

THE HIGH COURT

[2023] IEHC 624

RECORD NO. 2019/4606P

BETWEEN

EVERYDAY FINANCE DAC, STEPHEN TENNANT

AND NICHOLAS O'DWYER

PLAINTIFFS

AND

PAUL WHITE AND JANE GLEESON AND PERSONS UNKNOWN

OCCUPYING 96 AVOCA PARK, BLACKROCK, CO. DUBLIN

DEFENDANTS

JUDGMENT of Mr. Justice Oisín Quinn delivered on the 10th day of November 2023

Introduction

1. The Plaintiffs obtained summary judgment in default of defence on 27 February 2023 and the Defendants, having failed to appear at the hearing of the motion upon which judgment was granted, brought an application to set same aside.
2. The application raised the following issues: -
 - (i) were there special circumstances as of 27 February 2023 within the meaning of Order 27, rule 15(2) of the Rules of the Superior Courts (“RSC”) to allow the Court to consider whether it would be justified in setting aside the default judgment?
 - (ii) if special circumstances did exist, does the balance of justice justify setting the judgment aside?

Background

3. The first named plaintiff is a designated activity company and the second and third named Plaintiffs are chartered accountants. It is claimed that they have been lawfully appointed as receivers over a property at 96 Avoca Park in Blackrock County Dublin (“the property”).

4. This property is owned by the first and second named Defendants who are married but are now apparently estranged. The first named Plaintiff claims possession of the property on the basis that it acquired loan facilities and mortgage securities which it says were originally agreed between the defendants and AIB plc. It is said that on foot of these loan facilities an amount of €2,750,000 was advanced in 2008, to which there was subsequently a default and that despite demands in 2016 and 2017 the amount outstanding has not been repaid. The plenary summons issued on 11 June 2019 and the next day a motion on behalf of the Plaintiffs was issued seeking interlocutory injunctions whereby the plaintiffs sought to obtain vacant possession of the property. At that stage the property was being let to persons unknown and the plaintiffs complained that whatever rent was being paid was not being passed on to discharge or reduce the debt.
5. The interlocutory application was contested, and the matter came on before the High Court on 7 February 2020. In a judgment of Mr Justice Sanfey on 20 February 2020 interlocutory relief was granted directing the defendants to surrender vacant possession of the property and following a suggestion by counsel for the plaintiffs, a stay was placed on the sale of the property pending the determination of the proceedings. Vacant possession of the property was then obtained by the plaintiffs on 20 March 2020. The second defendant successfully appealed this order to the Court of Appeal, see [2022] IECA 130. The judgment was delivered by Ní Raifeartaigh J. on behalf of the Court on 8 June 2022 and the High Court order was set aside.
6. One of the issues raised in the appeal was whether the Receivers had been validly appointed. Having considered that issue (see paras 66 to 76) Ní Raifeartaigh J. concluded that arising from the issues raised on behalf of the second named Defendant that “I have reservations about characterising the plaintiffs’ case in this regard as a strong one”.
7. The Court of Appeal judgment also dealt with a further important issue raised on behalf of the second Defendant. Namely, whether she had agreed to provide continuing security by way of a mortgage on the property in respect of the 2008 loan which was given to her husband. She contended in fact that she had been released from the original mortgage of 1998 at that time. At paragraph 93 Ní Raifeartaigh J. states as follows:

“Although the deed of mortgage anticipates the mortgage potentially operating as security for future loans and refinancing, as the plaintiffs point out, it is also the case that certain conditions must be satisfied before that can happen, including that any such future loan is accepted in writing by “the mortgagor”. The question of whether “the mortgagor” in this particular context means only one of the defendants or both of them becomes acutely important, therefore, because the loan offer was made to and accepted

by the first defendant only. If the second defendant is correct that the consent of both mortgagors is required, then her lack of written consent to the loan may be an indication that the intention was to release her from the mortgage insofar as it affected her interest in the property because the original family home loan had been discharged upon drawdown of the 2008 loan. I find the plaintiff's argument that the signing of the Family Home declaration is significant to be rather unpersuasive, at least at first sight, on the ground that it appears to relate to the Beacon Court rather than the Avoca Park property, as noted in my earlier section "Key Documents",.

8. Ultimately the Court of Appeal concluded as follows at para 97:

"I am of the view that having regard to the matters discussed above, taken on a cumulative basis, the plaintiffs have not met the required threshold of a "strong case" in relation to the case as a whole. In those circumstances, I believe the appeal should be allowed and it is not strictly necessary to consider the balance of convenience. Nonetheless some remarks in that regard may be apposite."

9. Accordingly, it can be observed that following a very detailed analysis of the issues likely to arise at a potential trial of these proceedings that the Court of Appeal was not satisfied that the Plaintiffs had a strong case. It is important to observe that in one respect one of the issues went to the very validity of the appointment of the Receivers.

10. In addition, the Court of Appeal had observations to make as to what had happened as a matter of practice on the ground in the context of discussing the issues around the balance of convenience. At para 98 Ní Raifeartaigh J. States as follows:

"In the present case, while the plaintiffs submit that the situation at the time of the application in the High Court was entirely unsatisfactory, with some sixteen people living in the property, and a complete lack of co-operation from the defendant, it is also true to note that despite their calling in of the public authorities, no hazard was identified or enforcement action taken. Secondly, it is of considerable importance that at the hearing of the appeal it was indicated by counsel on behalf of the plaintiffs that the property had been secured by the receivers and was now vacant. No tenants had been secured for the property since the High Court order was made. Counsel said that this was because it was difficult to let the premises by reason of the pending court proceedings. However, there was no affidavit evidence to this effect, and it is difficult not to be somewhat sceptical about this explanation having regard to the current Dublin rental climate. What has therefore happened is that, by obtaining the interlocutory

injunction, the plaintiffs have created a situation where the existing tenants were evicted and no new tenants have been secured. Nor was the Court informed of any significant efforts to bring the substantive matter to trial; merely that a timetable had been agreed. Meanwhile the property lies vacant and is generating no rent for anybody. Were it necessary to decide the matter on the balance of convenience, these would be significant factors in the balance in favour of a discharge of the interlocutory injunction. However, it is not necessary to proceed to this issue because of my earlier conclusion regarding the failure of the plaintiffs to meet the ‘strong case’ threshold having regard to the various issues raised on behalf of the second defendant.”

11. Following the delivery of the judgment of the Court of Appeal an Order was made setting aside the Order of the High Court. The Receivers however continued to remain in possession and did take any steps to either return possession to the Defendants nor alternatively to let the property. It is important to note that the Receivers had only been granted possession on foot of the original High Court order which had been set aside in its entirety by the Court of Appeal. In addition, even though critical observations had been made about the fact that the property was unlet, even by December 2022 no steps had been taken to alter that position either.
12. During this period of time the Receivers had a person described as a caretaker in situ in the property. On 1 December 2022 a standard letter was written on behalf of the Plaintiffs’ solicitors calling for a defence to be delivered within 28 days from the date of that letter and threatening that a motion would issue. This letter referred back to a previous letter of 12 February 2021 which had also requested the delivery of a defence. It was not explained why (given what had been said by the Court of Appeal) nothing had happened since July 2022 in terms of the Plaintiffs seeking to move the case forward.
13. There were two very important letters that followed this letter of the 1 December 2022. Firstly, on the 15 December 2022 the Defendants’ solicitors wrote complaining about the Receivers having retaken possession of the property despite the Court of Appeal decision and threatening an application to court. The Plaintiffs’ solicitors replied by letter dated the 16 December 2023 stating that on 9 December 2022 someone appeared to have removed the possessions and car of the caretaker who was present in the property on behalf of the Receivers and that the locks were changed. It was then said that the Receivers subsequently took steps to secure the property. It was said on behalf of the Plaintiffs that it would be a waste of time to have a further ‘interlocutory battle’ and that ‘it was clear that the issues in dispute will have to be determined at plenary trial’. Importantly, this letter called again for a defence to be delivered and gave a

new further period of 28 days for the defence to be delivered, thus replacing the 28 day extension provided in the letter of 1 December 2022.

14. The position of the Receivers appears to have been that they were not required to give up possession following the decision of the Court of Appeal, and they appear to have taken the view that in effect the Court of Appeal decision changed nothing regarding their possession of the property. In other words, notwithstanding the fact that the Plaintiffs had lost in the Court of Appeal and had been told that they did not have a strong case, and that the balance of convenience was not in favour of leaving them in possession, the Receivers had simply remained in possession as if they still had the benefit of the High Court order. However, as no application concerning this was before the court, it is not necessary for the court to resolve the issue as to whether the Receivers were entitled to remain on in possession after they had lost in the Court of Appeal.
15. The Plaintiffs solicitors letter of 16 December 2022 was sent via email at 4:13 AM on Saturday 17 December. This unusual timing was explained as being related to the email system in the Plaintiffs solicitors office. The letter was then emailed by a legal executive in the Defendant solicitors office to junior counsel acting for the Defendants, as well as copying in the principal solicitor in the firm then acting for the Defendants along with the first named Defendant.
16. In the emails exhibited in the motion before the court, it appears clear that during January 2023 the first named Defendant was seeking to have a meeting with the solicitors then acting for the Defendants. This was with a view to getting an update and information about the delivery of the defence and counterclaim. In one email of 12 January 2023 he says to the solicitor “we are both completely lost on all matters and need an update please. Thx”.
17. The Defendants’ solicitor replied on 12 January 2023 stating that the junior counsel was drafting a defence and counterclaim, which the senior counsel would settle. It appears that there was some delay in setting the meeting up due to people being away.

The motion seeking judgment in default of defence

18. At the end of January 2023, a motion seeking judgment in default of defence was issued as against the first and second named Defendants. The motion was served by registered post on the Defendants’ solicitors on 30 January 2023. This was supported by an affidavit of service. The motion was grounded on an affidavit of a solicitor in the Plaintiffs’ solicitors firm, sworn on 26 January 2023. This affidavit stated the following at paragraph 7: “[I]n circumstances

where the period stipulated under the Rules of the Superior Courts for the delivery of a defence by the first named defendant and by the second defendant lapsed, the plaintiffs instructed their solicitors to write the first named defendant and the second defendant calling on them to deliver their respective defences in the proceedings. I beg to refer to the plaintiffs' solicitors letters of 4 December 2020, 15 December 2020, 12 February 2021 and 1 December 2022 addressed to John P. O'Donohoe Solicitors ... calling on the first and second named defendants to deliver their respective defences in the proceedings" and he then exhibited those four letters. No other letters were exhibited or referred to and it was said that "no reply has been received to the foregoing letters". However, the grounding affidavit did not mention the interlocutory injunction motions, nor that the High Court order granting possession on an interlocutory basis had been set aside. It also made no mention of the Court of Appeal decision of June 2022. There was however reference to the statement of claim. While the statement of claim (having been delivered on 24 November 2020) does mention the interlocutory application and the High Court order it does not mention the Court of Appeal because it pre-dated it. Furthermore, there was no mention in the affidavit of the letter that followed from the Defendants' solicitors of 15 December 2022 or indeed the further letter from the Plaintiff solicitors of 16 December 2022 which gave a further 28 days for the defence and again called for the defence to be delivered.

19. During the hearing of the motion to set aside the judgment, counsel for the Plaintiffs read from an attendance taken by a solicitor who attended the motion for judgment on Monday 27 February 2023. What appears to have happened is as follows: there was no appearance on behalf of the Defendants at first call. There was no appearance at second call from the Defendants, so the motion then went ahead at second call. The four letters exhibited were referred to. It does not appear that the court was told about the Court of Appeal decision nor about the fact that the High Court order granted on an interlocutory basis had been set aside or indeed about the letters of the 15 and 16 of December 2022. The attendance note was reasonably described by counsel for the Plaintiffs as reflecting a relatively cursory coverage of the usual proofs.
20. The High Court Judge dealing with the matter at second call on the Monday would have been entitled to assume that the four letters exhibited were the only relevant letters and that there had been no correspondence from the Defendants' solicitors. Accordingly, the High Court Judge granted judgment in default of defence as against the Defendants and directed that the question of the reliefs and the damages to be awarded to the Plaintiffs be set down for assessment by the Court.

21. It was not disputed that the motion had been served. The application to set aside the judgment was brought on behalf of the Defendants by new solicitors now retained by them and new counsel. As far as they could establish, the failure to attend on 27 February 2023 had been an oversight on the part of the previous firm of solicitors retained by the Defendants. It was explained that the Defendants themselves certainly were not aware of the motion. In addition, attention was drawn to a letter dated 24 March 2023 from the then solicitors acting for the Defendants to the Plaintiffs' solicitors, enclosing the defence and counterclaim and referring to the "motion returnable to 27 April 2023" and then asking the Plaintiffs' solicitors to have the motion struck out with costs reserved.
22. It is reasonable to conclude from this that due to an oversight in the Defendants' former solicitors' firm they had incorrectly thought the motion for judgment was listed for 27 April 2023 instead of 27 February 2023. This subsequently informed the pace at which the Defendants' former solicitors had arranged for the defence and counterclaim to be prepared and delivered.
23. The Plaintiffs' solicitors replied to the aforementioned letter of 24 March 2023 by letter of 30 March 2023 enclosing by way of service upon them for the first time the Order of the High Court perfected on the 24 March 2023 and they referred to the fact that the Defendants solicitors had been served with the motion for judgment which had been returnable for 27 February 2023. Further correspondence followed, in which the Defendants' former solicitors were invited to make application to set aside the judgment and the Plaintiffs' solicitors indicated that period of 28 days would be afforded to allow such a motion to be brought, failing which they would set the matter down for hearing in relation to obtaining their default judgment.
24. Subsequently, there was no action taken by the Defendants' former solicitors of any substance for reasons that have not been fully explained. Ultimately the Defendants retained new solicitors and new counsel. When it was realised that judgment had been granted and that a hearing date of 27 October had been assigned for the assessment of damages and reliefs, steps were taken to bring this motion which was listed for hearing on 26 October. Due to the amount of detail and issues to consider I felt it was necessary to reserve my decision in relation to the application to set aside the default judgment and accordingly this necessitated adjourning the undefended hearing date of 27 October to await the outcome of this application.

Legal Principles

25. The application to set aside the default judgement was brought pursuant to O. 27, r. 15(2) of the RSC which provides as follows:

‘Any judgment by default, whether under this Order or any other Order of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that at the time of the default special circumstances (to be recited in the order) existed which explain and justify the failure, and any necessary consequential order may be made where an action has been set down under rule 9’.

26. The case law establishes several components to this Order: -

- (i) The words ‘*at the time of the default*’ means ‘at the time when judgment was obtained’ per Murray J. in *McGuinn v Commissioner of An Garda Síochána & others* [2011] IESC 33.
- (ii) The rule involves a two-stage process. The first is for the court to be satisfied that ‘special circumstances’ exist at the time of the default to explain the failure. Then the court must be satisfied that the special circumstances justify the failure. This second stage is sometimes phrased as involving the court considering whether the balance of justice is in favour of setting aside the default judgement. This two-stage approach was adopted by the Supreme Court in *McGuinn v Commissioner of An Garda Síochána & others* [2011] IESC 33 (see Murray J. page 3) and by Ferriter J in *De Souza v Liffey Meats & others* [2023] IEHC 402 at para 67.
- (iii) Each case will be fact specific (see Murray J. in *McGuinn* ‘each case falls to be determined on its own particular facts and circumstances in order to do justice to the parties’) and that there is no ‘hard and fast rule’ as to what can or cannot be considered ‘special circumstances’, see Ferriter J. at para 57 of *De Souza*.
- (iv) When this wording was introduced into the RSC in 2004 by statutory instrument No. 63 of 2004 it was considered to reflect ‘a new, and stricter, criterion’, per Murray J. in *McGuinn*.
- (v) In general, mere inadvertence or mistake by the legal advisors ‘will rarely amount to special circumstances’, see Haughton J. for the Court of Appeal in *Murphy v HSE* [2021] IECA 3 when referring to the words ‘special circumstances’ in O. 8, r. 1(4) and see also Ferriter J. in *De Souza* at para 57 adopting that approach in the context of O. 27, r. 15(2).

27. However, it is also necessary to see the relief that can be granted pursuant to O.27 r. 15(2) in the wider context of the court’s jurisdiction to set aside default judgments generally.

28. As will be observed from the wording of O. 27, r. 15(2) it applies to ‘any judgment by default, whether under this Order or any other Order of these Rules’. In other words, it does not appear to be intended to be limited to scenarios such as pertain here, namely where judgment has been entered on foot of a motion for judgment in default of defence at which there was no appearance.

29. In that regard, *Delaney and McGrath on Civil Procedure* (4th edn, Roundhall, 2018) state at para. 4-42:-

‘It is not clear whether this rule, which was introduced to confine the discretion of the court when dealing with an application to set aside a default judgment, applies to a judgment obtained in default of appearance so as to modify Order 13, rule 11. However, even if the requirements of Order 27, rule 14(2) are imported, it is doubtful that they would lead to any significant alteration of the principles that have been developed in relation to applications to set aside such default judgments’.

30. Accordingly, it is appropriate to look at case law governing O. 13, r. 11 applications and indeed the broader case law where the jurisdiction of the courts to set aside a default judgment either pursuant to the rules or to the courts’ inherent jurisdiction.

31. In general, default judgments can be granted in circumstances where: no appearance has been filed, no defence has been delivered, a discovery (or some other) order has not been complied with, or where the matter proceeds to hearing and there is no attendance by or on behalf of the Defendant.

32. The landscape of this broader jurisdiction of the courts to set aside default judgments is helpfully considered in a number of judgments of the Court of Appeal. The judgment of Whelan J. in *AIB v Forde & another* [2020] IECA 133 reviews the jurisdiction very comprehensively from para.s 31 to 48. This was a case where summary judgment had been entered on foot of a motion in circumstances where there was no appearance on behalf of the Defendants due to mistake and inadvertence. While the Defendants in that case chose to appeal the decision (successfully), the Court of Appeal considered the general inherent jurisdiction of the courts to set aside judgments granted in default as part of their analysis.

33. In addition, Irvine J. for the Court of Appeal examines the principles in the context of an application to set aside a summary judgment obtained in the Central Office in default of appearance (O. 13, r. 11) in *Emo Oil v Willowrock* [2016] IECA 200 and adopts the following as relevant principles to O. 13, r. 11 applications stating at para.s 52 and 53 as follows: -

“52. ... In this regard some guidance is to be found in the decision of Geoghegan J. in *Croke v. Waterford Crystal Limited* [2005] 2 I.R. 383 in the course of which he endorsed as ‘pertinent and useful’ the dictum of Bowen L.J. in *Cropper v. Smith* (1884) 26 Ch.D. 700 at pp. 710 and 711 where he stated as follows:-

‘[I]t is a well established principle that the object of the Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. ...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace.... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.’

53. I accept, of course, that the aforementioned principles were enunciated in the context of a late application to amend a pleading, but the principles are in my view equally relevant to an application under O. 13, r. 11 particularly in circumstances where the Court did not find any conduct of a grossly culpable or fraudulent nature.”

34. Finally, in the context of the much rarer scenario where a default judgment is entered pursuant to the RSC on foot of a defendant being in breach of a discovery order, Barrington J. for the Supreme Court in *Murphy v J Donoghue (No. 2)* [1996] 1 IR 123 stated in the context of the court’s decision to set aside the default judgment that, ‘[T]he courts have repeatedly stated that rules of procedure exist to serve the administration of justice and must never be allowed to defeat it’.

35. From the foregoing cases, the following principles emerge:

- (i) The courts in the interests of justice, lean in favour of a determination of litigation on the merits of the issues between the parties rather than preventing a party from having access to the courts, when his or her rights or obligations are being determined, for procedural reasons including culpable delay, per Murray J. in *McGuinn*;
- (ii) It is well established that the object of the courts is to decide the rights of the parties, and not to punish them for mistakes, see Bowen LJ in *Cropper v Smith*, adopted in this context in *Emo Oil*;

- (iii) Where the default judgment has been obtained irregularly or in circumstances of mistake there is a wide discretion to set aside the judgment, see Whelan J in *AIB v Forde* at para 31;
- (iv) Where the judgment was been obtained ‘regularly’ it will only be set aside if the defendant can establish ‘a good defence on the merits’ or ‘real prospects of success’, see Lynch J. for the Supreme Court in *Martin O’Callaghan Ltd. V O’Donovan* [1998] WJSC-SC 11079 and Clarke J. in *O’Tuama v Casey* [2008] IEHC 49;
- (v) Where the judgment has been obtained after summary trial at which the defendant has deliberately decided not to attend that party ‘will normally be bound by the decision’ see Leggatt L.J. in *Shocked v Goldschmidt* [1998] 1 AER 372;
- (vi) The court has an inherent jurisdiction to set aside a default judgment obtained in default of appearance due to accident, mistake or inadvertence when ‘it is just and equitable to do so’ and to achieve ‘justice between parties’ and the RSC are additional to this and not ‘substitutive’ per Barrett J. in *Bank of Scotland plc v McDermott* [2017] IEHC 77, as approved of by Whelan J. in *AIB v Forde* at para 38.

36. These wider principles reflect a coherent body of caselaw governing how the courts approach the question of whether to set aside a default judgment.

37. In considering whether the particular facts and circumstances of this case (existing at the time the judgment was obtained) amount to ‘special circumstances’ to meet the first stage of the two stage process envisaged by O. 27, r. 15(2) it is appropriate to view those facts and circumstances bearing in mind not just the component principles of the case law concerning O. 27, r. 15(2) but also the wider principles referred to above.

Submissions and Conclusions

38. Counsel for the Defendants submitted that the failure of the Defendants’ former solicitors to attend at the motion on the 27 February 2023 was clearly due to inadvertence and mistake. They also submit that the Defendants themselves were entirely unaware of this mistake and that the former solicitors were not acting on instructions in that regard. It was pointed out that the emails exhibited showed that the Defendants were keen to meet their then lawyers to arrange for the Defence and counterclaim to be prepared and that when this was delivered in March, 2023 it was clear that the Defendants’ former solicitors wrongly thought that the motion for judgment was listed for the 27 April, 2023 when in fact, due to their inadvertence, it had actually been dealt with on the 27 February, 2023.

39. It was submitted on behalf of the Defendants that all of this sufficiently constituted ‘special circumstances’ for the purposes of O. 27, r. 15(2) and therefore engaged the court’s jurisdiction. It was also submitted that the balance of justice clearly favoured setting aside the default judgment, given that the reliefs and damages had not yet been assessed and given that the Court of Appeal had clearly determined that there was ‘substance’ to the defence being raised and that the Plaintiffs had not been able to satisfy the Court of Appeal that they had a strong case. Any consequent delay was of marginal impact compared to the impact on the Defendants of being unable to defend the case it was submitted, and the court could remedy any specific prejudice by making appropriate costs orders. While attention was drawn to the omission of the 15 and 16 December 2022 letters in the motion papers upon which judgment had been obtained, it was not submitted that the judgment was obtained irregularly or that these omissions were in themselves ‘special circumstances’.
40. Nonetheless, counsel for the Plaintiffs was asked to and did address two concerns of the court. Namely, firstly whether the failure to draw the courts attention, when judgment was being obtained, to what had happened in the Court of Appeal and the correspondence in December 2023 could amount to or contribute to the court finding that special circumstances did exist; and secondly, whether the Court of Appeal decision itself and the observations on the merits could contribute to the special circumstances.
41. Counsel for the Plaintiffs submitted that this did not amount to special circumstances. It was argued that it was a motion for judgment in default of defence which was properly served; that it was not an *ex parte* application and that it did not have to be moved on a good faith or *uberrimae fide* basis. It was said that the Court of Appeal judgment was not relevant in that it did not explain the failure to attend at the motion. It was accepted that the attendance note taken of the 27 February showed there was no reference to the Court of Appeal decision or the substantive letters of the 15 and 16 December. However, it was submitted that in reality it was a matter for the Defendants to be present and put this correspondence or these matters before the court if they wished. Concerning the default judgment, it was submitted that this was obtained due to what was the apparent mistake of fact of the former solicitors for the Defendants and the jurisprudence was clear that this will ‘rarely’ amount to special circumstances. Furthermore, it was pointed out that when it became clear that judgment had been obtained, there had been inexplicable delay on the part of the Defendants’ former solicitors in failing to move speedily to have the judgment set aside and that by coming in at the last moment this created prejudice to the Plaintiffs. In addition, the court was informed that the property is now being let by the Receivers and the rent is being held in escrow.

Conclusions as to 'special circumstances'

42. I am satisfied that the failure of the Plaintiffs to put the letters of the 15 and 16 December 2022 before the Court on 27 February 2023 contributes to the special circumstances here. While it is correct that this was not an *ex parte* application it is less than ideal to ground a motion for summary judgment in default of defence on selective correspondence. In saying that, I assume that same was inadvertent on the part of the Plaintiffs legal advisors. However, the four letters exhibited in the grounding affidavit with the last letter being the 1 December 2022 would have given an incorrect impression to the court on 27 February 2023. The true position is that the last letter requesting a defence was the Plaintiffs solicitors' letter of the 16 December 2022. It was not explained why this was not exhibited, particularly given that it extended the time for delivery of the defence beyond the time afforded by the last letter exhibited to the court. If it had been exhibited, then the letter from the Defendants solicitors of the 15 December 2022 would need to have been exhibited as well. That correspondence would have materially altered the impression being presented to the court on the 27 February 2023. It would have revealed the substantive alteration of the position effected by the Court of Appeal judgment and would have made it clear that the claim was not only going to be defended, but that the Defendants intended to take action *against* the Plaintiffs for what they believed was the wrongful re-entry onto the property by the Receivers. The letter from the Plaintiffs solicitors of 16 December 2023 also makes it clear that the Plaintiffs expected the matter to be fully defended. The Plaintiffs letter of 16 December 2023 states '[I]t is clear that the matters in dispute will have to be determined at plenary trial'. When there was no appearance on behalf of the Defendants at second call, the court should have been informed of the correct position. It is questionable to leave out letters like this; one from the other side that postdates the last letter exhibited and one from the Plaintiffs that further extended the time. To leave these letters out gave the impression that nothing had been heard of from the other side. The court hearing a busy Monday motion list relies on legal practitioners who decide to press ahead not to leave an incorrect impression - especially when somewhat surprisingly no one from the other side turns up, and particularly where a party seeks a default judgment. Again, I assume that all of this was inadvertent on the basis that the counsel presenting the motion presumably was unaware of these later letters and presumably assumed the letter of 1 December 2022 was the last letter requesting a defence and that nothing had been heard from the other side since then. In addition, it is conceivable that someone in the Plaintiffs solicitor's office may have been delegated the task of preparing the motion for judgment in default of defence and simply exhibited the four short letters seeking a defence thereby inadvertently omitting the later letters as the further request for a defence and offer of further time is somewhat in the middle of an otherwise long letter.

43. In *O'Tuama v Casey* Clarke J. had to consider the failure by the Plaintiff's legal advisors to refer to a fax that had been sent on the morning of the day on which the motion for judgment proceeded. In that case, he was satisfied that the Plaintiff's legal advisors would not have been aware of the arrival of the fax when the instructions were given that morning to Counsel who was moving the motion that nothing had been heard from the other side. At para. 2.4 to 2.6 Clarke J. states:-

“On the morning of the adjourned date for hearing of the motion for judgment a faxed copy of a purported notice of appearance was, it would appear, sent by Casey & Co. to the plaintiffs' solicitors. However, it is also clear that no appearance was, in fact, entered in the Central Office, nor could it have been without an extension of time agreed by the plaintiffs or ordered by the court. No person appeared in court on behalf of Casey & Co. when the motion was moved. I am satisfied on the affidavit evidence that what occurred was that, while the faxed copy notice of appearance had arrived by fax in the plaintiffs' solicitors' office prior to the beginning of the list in which the motion for judgment was due to be heard, the receipt of the document did not come to the attention of the solicitor involved until after he had instructed counsel that there had been no communication from Casey & Co. By the time the fact that the document had been faxed to him came to his attention and he had contacted counsel, the motion had been moved in the absence of Casey & Co. and judgment obtained.

... While the circumstances were, therefore, somewhat unusual, I ruled that they were much more analogous to a regular than an irregular situation...

I did note that, where a plaintiff is aware of contact from a defendant against whom a motion for judgment is moved, it may well be incumbent upon such plaintiff to bring the nature of such contact to the attention of the court so that the court can place whatever weight might be considered appropriate on that contact. However, even that obligation has to be seen against the background of circumstances where the contact in this case occurred at such a late stage that it should have been known to Casey & Co. that there was every risk that counsel instructed would not actually have the fact of the contact brought to his attention'.” (underlined for emphasis)

44. However, the situation here is very different from that in *O'Tuama* where the contact came by way of a fax at the last minute. The letters omitted here pre-date the swearing of the grounding affidavit and included not just a substantive letter from the Defendants solicitors but also a letter

from the Plaintiffs solicitors that further extended time for delivery of defence and which letter made it clear the issues “in dispute will have to be determined at plenary trial”.

45. Clarke J. in *O’Tuama* refers to his conclusion at para 2.7 that:

“On that basis I ruled that the circumstances in which judgment was obtained in this case were much closer to the regular than the irregular end of the spectrum and that, in all the circumstances of the case, it would be inappropriate to set aside the judgment without considering the basis on which it was suggested that Casey & Co. might have a defence. I therefore afforded Casey & Co. an opportunity to put whatever defence they might seek to assert on affidavit so that I could give further consideration to the matter in the light of the asserted defence. A subsequent hearing occurred after affidavit evidence had been filed concerning the contended for defence and this judgment is directed to that hearing.”

46. Clarke J. was ultimately satisfied that the defendants could show a defence with ‘real prospects of success’ and accordingly he set aside the default judgment.

47. Here, I am satisfied that while on a formal basis the default judgment has probably been regularly obtained (the Defendants counsel did not in fact argue otherwise), I am of the view that it goes to the special circumstances that important letters were omitted from the evidence presented to the court on the relevant date and it leaves a question mark as to what weight the Judge on the 27 February, 2023 might have given to that correspondence and the substantive matters it disclosed (to paraphrase Clarke J. in *O’Tuama*) and accordingly this feature of the facts of this case goes, in part at least, to ‘explain’ how the judgment was granted.

48. Next, the fact that the Court of Appeal has analysed the claim being made here and come to the view that the Receivers do not have a ‘strong case’ in relation to their case as a whole; per Ní Raifeartaigh J. at para 97, is also part of the special circumstances. This is sufficient to meet the standard in cases dealing with the closely related O. 13, r. 11 that the defendants establish more than a bare assertion of a defence but rather establish a defence with ‘real prospects of success’. It must be remembered that one of those points raised was that the Receivers have not been validly appointed and the Court of Appeal was not persuaded that the Plaintiffs had even established a ‘strong case’ on that point, see para 76 of the judgment of Ní Raifeartaigh J.

49. I am satisfied that it is appropriate to consider the Court of Appeal decision and its findings about the strengths and merits of the underlying substantive case here between the parties as part of the special circumstances that existed at the time the judgment was granted. To fail to do so would be to ignore the robust and clear principles described above that underpin the wider jurisprudence relating to applications to set aside default judgments.
50. In coming to that conclusion I acknowledge that it could be said on a strict reading of the wording of O.27, r15(2) that the Court of Appeal decision (and the substantive references therein to the merits of the Defendants' case) do not 'explain' why there was no appearance at the motion on 27 February, 2023 and that, therefore, this should not be considered as part of the 'special circumstances'. However, I prefer to approach the issue in a broader way for several reasons. Firstly, it seems that O.27, r.15(2) despite its wording has not altered in any substantive way the approach taken by the courts in the analogous sister applications to set aside judgments in default of appearance under O.13, r11; see *Delaney & McGrath* referenced above at para 4-42. Under that line of jurisprudence whether there are real merits to the Defendants' defence is clearly relevant; see *O'Tuama*. More importantly though, the caselaw dealing with O.27, r.15(2) makes it clear that there are no 'hard and fast' rules as to what can amount to 'special circumstances' (per Ferriter J. at para 57 of *DeSouza*) and that 'each case falls to be determined on its own particular facts and circumstances in order to do justice to the parties' (per Murray J. in *McGuinn*). The Court of Appeal decision setting out real merits to the defence of the Defendants and which was in existence at the time of the default judgment therefore should be seen as contributing to the special circumstances.
51. Finally, I am also satisfied that the I can have regard to the inadvertence and the mistake that was made by the Defendants' former solicitors. It is clear that the instructions at all times were to defend the case and indeed efforts were being made to arrange meetings to discuss the defence and counterclaim. A defence and counterclaim was purportedly delivered in March 2023 at a time when the then solicitors thought the motion for judgment was not listed until 27 April (as opposed to 27 February).
52. While it is correct to say that inadvertence or a mistake by legal advisors will rarely on its own amount to special circumstances, that it not the situation here for the reasons described above.

Conclusions on the 'Balance of Justice'

53. I now turn to the 'interests of justice' or, as it is sometimes referred to, the 'balance of justice'. In my view the position in relation to this stage of the process is very clear. Very little if any prejudice has been identified on the part of the Plaintiffs if the judgment is set aside. They did not point to any steps being taken in reliance on it – other than the legal steps of setting the matter down for assessment and that can be remedied by appropriate conditions being imposed in relation to costs. At all times up to the 27 February 2023 the Plaintiffs must have expected that the matter was likely to be defended. Even after judgment was obtained, the Plaintiffs' solicitors wrote by letter of 9 May 2023 proposing to hold off setting the matter down for 28 days to allow a motion to be brought to set aside the default judgment.
54. From the point of view of the Defendants however if the judgment is not set aside, they will be denied the opportunity to defend the claim without being heard. Especially in the circumstances of the substantive analysis of the issues raised in the Court of Appeal judgment, there would be a significant risk of an injustice being done were that so.
55. The prospect of a professional negligence action against the former solicitors is not attractive in the sense that there would remain considerable uncertainty as to what the outcome of the case would have been had the Defendants been allowed defend the matter. In that regard I adopt the reasoning of Peart J. in *AIB v Lyons*, High Court, 21 July 2004, [2004] IEHC 129 at page 5 who states in relation to a similar issue: -

“One could say that the consequences of this error might be capable of giving rise to a cause of action against the solicitor, and that such be the remedy in the present case, rather than requiring that the judgment be set aside so that the mistake can be nullified and the parties or at least the second named defendant be returned to the situation which would have pertained had the error not occurred. The question which the Court must consider in the face of such an argument is whether that meets the justice of the case. In such a situation the second named defendant would be put to the hazard of suing her solicitor and discharging the burden of proof which would rest with her in succeeding in an action against her professional adviser, and to the appropriate standard. That would take a considerable length of time and of course there is no guarantee of success. In the interim while such proceedings were making their way to a hearing the second named defendant would no doubt be involved in much expense, as well as having all the stress and uncertainly attendant upon that litigation. In the interim also,

the plaintiff would retain its judgment on foot of which it could proceed to take steps lawfully open to it in order to enforce it. In the present case we know that a judgment mortgage has been registered in very recent times against property in her sole name, and given that this step was taken at a time when the plaintiff was aware that this motion was to be heard, it is reasonable to assume that the plaintiff would take whatever steps are open to it to obtain payment on foot of its judgment, and this would include presumably proceedings on foot of the judgment mortgage in order to obtain an order for the sale of her house. These therefore are the consequences of leaving the second named defendant only with a possible but not guaranteed remedy against her solicitor in negligence.”

56. Accordingly, I am satisfied that there are special circumstances that existed at the time of the judgment that explain and justify the default. Namely: the inadvertence and mistake of the Defendants solicitors in failing to attend at the motion for judgment; the inadvertent failure of the Plaintiffs’ legal advisors to put relevant material before the court at the hearing of the motion; and the existence of the Court of Appeal judgment that determines that the Plaintiffs do not have a strong case in relation to their case as a whole. Accordingly, it would be unjust to deprive the Defendants of the opportunity of defending the proceedings.

57. Therefore, the judgment of the 27 February 2023 shall be set aside and the hearing set down for the assessment of damages and relief will be vacated. I will list the matter to hear the parties in relation to the conditions as to costs to be imposed on the Defendants and what directions are appropriate to move the matter forward.