories were being sent.

**24.** Mr. Hogan's claim that he had been unaware that 15 October 2021 was the date set for hearing until he arrived at court was rejected by Holland J. I am satisfied that it was rejected for good reason. It is abundantly clear that Mr. Hogan was physically present in the High Court when Allen J. fixed the date for trial. A consideration of the events in court on the relevant day demonstrate that it was expressly stated by Allen J. on two occasions that he was fixing 15 October 2021 for hearing and that date was repeated by Mr. Hogan. I therefore reject his claim that he was caught by surprise because 15 October 2021 was never set as the date for hearing or that he was not told it was the date for hearing.

**25.** Before Holland J., Mr. Hogan stated that he had received no paperwork whatsoever. It is not entirely clear what he meant by this as he clearly had received the Plenary Summons and Statement of Claim. A Notice for Trial had been served in September 2021 (which did not refer to the specific trial date) and Mr. Hogan replied saying he was not ready for trial. That letter makes no reference to the date of 15 October 2021. It does not appear to have been replied to by Tarbutus, which would have been preferable. Mr. Hogan also received a Certificate of Readiness and he made further arguments in relation to this which will be dealt with further below. The reference to paperwork may have been to the absence of affidavits and exhibits but a plenary hearing is a hearing based primarily on oral evidence. This difference was explained to Mr. Hogan. Most important however is that this was an early trial date that had been specifically directed by Allen J., the judge who had heard the interlocutory hearing and decided it was a matter that ought to proceed to plenary hearing on the date he clearly fixed. Mr. Hogan was present when that date was set by a judge who had knowledge that Mr. Hogan wished to proceed in a particular way. The reality is that Mr. Hogan took very little action or pro-active steps in the intervening period and chose to proceed as if a trial date had never been set.

**26.** Mr. Hogan's other points are that the case ought not to have proceeded when his delivered interrogatories were outstanding (the Rules permit interrogatories in fraud cases to be delivered without the leave of the court); and that he had a motion to consolidate the proceedings outstanding. Of note is that the issue of interrogatories was raised with Allen J. in July 2021 but he nonetheless proceeded to fix the hearing date. The interrogatories were not delivered until 11 October 2021, despite the matter having been set down in July 2021.

**27.** I am satisfied that there was no error by the trial judge in proceeding with the trial in all the circumstances where the matter had been raised before the judge who was listing matters and who had, notwithstanding the submissions and arguments made to him, proceeded to fix an

early date for hearing in the course of his case management of this litigation after having heard what Mr. Hogan had said. This was a case-management decision taken in the context of the overall state of the proceedings and it was within the range of orders reasonably open to the High Court. Moreover, it is possible to look at this matter from the vantage point of the appellate court in light of the fact that the trial proceeded on the date fixed in the High Court. Mr. Hogan had the opportunity, and to a large extent availed of it, to raise in cross-examination those matters he had raised in the interrogatories. As will be demonstrated, nothing of relevance arose from those matters. No injustice has been demonstrated as a result of that decision. Furthermore, Mr. Hogan had made no application for voluntary discovery as he had chosen to await the reply to interrogatories which were served only four days before the trial, and there was nothing wrong in the trial judge ruling that the case had to proceed.

**28.** Mr. Hogan's claim that there was unfairness because he was unable to consolidate the proceedings is not sustainable. Holland J. carefully considered the position vis-à-vis consolidation with the other sets of proceedings. In relation to the 2017 proceedings by Tanager against Mr. Hogan, Holland J. said it was not apparent why the trial ought to be delayed on that account as it was unclear how it could bear on the case before him. That finding has not been meaningfully challenged by Mr. Hogan, who has presented his case on the basis that going ahead with the trial before the motion was heard prejudged the motion. Contrary to what Mr. Hogan argues, the finding of Holland J. fits perfectly within the jurisprudence on the consolidation of cases. As the Supreme Court (McCarthy J.) observed in *Duffy v News Group Newspapers Ltd*. [1992] 2 IR 369, whilst the wording of the relevant rule on consolidation of actions was wide that "does not mean that it is to be applied widely or that a heavy burden does not lie upon those who seek to join or consolidate actions."

**29.** Mr. Hogan also argued that he "was clearly due the right to firstly contest" the 2017 proceedings and that his 2020 proceedings ought to travel with the present proceedings. This

argument misses the clear principle behind the observation in *Duffy v News Group Newspapers Ltd*.; consolidation is not a right of parties. Instead, those who seek orders of consolidation bear a heavy burden. Holland J. carefully considered the other set of proceedings and noted that the gravamen of those proceedings was that Mr. Hogan sought to set aside the transfer and the subsequent registration of the property in the name of Tarbutus. Holland J. agreed to hear Mr. Hogan on any issue he wished to raise in his other proceedings as to the validity of Tanager's transfer to Tarbutus. Holland J. took the view that Mr. Hogan was not prejudiced in any way by being unable to prosecute his motion in those other proceedings. Indeed, Holland J. went on to say that if it proved necessary for Mr. Hogan to amend his pleadings to in some way claim relief by way of rectification of the register, he would facilitate him in that regard.

**30.** There is no doubt that Mr. Hogan was facilitated in every way so that he could pursue the main point in his proceedings. There was no injustice in proceeding with the hearing of this case. On the contrary, there may have been a very real injustice if this case had been adjourned merely to facilitate the hearing of a motion on whether proceedings ought to be consolidated. As McCarthy J. held in *Duffy v News Group Newspapers Ltd*, one of the criteria is whether there will be a substantial saving of expense or inconvenience. To adjourn a case on its listed hearing date merely for the purpose of enabling a motion to consolidate to be heard would be to turn this requirement on its head. It would allow for both substantial inconvenience and expense if a party was able to obtain an adjournment on the date of the hearing because such a motion was outstanding. A judge is entitled to proceed in the interest of justice with the case at hand. In the present case, the trial judge was conscious that this was a matter in which an interlocutory motion had already been heard but adjourned for plenary hearing and in which issues had been raised before that judge as to whether the case was ready for hearing and held it ought to proceed. Nonetheless he gave every opportunity to Mr. Hogan to raise all relevant issues that he sought to raise in the other proceedings. There was no injustice.

**31.** Mr. Hogan also claims that all references to lack of evidence were because he was not granted his adjournment. It is, however, the responsibility of a party to the proceedings to prepare their case for trial. Mr. Hogan was aware the matter was listed for trial and had an opportunity to so prepare. He bore responsibility if he failed to so prepare despite his knowledge that the case was listed for hearing.

**Other grounds of appeal claiming breach of natural justice**

**32.** A further issue raised by Mr. Hogan was what he termed "the non-consensual Certificate of Readiness." The certificate of readiness as signed by counsel for Tarbutus stated that having consulted with other parties, that the proceedings were ready for trial. Mr. Hogan took issue saying he had never been served with it. Holland J. held that no issue arose as Allen J. was aware of the position in July. This is correct; Allen J. was aware that no certificate of readiness had been served but he was prepared to fix the date. A litigant is not entitled to refrain from agreeing or consenting to a Certificate of Readiness for the purposes of controlling or impeding the efficient progress of litigation. It would of course be preferable that the certificate not state that consultation had taken place with the other parties (i.e., Mr. Hogan) when no such consultation had in fact occurred. However, in the particular circumstances where the date was set by Allen J. in open court with both parties present or represented, nothing turns on this error.

**33.** Mr. Hogan argued that, contrary to the certificate of readiness, the trial was not ready to proceed because the plenary summons and statement of claim were amended on 15 October 2021 by the trial judge before the trial could even proceed. Mr. Hogan had, when asked by the judge to outline his defence, claimed that the statement of claim "falsely claimed" that was a "Schedule which is annexed to the Plenary Summons and to this Statement of Claim." No such annex was scheduled to either pleading. This was clearly an error and did not amount to, nor could it be characterised as, a false claim. The trial judge permitted the amendment of the pleadings

by adding the schedule. He did so, pointing out that pleadings may be amended where there is no prejudice; in those circumstances there would be no unfairness. Despite Mr. Hogan's claims of unfairness, I am satisfied that the trial judge acted within his discretion in permitting the amendment. The added schedule does no more than identify by reference to its folio number the property that is the subject of the proceedings. Holland J. correctly pointed out that the property had been described in the statement of claim and he was satisfied that the description in the folio (now referred to in schedule) pertained to the same property. He took into account that Mr. Hogan was submitting that he was still the owner and entitled to occupation of that property and that the statement of claim, albeit defective in original form, did serve to convey to him the identity of the property to which it related. He correctly held there was no prejudice. I reject Mr. Hogan's claim in his ground of appeal that there was something untoward in proceeding to amend despite the certificate of readiness having been served when pleadings required amendment.

**34.** I would also like to comment on Mr. Hogan's written submission when he frames his appeal in natural and constitutional justice with the following: "A trial Judge is an arbitrator of a dispute between parties and can only proceed to determine said dispute when the parties before him/her in Court have legally consented to proceed. There was no legal consent in Court from the Appellant on 15th October to proceed." This submission betrays a profound misunderstanding of the system of the administration of justice. A court's jurisdiction to enter into the hearing and determination of a dispute is not premised on consent of all parties. In many cases one party, usually the defendant, is an unwilling participant to proceedings and would gladly have the case not proceed. To give a party a veto over whether a case could ever be heard would be entirely contrary to natural and constitutional justice and to the right of access to court of the other party. It is of course the duty of the judge to ensure that the rights to constitutional and natural justice of all parties have been respected and the judge does so by

ensuring that notice and service provisions, etc., have been adhered to by the party seeking to have the case heard. In this case, I am satisfied that Mr. Hogan was well aware that the trial was proceeding on 15 October 2022 following a previous full hearing of the interlocutory application for an injunction which had resulted in the case being sent for plenary hearing. In all the circumstances, there was no breach of his rights to constitutional and natural justice.

**The finding as to the conclusiveness of the Land Registry Folio**

***"The principle of conformity?"***

**35.** The main argument of Tarbutus – accepted by the trial judge – was that the conclusiveness of the Folio pursuant to s. 31 of the 1964 Act was central to their claim to possession. In opening his appeal, Mr. Hogan submitted that he never disputed that s. 31 was conclusive. Nonetheless, he argues that ever since he found out about the purported change in ownership as set out on the register, he has asserted that the register was mistaken, flawed or fraudulent. He submits however that the register requires rectification.

**36.** While this may appear an important - and legally correct - concession as to conclusiveness of the register on Mr. Hogan's part, in truth many of his arguments in the High Court, and on appeal, can be characterised as proceeding on the basis that conclusiveness is only a description and that assertions, hypotheses and mistakes in documentation relied upon to effect registration permit him to go behind what has been described – incorrectly in Mr. Hogan's view – as an iron curtain. Mr. Hogan starts out by saying that the trial judge was correct in holding that the factors that would militate against a defendant seeking rectification in summary possession proceedings would not militate against him defending himself in a plenary action for trespass but says that all matters, including the evidence, facts and law, point to the register being mistaken at best or fraudulent at worst. He submits that the trial judge's findings make the case on his behalf and that the register should have been rectified.

**37.** The trial judge spent considerable time explaining the meaning of the conclusiveness of the register. As no error in his conclusions have been raised by either party, it is not necessary to repeat what is said in his judgment. His judgment includes the dicta of Haughton J. in *ADM Mersey PLC v Flynn* set out at para 17 above.

**38.** Mr. Hogan seems to misunderstand the full meaning and effect of s. 31 of the 1964 Act and the conclusiveness of the register. Perhaps it is more appropriate to say that he misunderstands the *nature of the evidence* required to "go behind" that conclusiveness and, in particular, it appears that he does not understand – or perhaps it is that he does not accept - what is meant by fraud or mistake within the meaning of the said section. This is apparent from the very first ground he strongly urged upon the Court at the appeal which he said demonstrated how the trial judge had failed to act on his own finding of a mistake. He referred to para 42 of the High Court judgment where the judge found that "the operative part of the Transfer identified the transferee as "*Tarabutus*" – not "*Tarbutus*"." According to Mr. Hogan, the trial judge was wrong to say that the "iron curtain" prevented him from going behind the register. The proposition that Mr. Hogan argues for is not tenable as a matter of law. In explaining why this is so, it is appropriate to look at some academic and judicial commentary on the conclusiveness of the Register. It is appropriate, however, at this time to refer to a claim that Mr. Hogan repeatedly makes to the effect that he is relying on the *principle of conformity*.

**39.** In appeal ground 2 Mr. Hogan refers to "the principle of the register needing to have conformity in being conclusive". In his written submissions, Mr. Hogan relies upon what he calls "Justice Baker's Determination as to the Principle of Conformity raised in Tanager DAC v Kane." He also refers to the principle of conformity in Grounds 8 and 16; indeed, it is a thread running through his submissions. It is difficult to understand what Mr. Hogan actually means by this. Tarbutus submit that there is no such principle. For example, the following, which is the first point he makes in his submission under this heading, is quite opaque: "The register for 9B B…

as it pertains to ownership, while conclusive, can never be in conformity since 9th September 2019 as to the Respondent being Full Owner without having regard to the principle of the register needing to have conformity in being conclusive."

**40.** Mr. Hogan's argument appears to be that because the respondent did not purchase possession of the lands ("it was not sold to them"), the register is being used as a "State backed mechanism to in turn allow what would then be the theft of the Appellant's possession since that beneficial ownership cannot be registered." Mr. Hogan submits that the court had no jurisdiction to ignore his "lawful rights to possession." He claims that Tarbutus acknowledge that they had no right to possession. In oral submissions, he referred to possession being 9/10ths of the law.

**41.** In aid of his submission, he relies upon paragraph 63 of the judgment of Baker J. in *Tanager v Kane*. At that point in the judgment Baker J. had already referred to the equitable jurisdiction to rectify which is exercisable in an *inter partes* action grounded on alleged mistake or fraud, and not in a summary action on affidavit. At paragraph 63 she stated: "Allied to this is the other jurisdiction of the court to correct an error that occur in registration of an instrument or transaction explained by Madden J. in *In Re Walsh* [1916] 1 IR 40 at 47, where such is necessary "to bring the register into conformity" with the instrument or transaction which is the subject of registration."

**42.** Immediately thereafter, however, Baker J. stated: "<u>This</u> statutory power to rectify is contained in s.32 of the 1964 Act, as substituted…" (emphasis added). Section 32 provides "where any error originating in the Land Registry (whether of misstatement, misdescription, omission or otherwise, and whether in a register or registry map) occurs in registration", the Property Registration Authority (or the court) may under certain conditions rectify the Register.

**43.** Contrary to Mr. Hogan's submission, there is no general overarching or free-standing "principle of conformity" that permits either the Property Registration Authority or a court to look behind the conclusiveness of the register. Nothing in paragraph 63 takes from the

endorsement by Baker J. of the concept of the *iron curtain* or the *impenetrable curtain of the register*, both of which she quotes with approval, when discussing the system of registration of title earlier in her judgment. It is appropriate to look in greater detail at the implications of the conclusive nature of the register.

**44.** In Deeney, *Registration of Deeds and Title in Ireland*, (2014, Bloomsbury Professional), the author, a former Deputy Registrar of Title in the Property Registration Authority of Ireland, states with respect to s. 31 of the 1964 Act:

"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 the statement. The title of such registered owner, in the absence of actual fraud, is conclusive even if the registered owner had notice of any deed, document or matter relating to the land."

**45.** Although the following case was not cited before us, I am referring to it for the sole purpose of giving a concrete example to Mr. Hogan of the implication of the conclusiveness of the register. I do this instead of merely repeating over again what has been said, with great clarity, in the judgment (and in the course of the hearing) by the High Court judge and also in the submissions of Tarbutus. The reference to the case is therefore to seek to assist Mr. Hogan in understanding the import of the trial judge's findings on s.31 and why those findings were correct.

**46.** The strict application of the concept of conclusiveness can be seen in the decision of the Supreme Court in the case of *In Re Mulhern's Estate* [1931] IR 700. This case concerned s. 34 of the Local Registration of Title (Ireland) Act 1891, a similar provision to s. 31 of the 1964 Act. In that case, a publican, M, died intestate; his widow (and mother of his five children) took out a grant of administration but without authority continued to carry on the business of publican. M's widow drew some of the cash assets of M and purchased registered land and was registered as full owner describing herself as a widow. Eight years later she charged these lands in favour of the Bank to secure a loan to which a certificate of charge issued. M had also

owned other lands and M's widow, having already deposited the title deeds to those lands with the bank as security for a further loan, executed a legal mortgage in respect of them. The Bank had notice that the widow was the administratrix of M and that she had children but had no knowledge of the circumstances in which the registered lands were purchased. In a subsequent action for administration brought by the children, the widow was refused liberty to continue trading. She was subsequently adjudicated a bankrupt. The children claimed that the registered lands were to be regarded as asset of M and that their equitable charge upon the lands for their interest in the purchase money had priority to the Bank's registered charge since the administratrix was guilty of fraud in registering herself as full owner free of equities.

**47.** In both the High Court and the Supreme Court, the children's argument was rejected. Their argument was that there was "actual fraud" on the part of the widow in having the lands transferred in the registry to her in her own name and thus s. 34 did not apply. Kennedy C.J. rejected that, saying:

"This argument, in my opinion, breaks down *ab initio*. Mrs Mulhern committed a breach of trust in investing the assets in registered land, but it is impossible to say that it was in any sense fraud to take a transfer in her own name. However, even if this first step had been established, it would not necessarily have followed that all subsequent transactions on the register would be vitiated."

Furthermore, as regards the argument that the Bank was negligent and thus ought to be deprived of the defence available to a purchaser for value without notice, Kennedy said that with respect to transactions governed by the Act of 1891 those equitable doctrines had little application and that the Act itself determines priorities.

**48.** Thus, unless there is actual fraud in the conveyance, the entry on the Folio is conclusive as to the title of the owner as appearing on the register.

**49.** With respect to what is meant by "mistake" which will permit rectification, an excellent example of this is to be found in the case of *Boyle v Connaughton* [2000] IEHC 28. Again, I refer to this case to be of assistance to Mr. Hogan. Prior to looking at the facts in that case, it is important to point out that s. 85(2) of the 1964 Act provides that neither the register nor its accompanying maps are conclusive as to the boundaries of registered land. Laffoy J., having considered the commentaries on that section, concluded that the provision in the Act, as to the extent and boundaries of registered land not being conclusive should not be taken as extending to substantial discrepancies in areas; the provision is only intended to cover minor errors in calculation.

**50.** In *Boyle v Connaughton*, the issue was that a small piece of the extension to the plaintiff's dwelling was shown on the registry maps as being on the portion of a neighbouring portfolio. An even larger portion of the land that the defendants considered theirs – and on a portion of which their house was built – was shown in the registry map as being on the plaintiff's property. The plaintiff sought an order that the defendants vacate the land and an injunction against trespass whereas the defendants sought rectification of the registry map. Laffoy J. heard evidence of how it came about that the two folios had been carved out of a single folio and of the intention of the original parties to the transfer. She held that because of a mistake in mapping that intention was not given effect to and she held that the defendants had established a right in equity to have the Land Registry map rectified. She held there was no basis for the plaintiff resisting that rectification.

**51.** It is that type of mistake that is required by s. 31 before rectification can occur; clear evidence that what was actually recorded did not reflect *the intention of the parties* to the transfer. Mistakes in the nature of spelling etc., in the transfer document, are not in general the type of mistake at issue.

**52.** Mr. Hogan's appeal ground 4 claims that the trial judge gave an entirely contradictory judgment in holding that the register was conclusive "while separately conceding the "iron curtain" could be breached for Plenary actions". The premise of this appeal ground reflects an unfortunate misunderstanding of the legal position as set out in *Tanager v Kane* and which was explained in his judgment by the trial judge. For the reasons set out in that judgment and explained further herein this ground is rejected. In a plenary action it is possible to go behind, on appropriate evidence, the conclusiveness of the register. Throughout his judgment, the High Court judge made it clear that he would go behind the register if it was appropriate to do so. All Mr. Hogan's claims to be entitled to go behind the register and/or seek to join the Property Registration Authority were quickly and properly rejected by the trial judge as they did not reach the threshold required to do so.

***Mr. Hogan's claims of beneficial right to possession***

**53.** I will now return to the substance of the claim that Mr. Hogan made when he attempted to rely upon the "principle" of "conformity of the register." This is his claim that he had a beneficial interest in the property because he was in possession. At various points in his submissions or his pleadings, he says he was in lawful possession and that Tarbutus were not or that he was in lawful occupation. He says that he has the right to beneficial possession which itself cannot be registered.

**54.** It is correct to say that what is recorded on the register is evidence of the title of the owner to the land. The register was not intended to be evidence of any beneficial ownership of the land that might exist. The policy of Land Registry and the Registration of Title Act,1964 (as amended) is to keep trusts off the title.

**55.** Was Mr. Hogan entitled to rely upon any such claim to defend against the trespass claim of the registered owner of the Apartment? It is the case that Tarbutus did not have physical possession at the time of the sale. The statement of claim pleads that there was a family in

occupation of the premises in August, September, and October 2019 when Tarbutus' agent checked the property but no evidence of this was given at the hearing. It is not clear that Mr. Hogan was either living in the premises at the time of the transfer or had the matter rented out. Mr. Hogan did not give evidence that he was in receipt of any rent or profits. Indeed, his defence appears carefully drafted and does not plead that he was in receipt of rent or profits. Particular (a) of para 18 surprisingly contains the following assertion: "The Plaintiff has no such knowledge that any such rent was collected. In any event the same is an admission they were not receiving any income as they were not recognised as to being lawfully entitled to same and so any such purported notices as issued also of no lawful effect or force. The said family were not in occupation in any event, thus denied."

**56.** Mr. Hogan claimed that the High Court judgment treated his situation in a manner which was at odds with other cases where it was stated that possession was needed. He referred to the decision of the Supreme Court in *Bank of Ireland v Cody* [2021] 2 IR 381, [2021] IESC 26 and in particular the dicta of Baker J. at para 40 therein and he submits that in terms of pre-1 December 2009 charges a court order was required. This submission fails to take into account the fundamental difference between these proceedings and *Bank of Ireland v Cody* which is that the latter proceedings were for possession by a mortgagee. As Baker J. stated, "a court order is now required by reasons of s. 97 (1) of the Act, of 2009, which provides that a *mortgagee* may not take possession of mortgaged property without a court order, except with the written consent of the mortgagor." (Emphasis added). Tarbutus in this case is not the mortgagee but is the registered owner. Tarbutus is not seeking an order for possession under s. 97(1) of the Land and Conveyancing Law Reform Act, 2009. These are proceedings for trespass and are not proceedings for possession.

**57.** Mr. Hogan also relied upon *Charleton v Hassett* [2021] IEHC 746 and another High Court decision *Tyrell v O'Connor* [2022] IEHC 274 which, in turn, referred to *Charleton v Hassett*.

Again, the reliance on these cases by Mr. Hogan demonstrates his misunderstanding of what is at issue here. Those cases concerned the claim for interlocutory orders by a receiver restraining the defendants from interfering with what were claimed to be the functions and duties of the receiver in respect of mortgaged property. The argument in those cases was that s. 62(7) of the 1964 Act required a receiver, as against a chargeholder, to proceed by way of possession proceedings rather than interlocutory proceedings. These are not proceedings by a chargeholder but are trespass proceedings brought by a registered owner.

**58.** That brings us back to s. 62(6), (9), and (10) and the Conveyancing Acts 1881 - 1911. It was through the use of these provisions that Tarbutus came to be registered as full owners of the Apartment. As s. 62(10) provides: "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." Thus, under the law as applied to mortgages predating 1 December 2009, there is provision for the type of overreach that apparently occurred in this case. I say apparently at this point because it would be possible, *on appropriate evidence*, to set aside a registration if there is the type of actual fraud or mistake or error on the part of the Property Registration Authority that the 1964 Act envisages for rectification.

**59.** For the avoidance of doubt, I have considered the provisions of s.72 which refers to burdens which are without registration to affect registered land. While Mr. Hogan made no specific reference to this section, he did refer more generally to the principle that beneficial interests were not affected by registration and that unregistered burdens could run with the land. No particular unregistered burden was pointed out by Mr. Hogan as applying to him. This may well be because he accepts that he has no entitlement to claim any such burden. The language, however, that he uses is similar to some of the language in s. 72(j) of the 1964 Act. That subsection refers to "the *rights* of every person in actual occupation of the land or in receipt of

the rents and profits thereof, save where, upon enquiry made of such person, the rights are not disclosed" *(emphasis added)*. Such an unregistered burden does not apply to his situation because s. 62(10) makes clear that when Tarbutus were registered as owners of the land as a transferee from the registered owner of the charge (Tanager), the *rights* of Mr. Hogan (*all estates, interests, burdens, and entries inferior to the charge*) were discharged. Therefore, even if it could be said that Mr. Hogan was in occupation or in receipt of rents or profits at the time of registration (and I do not hold that there was evidence of that), he had no *rights* arising from that because any such *rights* were discharged by the registration of the transferee as owner of the land.

**60.** This is also an appropriate place to address a submission that Mr. Hogan made in reliance on the case of *In re the Registration of Title Act 1964 and in re Allied Irish Banks PLC* [2006] IEHC 463 reported at [2020] 1 IR 775. This is a judgment of Abbott J. on a reference by the Registrar of Titles to the High Court pursuant to s. 19(2) where the Registrar entertained a doubt as to any question of law or fact arising in the course of registration under the Act. Mr. Hogan raised this case in support of a contention that, without the contract for sale being in Court the Court could not make any accurate determination on the consideration of €24,000 that he claimed was to be "paid for what was merely assumed to be a building on lands sale absent possession." He submitted that the burden that was being relied upon was limited to the "estate or interest which is subject to the charge." He submitted that it was not determined that "as to there being any equity in the burden or that the burden had become charged, nor that the party could deem to sell lands based on said burden." He said that the burden in and of itself conveys no estate, legal or equitable, in lands and that this was confirmed by Abbott J.

**61.** Mr. Hogan is mistaken in his reliance on that decision. That case concerned a new situation where borrowers simultaneously created a mortgage in favour of two separate mortgagees (related companies). The purpose of this new type of mortgage was to enable the Bank Group

to take advantage of the Asset Covered Securities Act 2001 which had been enacted to allow credit institutions create a new form of security over their assets and obtain favourable rates of interest on the international money markets. The registrar was concerned that as the shares in the mortgaged property could potentially vary as between the mortgagees over the payment period of the mortgage, it was not possible for their respective share to be stated as required under the Land Registration Rules, 1967. Abbott J. held that the fluctuating share *in a charge* was an interest that could be registered. Abbott J. quoted Glover, *A Treatise on the Registration of Ownership of Land in Ireland* (2nd ed., J. Falconer, 1933) in stating "the owner has no estate legal or equitable in land", which is apparent in that part of the judgment upon which Mr. Hogan relied. Abbot J. goes on to refer to s. 62 of the 1964 Act and in particular ss. 6 thereof which, as referred to above, includes the power to sell the estate or interest *which is subject to the charge* and stated that those provisions "have removed many of the shortcomings of the charge under the 1891 Act highlighted by Glover…".

**62.** Nothing in that decision takes from the powers under s. 62(6) to sell the estate or interest which is subject to the charge. It is not the charge itself over which the subsection grants power to sell, instead it is the power of sale over the estate or interest in the land. Even more importantly, none of this takes from the conclusiveness of the register. If there was actual fraud or mistake in that sale, there was a power to rectify the register and to that end the High Court could have joined to the proceedings the Property Registration Authority. Mr. Hogan did not bring evidence himself or give evidence himself that there was no charge over his estate or interest in the land/Apartment. It was not up to the registered owner to go behind the folio and prove the processes which lead to the transfer. To require that proof would defeat the very purpose of the system of registration of title.

**63.** Finally, and for the sake of completeness, I note that there was an issue raised by Mr. Hogan in the High Court as to the manner in which a Mr. Hanrahan, who gave evidence that he was

engaged by Tarbutus in respect of property management of the Apartment, entered into the property on 14 July 2020. The trial judge held that nothing turned on the particular events of that date and he did not rule on it. No specific ground of appeal was raised by Mr. Hogan. I am satisfied that all issues regarding his claim to possession were properly addressed by the trial judge and that those events of 14 July 2020 are not and cannot be relevant to any issue regarding his claim to have a right of possession.

**64.** Having explained the important concept of conclusiveness of the register, I will now proceed to address the specific grounds of appeal of Mr. Hogan.

**Categorisation of Mr. Hogan's Claims**

***Mistake***

**65.** Mr. Hogan's claims pursuant to appeal grounds 10, 11 and 12, which are based upon the errors or "mistakes" in the transfer such as an incorrect spelling of Tarbutus and an apparent description of Tanager as a Bank, are not the type of issues that amount to "actual fraud" or "mistake" such as would permit/require a rectification of the register. Section 31 and the conclusiveness of the register is designed, in part, to prevent these types of claims relating to title. The register is, as Baker J. observed in *Tanager*, "evidence of the title of the owner of the land" and s. 34 makes the register conclusive evidence. Conclusive means, as per Deeney above (also cited by Baker J. in *Tanager v Kane*), "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."

**66.** This also disposes of Mr. Hogan's appeal ground 6 that the contract for sale had to be produced. It did not; Tarbutus were entitled to claim to be full owners based upon the evidence of the register. This was achieved by the production of the certified copy. Mr. Hogan's claim at Ground 8 seeks to go behind the conclusiveness of the register and challenge title – he disputes entitlement to possession "regardless of any conclusive title" – and is also rejected. Similarly, appeal ground 9 which claims, *inter alia*, failure by the trial judge to refer to the Law Society

Conveyancing Guidelines concerning the need for a purchase to be concerned that an originating mortgage deed was extant seeks to go behind the conclusiveness of the title which s.31 does not permit.

**67.** Mr. Hogan's claim based on *Kavanagh v McLaughlin* (that BoS had no power to transfer the charge to Tanager) is perhaps strictly speaking not one that can be categorised as a "mistake" except in so far as he claims it was not permitted by law. This claim also fails on the basis that the register is conclusive evidence of the ownership. If there was to be a challenge, it would have to be confined to a challenge by either Tanager or BoS on account of a fraud or mistake in the transaction or instrument on foot of which Tanager became registered. This point was made by Baker J. in *Tanager v Kane* and was adopted by the trial judge herein. Furthermore, any argument based upon *Kavanagh v McLaughlin* arguing the requirement based upon s. 62 that an owner of a charge be registered as such, must cede to the authority of *Tanager v Kane*. Regarding the transfer of the charge from BoSI to BoS, Baker J. held that in the merger between those companies, BoS became entitled by defeasance under an enactment within the meaning of s. 60 of the 1964 Act to the interest of BoSI in the registered charge such that BoS was entitled to be registered as owner of the charge. Therefore, pursuant to s. 90, BoS was entitled to transfer the charge to Tanager despite not having been so registered.

**68.** The claim that the deed of charge was not returned to him is a claim that hovers between a claim of mistake and a claim that this affects the legal position. As the trial judge rightly concluded, the fact that the original deed of charge has not been returned to him does not affect his case. The folio records conclusively that the charge has been cancelled, even if it does so in the context of the sale of the lands to Tarbutus.

**69.** Mr. Hogan also argues that there are inconsistencies between the oral evidence and "Form 24 PRA application form inclusive of the purported Deed of Transfer" as to who is even the claimed mortgagee. In oral submissions Mr. Hogan submitted that on the face of the transfer,

it was defective as not done by the mortgagee in possession. This argument again misunderstands two fundamental concepts; a) that the transfer on its face is not being carried out by Tanager as mortgagee in possession but as registered owner of the charge and b) that the register is conclusive as to the title of the registered owner. Thus, this submission is rejected.

***Fraud***

**70.** Under a variety of claims, Mr. Hogan sought to have the register rectified because of fraud. These claims concerned, inter alia, allegations of the status of Tarbutus at the time of the sale, alleged deception by the parties in the 2017 proceedings, alleged breaches of duty of care by the receiver, failure to identify the beneficial owners of Tarbutus, and also the alleged sale at an undervalue.

**71.** These claims do not reach the high threshold of establishing actual fraud that is required before the conclusiveness of the register may be set aside. His claim in the High Court (and referable to appeal ground 10) that Tarbutus was dormant and lacked legal personality at its purchase of the Apartment was one he made by asserting aspects of English law, Tarbutus being registered in England. He called no evidence of English law (a requirement if one party wants to demonstrate the requirements of English law, being foreign law to this jurisdiction) or that, as a matter of fact, Tarbutus had no legal personality at the time. The evidence of Mr. Harvard in cross-examination, that Tarbutus was dormant for accounting purposes as it was not trading, was not sufficient to establish either fraud or mistake. Indeed, Mr. Harvard said the purchase was funded by the beneficial owners of Tarbutus and that Tarbutus had the legal title. The trial judge correctly adjudged that on the case before him "no question arises…of looking behind the "iron curtain" of the Folio."

**72.** With reference to appeal ground 19, Mr. Hogan refers to the trial judge erring in law or in fact in ordering costs against him in favour of a party who was dormant for tax purposes. This

again is a claim that is based on an allegation that the company was dormant but the only evidence of that was what Mr. Harvard replied when asked if there was a false return because Company House records (UK) state that Tarbutus claimed to be a dormant company from the date of incorporation until 30 June 2020. Mr. Harvard replied: "It's dormant as it goes for accounting purposes, but it owns the legal title to the properties, including 9B B…". That evidence does not establish that the company was dormant for "tax purposes" to the extent that it is not entitled to take legal action to secure full title to property it claims to own and to be awarded costs if successful.

**73.** At appeal grounds 14 and 15, Mr. Hogan claims that the trial judge erred in not ordering investigations by the Revenue whereby the Revenue receipt exhibited in Court was for a mortgagee sale only and not for a mortgagee in possession sale. He claims that this has resulted in an underpayment of tax and/or a false declaration to Revenue and by not ordering Revenue to work with the revenue authorities of the United Kingdom as to the tax implication of an English dormant company trading in Ireland while not making tax returns in the United Kingdom. These claims are entirely speculative on the part of Mr. Hogan. For example, his submissions refer to matters such as "may be a false declaration to Revenue" and that as the judge admitted it was not clear what dormancy meant for Tarbutus the judge should then "*as a matter of caution* as against any fraud" on the Revenue or the Court to engage with the revenue authorities to investigate the transactions (emphasis added to quotations). These grounds are based upon claims made without any evidential basis and are rejected.

**74.** Mr. Hogan claimed in the High Court that in the 2017 proceedings brought by Tanager and the receiver (Tarbutus was not a party to those proceedings) that the High Court was deceived because some of the adjournments of that case took place after the date of the impugned transfer between Tanager and Tarbutus. Holland J. quite correctly rejected the inference that Mr. Hogan's submissions requested him to draw, which was that this made the transfer defective

to the extent that amounted to fraud or mistake. That is not a claim that would even permit such evidence to be given to contradict the conclusiveness of the register. In appeal ground 23, Mr. Hogan claims that the judge erred in discounting the significance of the actions of the purported receiver advancing the 2017 proceedings while proceeding to "act for a sale not in possession" where those were the actions of a person acting "a double agent" and "thus wholly illegal". If the receiver has acted unlawfully, and that is by no means clear, the remedy lies against the receiver but not, absent actual fraud or mistake, against the party who now has title according to the register. Mr. Hogan has not demonstrated that there was any actual fraud or a mistake to permit him to go behind the conclusiveness of the register.

**75.** Mr. Hogan also claimed in the High Court that the sale from Tanager to Tarbutus was both "off-market" and at an "undervalue." It was not disputed on behalf of Tarbutus that the €24,000 was many multiples less than the value of the Apartment with good title – but of course the existence of proceedings taken by and against Mr Hogan in connection with the Apartment meant that the title was compromised until all of the litigation could be resolved. At appeal ground 7, Mr. Hogan claims that the trial judge erred in determining that a sale for €24,000 was bona fide if it were a property sale absent possession and claims that there was no determination as to the equity in the charge nor was there any evidence of there being any equity in the charge. As the judgment records, Mr. Hogan repeatedly claimed unjust enrichment for Tarbutus but he never put forward any evidence as to the value of his equity of redemption, if any, in the Apartment and he never addressed the law as to unjust enrichment. As the trial judge noted, if Mr. Hogan has any claim regarding the sale at an under value it would be against Tanager and not Tarbutus. What the trial judge actually held – and held correctly – was that there was no evidence of fraud, and the conclusiveness of the register prevented the judge going behind it to investigate the sale from Tanager to Tarbutus.

**76.** I also reject Mr. Hogan's claim (appeal ground 13) that the judge acted improperly or was biased in giving "unsolicited business and/or legal advice" to Tarbutus at para 58 of the judgment. The trial judge was doing no more than drawing an appropriate inference that the built-in risks in buying this particular title would include expenses incurred in realising the asset and that this had likely factored into Tarbutus bidding what it was thought the Apartment was worth having regard to the risks involved.

**77.** Mr. Hogan also sought to be told – but was refused by the trial judge – the identity of the beneficial owners behind Tarbutus. Mr. Hogan appealed (ground 20) on the basis that this denial meant "he could not be satisfied that the source and history of any funding used to allegedly purchase [his] property met anti-money laundering legislation." His legal submissions make allegations that he has identified at least three of the beneficial owners. He produced no evidence of this but that is not the only reason that this ground can be rejected. While it is written as another ground of appeal alleging fraud it amounts instead to a wild allegation centred on an attempt to reverse the onus of proof. In the context of the conclusiveness of the register, it was for Mr. Hogan to provide evidence of actual fraud leading to an error in the registration. This again he fails to do. Ground 21 claiming that the judge should have permitted identification so that he could be satisfied that this was "an arms-length transaction" is rejected for the same reason.

**78.** Mr. Hogan appealed at ground 18 that the judge failed to admit into evidence a letter from the Central Bank concerning the Central Credit Register which was dated 18 October 2021 and had therefore come into being after the hearing. It was only raised by Mr. Hogan after judgment was delivered on 15 December 2021. Mr. Hogan claims that the judge ought to have admitted it when he came to revisit his own judgment on 11 January 2022. It might be noted that the trial judge did not "revisit" his judgment on 11 January 2022. He delivered his judgment electronically on 15 December 2021 and adjourned the matter to 11 January 2022 for the

making of final orders and to deal with the question of costs. On that date Mr Hogan sought to adduce new evidence but unsurprisingly, since judgment had already been delivered, that application was refused. Mr. Hogan's point is that the letter says that the Central Bank has been unable to locate his name on the Register and therefore there was no statutory recorded lending by Tanager DAC or Bank of Scotland plc. either on a current or historical basis.

**79.** Mr. Hogan never explains why he did not seek to introduce this at any time prior to the delivery of judgment in circumstances where it appears he received almost immediately after the hearing and there was an interval of nearly two months before judgment was delivered. Mr. Hogan did not direct his written submissions, in which he relied upon this letter, to this matter. It is also noted that Mr. Hogan did not give any evidence in his trial about any lending or other credit arrangements that he had with any party. Most important, however, is that even if the "evidence" of the letter was to be received, it is not evidence of an actual fraud or mistake that would permit or require the High Court (or this Court) to go behind the conclusiveness of the register.

**80.** For the avoidance of doubt, I should also confirm that the trial judge did actually look at all the "errors" Mr. Hogan pointed out on the transfer but held that, reading the transfer as a whole, it was entirely unremarkable that the PRA had been content to register Tarbutus as owner on foot of the transfer. He further held that he had evidence from Mr. Harvard as to who executed the Transfer and this confirmed the inference the PRA had drawn. No error has been demonstrated in the trial judge's approach.

**Section 62(6) of the 1964 Act; "power" or "right"?**

**81.** In appeal ground 5, Mr. Hogan claimed the judge erred in declaring a registered charge owner has the "right" – not power – to sell under s.62(6) Registration of Title Act, 1964. In his submissions, he argues that "the power to sell land under certain circumstances is not to be confused with the right to sell land…." This argument is not expanded further. In his judgment,

the trial judge quoted the provisions of s.62(6) of the 1964 Act. In para 12 of his judgment quoted at para 16 above, he refers to the right of sale and goes on to refer to observations in A. Lyall, *Lyall on Land Law* (4 edn, Round Hall Press, 2018) to the power of sale. In the context in which the trial judge used power and right, there is no difference between the two concepts. Ultimately Tanager, as chargeholder, exercised the power of sale of the estate (the Apartment) which was subject to the charge.

***Landmark Case***

**82.** In the High Court and in appeal ground 22, Mr. Hogan claimed that this was a landmark case because it set a standard so low that anyone can have their registered land property "sold out from under them, subsequently registered in PRA without their knowledge, all while they remain in possession but then with no recourse to the law to correct same as against the '*iron curtain*"'. The trial judge rejected this claim saying that the submission ignores the power of sale explicitly arising under s. 62 and that, as was said in *ADM Mersey PLC v Flynn*, "[i]t is for the Property Registration Authority to investigate the title" on any application for registration of such a sale.

**83.** The trial judge was correct. This procedure is set down in law and applied to mortgages entered into prior to December 2009. The power to *overreach* by the chargeholder is confined to the circumstances set out in the section. Mr. Hogan's submissions that this type of procedure could be facilitated by actual fraud – he referred to "rogue elements" in the Property Registration Authority (without a scintilla of evidence that such rogue elements exist) – fails to engage with the fact that the possibility of rectification in the case of actual fraud covers this point.

**84.** Whether a case is or is not a *landmark* one cannot of itself amount to a ground of appeal. There either is, or there is not, a substantive ground of appeal arising on a particular matter. There is no such substantive ground of appeal in this case. The procedure adopted here is and was a

process permitted by law. The substantive nature of the submission that Mr. Hogan advances under this general ground is one that is rejected.

***Objection as to the Order of 11 January 2022***

**85.** In appeal ground 18, Mr. Hogan in essence complains that the High Court Order of 11 January 2022 referred to his legal submissions filed on 22 day of December 2021 as being filed on 23 December 2021. In some way therefore, the appellant seems to suggest that by failing to identify his submissions correctly and the Form of Orders he suggested (orders directing investigations by Revenue and the PRA), the court did not "deny the Form of Order of the Appellant" and the court "did have jurisdiction to order such investigations." This submission is rejected. In the first place, it is clear that there is a clerical error in the judgment because the earlier part of the High Court referred to the correct date of the submissions was noted, i.e., 22 December 2021. The phrase of which Mr. Hogan complains records "…as set forth at the Appendix to his <u>said</u> written legal submissions filed on the 23rd December 2021" (emphasis added). Thus, the Order was clearly referring to the submissions and Appendix actually filed. Secondly, his argument that the High Court had jurisdiction, which this Court had to enforce on appeal, to make orders that were plainly unwarranted because there was an incorrect reference to submissions is unsustainable. The argument was clearly made to the High Court judge and correctly rejected by him as set out above.

**<u>Conclusion</u>**

**86.** There was no breach of Mr. Hogan's rights to natural and constitutional justice in the refusal of the High Court to adjourn the plenary hearing. Mr. Hogan was well aware that the matter had been set down for hearing. Furthermore, there was no actual prejudice in proceeding to hear the case as he was entitled to ask all the questions of the witness for Tarbutus that he sought to ask in interrogatories (which he had only sent four days before the date of hearing).

There was also no prejudice in refusing to adjourn the hearing until the motion for consolidation of these proceedings with two other sets of proceedings was heard. There were no other procedural irregularities in the proceedings in the High Court.

**87.** Tarbutus are the registered full owners of the Apartment the subject matter of the proceedings. The register is conclusive evidence as to the title of the land. It will only be in the case of actual fraud or mistake that this title may be affected. In the case of actual fraud or mistake, a court of competent jurisdiction may make an order directing the register to be rectified in such manner and on such terms as the court thinks fit. Mr. Hogan does not meet the threshold to establish grounds for rectification.

**88.** This is an action for trespass against Mr. Hogan. The trial judge was correct in holding that Tarbutus, in producing the folio, had established its title to the property and was presumptively entitled to the injunctions prohibiting trespass by Mr. Hogan, his servant or agents and/or any other person acting on his direction or instruction. The trial judge was correct in finding that Mr. Hogan had not established any good defence against that entitlement. The trial judge was therefore correct in granting the injunctive reliefs to Tarbutus.

**89.** This appeal is therefore dismissed. The Order of the High Court is affirmed but it shall be corrected to remove the reference to "23rd December" on page 3 thereof and substitute "22nd December" in its place.

**90.** Tarbutus, having been entirely successful in this appeal, are presumptively entitled to its costs of this appeal. This Court would therefore propose that, unless an application is made by either party seeking a different order within 14 days of the delivery of this judgment, that the final Order be drawn up which will include the grant of the costs of this appeal to Tarbutus. If the parties, or one of them, request within the 14-day period a hearing on costs, the Registrar shall set the matter down as soon as possible for a short hearing thereafter.

*As this judgment is being delivered electronically, Whelan and Butler JJ have authorised me to indicate their agreement with this judgment and the orders proposed.*