Unapproved

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 303

Appeal No 2020/192

Faherty J.

Haughton J.

Collins J.

BETWEEN

HAVBELL DESIGNATED ACTIVITY COMPANY

Plaintiff/Respondent

AND

JAMES FLYNN

Defendant/Applicant

JUDGMENT of Mr Justice Maurice Collins delivered on 10 November 2020

PRELIMINARY

1. On 17 July 2017, the High Court (Ní Raifeartaigh J) granted the Plaintiff ("*Havbell*") summary judgment against the Defendant ("*Mr Flynn*") in the amount of €564,157.78

plus costs ("the *Judgment*"). Havbell had sought judgment in that amount as being the balance due (including interest) on a loan advanced to Mr Flynn by Permanent TSB in 2009, which had been assigned to Havbell in 2015. Mr Flynn - who is himself a solicitor - had contested Havbell's claim and solicitor and counsel acted on his behalf before the High Court.

2. The High Court Order was perfected in December 2017. At that point, Mr Flynn was entitled to appeal the Judgment to this Court and initially took steps to do so, including the preparation of a draft Notice of Appeal. However, the appeal was not lodged in time because, Mr Flynn says, his solicitors did not appreciate the shorter time-limit that was then applicable to expedited appeals (Mr Flynn's intended appeal being such an appeal). An extension of time could then have been sought from this Court in accordance with Order 86 RSC. In fact, however, it appears that an application for an extension was made to the Master of the High Court, which was obviously misconceived as the Master has no function in this context. That application was struck out in February 2018. One might then have expected an application to be made to this Court but, in fact, no such application was made because, Mr Flynn says, it was considered at that time that it would not be successful.

3. Mr Flynn appears to have abandoned any further thought of appeal at that stage. In April 2018 he applied for a personal insolvency arrangement (PIA) under the Personal Insolvency Acts 2012-2015. He had to prepare a prescribed financial statement for the purpose of that application which he was required to verify by way of statutory declaration as being "*a complete and accurate statement*" of his assets and liabilities.

In Mr Flynn's financial statement, he identified Havbell as a creditor in the full amount of the Judgement. Havbell and other creditors opposed the proposed PIA and the application failed for want of sufficient creditor support: see the decision of the High Court (McDonald J) in *In the matter of the Personal Insolvency Acts 2012-2015 and in the matter of James Flynn (A Debtor)* [2019] IEHC 752.

4. Now, more than 2½ years after that misconceived application to the Master, Mr Flynn asks this Court for an extension of time to appeal the Judgement and a stay on it pending the determination of his appeal. The application was, it seems, prompted by the happenstance of Mr Flynn reading the decision of this Court in *Promontoria (Aran) Ltd v Burns* [2020] IECA 87 ("*Burns*") in the course of the Long Vacation in 2019. *Burns,* it is said, has *"significantly clarified the law relating [to] the proofs required in summary judgment applications and in relation to the hearsay rule."* According to Mr Flynn, if the approach mandated by this Court in *Burns* is applied to the evidence put before the High Court by Havbell, it is clear that there was no sufficient basis for granting summary judgment against him.

5. Mr Flynn also invoked another subsequent decision in support of his application for an extension, that of the Supreme Court in *Bank of Ireland v O' Malley* [2019] IESC 84, suggesting that Havbell's summary summons and grounding affidavit failed to particularise the debt alleged to be due by Mr Flynn in the manner and detail that *Bank of Ireland v O' Malley* held to be required by the Order 4, Rule 4 RSC. It was never suggested to the High Court that the Indorsement of Claim in the Summary Summons here was in any way defective or deficient. In his oral submissions, counsel for Mr Flynn

made it clear that it was the decision in *Burns* that was "*the hook, line and sinker*" of the application and wisely did not seek to place any significant reliance on *Bank of Ireland v O' Malley.* As will be evident from this judgment, the decision in *Bank of Ireland v O' Malley* does not, in my view, provide any basis for allowing an extension of time here.

6. In my opinion, no basis for extending the time has been demonstrated by Mr Flynn and accordingly I would refuse the application for an extension. The issue of a stay on the Judgement therefore does not arise.

THE LEGAL FRAMEWORK

7. At the level of principle, there is little or no dispute between the parties as to the relevant legal framework. It is now clear that the judgment of Lavery J for the Supreme Court in *Eire Continental Trading Co v Clonmel Foods Ltd* [1955] IR 170 is not to be read as laying down rigid and inflexible rules to be applied mechanically in applications for extensions of time to appeal. All relevant circumstances must be considered and the ultimate obligation of the Court is to balance justice on all sides: see per Clarke J (as he then was) in *Goode Concrete v CRH* [2013] IESC 39, at para 3.3. However, while the *Eire Continental* guidelines should not be seen as a check-list according to which a litigant will pass or fail, "*it is necessary to emphasise that the rationale that underpins*

them will apply in the great majority of cases": per O' Malley J for the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v Gately* [2020] IESC 3, at para 63.[1]

8. It follows from these decisions, as well as the Supreme Court's earlier decisions in *Brewer v Commissioners for Public Works* [2003] 3 IR 539 and *Lough Swilly Shellfish Growers Co-Op Society v Bradley* [2013] IESC 16, [2013] 1 IR 227, that an extension may be granted even where one or more of the *Eire Continental* criteria is not met (and, in principle, may be refused even where all three criteria are satisfied). However, as Clarke J emphasised in *Goode Concrete*, it is difficult to envisage circumstances where it would be in the interests of justice to allow a late appeal where the Court is not satisfied that any arguable grounds of appeal have been established, for the simple reason that it *"cannot be in the interests of justice to allow wholly unmeritorious appeals to progress*": para 3.4.

9. In *Seniors Money Mortgages (Ireland) DAC v Gately,* O' Malley J referred to that passage and stated by reference to it that the three *Eire Continental* criteria are not necessarily of equal importance *inter se*. She continued on:

> *"[65] By the same token it seems to me that, given the importance of bringing an appeal in good time – the desirability of finality in litigation, the avoidance of unfair prejudice to the party in whose favour the original ruling was made*

[1] See also the judgment of O' Malley J in *Pepper Finance Corporation (Ireland) DAC v Cannon* [2020] IESC 2, at para 122. The decision in *Pepper Finance Corporation (Ireland) DAC v Cannon* was handed down on the same day as *Seniors Money Mortgages (Ireland) DAC v Gately.*

and the orderly administration of justice – that the threshold of arguability may rise in accordance with the length of the delay. It would not seem just to allow a litigant to proceed with an appeal, after an inordinate delay, purely on the basis of an arguable or stateable technical ground. Since the objective is to do justice between the parties, long delays should, in my view require to be counterbalanced by grounds that go to the justice of the decision sought to be appealed. Not every error causes injustice."

O' Malley J returned to that point in her conclusions:

"[71] .. As I said earlier, it seems to me that where there is significant delay before seeking an extension, the appellant will need to show a correspondingly strong case. Since the objective is to do what is just in the circumstances as presented on the facts of each individual case, an argument based purely on a technical error by the trial judge, that cannot be described as having brought about an unjust result, may be insufficient. In my opinion, that is the situation in this case."

10. Implicit in these passages is a characterisation of the delay in *Seniors Money Mortgages (Ireland) DAC v Gately* as "*inordinate*" and/or "*significant*". Notably, the application for an extension there had issued a year after the expiry of the appeal period. Here, as already noted, the application for an extension of time issued more than 2½ years after the expiry of the applicable appeal period. Such a delay is clearly "*inordinate*" and "*significant*" in this context.

11. Finality in litigation was also emphasised by Clarke J in *Goode Concrete*. Failing to bring finality to proceedings in a timely way, he observes, is, in itself, a potential and significant injustice. Significant weight is also to be given to the *"proper administration of justice in an orderly fashion*": para. 3.3.

12. In *Goode Concrete,* the relevant applications for an extension were made between 19 and 22 months after the perfection of the High Court orders (the applicant sought to appeal from several different High Court judgments). However, the applicant argued – and the Supreme Court accepted – that there were unusual circumstances which warranted the extension sought. Different considerations (to those identified in *Eire Continental*) necessarily applied where the basis of the appeal sought to be brought stemmed from factual circumstances outside of the materials that were before the High Court. The applicant sought to appeal on grounds of objective bias and said that the facts and circumstances that, on its case, gave rise to a reasonable apprehension of bias had first come to its knowledge long after the hearings in the High Court. In those circumstances, the Court accepted that, while it was necessary for the applicant to establish an arguable basis for appeal in the ordinary way, the other two criteria in *Eire Continental* – formation of the necessary intention to appeal within the permitted time and the existence of "*something like mistake*" – required modification: paras 3.7 – 3.8.

13. Here, the appeal that Mr Flynn seeks to bring is not based on factual circumstances outside of the materials that were before the High Court. Rather, Mr Flynn asserts that the High Court erred in its determination of Havbell's application for summary

judgment. He was fully aware of that determination, and the basis for it, at the time. He was fully aware of the evidence before the High Court by reference to which the High Court Judge made her decision. There has been no discovery of any new fact here analogous to what was said to have been discovered by the applicants in *Goode Concrete*. It does not appear necessary, therefore, to say anything more about that aspect of the Supreme Court's decision.

14. However, another aspect of *Goode Concrete* has particular resonance here. In addition to the objective bias ground that was common to all of the intended appeals, the applicant sought to raise other issues arising from the respective judgments of the High Court. One of those judgments concerned security for costs and one of the grounds sought to be advanced by way of appeal from that judgment was that the High Court's decision to direct security for costs had been shown to be demonstrated to have been substantively incorrect by the subsequent decision of the Supreme Court in *Mavior v Zerko Ltd* [2013] IESC 15, [2013] 3 IR 268: para 2.2.

15. Addressing these other grounds, with particular reference to the *Mavior v Zerko* ground, Clarke J observed that there was nothing to prevent Goode Concrete from raising those grounds within the time permitted for an appeal. That was particularly so where it was suggested that the High Court's decision on the security for costs application was "*one which departed from the general drift of prior case law*". If Goode Concrete considered that the decision was at odds with the pre-existing jurisprudence, it was *"all the more surprising that an appeal was not brought at that time"*: para 6.2.

16. Significantly, Clarke J then stated as follows:

> *"6.3 Next, it needs to be emphasised that the fact that there may be a development in relevant jurisprudence after a decision of the High Court does not, of itself, provide a legitimate reason for extending time for an appeal. A party who loses a case or a particular application in the High Court has to make a decision, at that time, as to whether it wishes to appeal. Doubtless, at least in some cases, the possibility that there may be an evolution or clarification in relevant jurisprudence should an appeal be brought is a factor which a party ought to properly take into account. Parties, in their assessment of the chances of successfully appealing, must take a view on the possibility of this Court analysing the relevant jurisprudence in a way which might involve an evolution of same to their advantage. Likewise, a party who feels that a decision of the High Court involves a departure from existing jurisprudence has to assess the likelihood of this Court agreeing with the departure in question. But in all such cases the party has to make its mind up, at the time of the decision of the High Court, whether it wishes to appeal. If the party decides not to appeal it cannot then complain if it is deprived of the benefit of some subsequent evolution in the jurisprudence which it could have urged on the Supreme Court in its own case but chose not to."*

17. While it was suggested by counsel for Mr Flynn that this passage was *obiter*, I do not agree. The Supreme Court declined to permit Goode Concrete to rely on these additional grounds by way of appeal and the passage above is, as I read it, an integral

part of the reasoning underpinning that aspect of its decision. In any event, the observations of Clarke J in this passage appear to me to be plainly correct.

18. It should be noted that the issue in *Mavior v Zerko Ltd* – the circumstances in which a court might properly direct an unlimited company to provide security for costs – was also the central issue in the application for security for costs in *Goode Concrete*. Even so, Goode Concrete was not permitted to piggyback on the subsequent decision in *Mavior v Zerko Ltd* so as to justify a late appeal. Instead, it could and should have brought an appeal from the High Court's decision at the time.

19. The position here is rather different. Mr Flynn does not seek to rely on *Burns* to provide support for any argument raised by him in the High Court. It is common case that no hearsay argument or objection was taken on Mr Flynn's behalf before the High Court. Mr Flynn is therefore seeking to piggyback on a subsequent decision in order to advance a wholly new argument on appeal.

20. *Lough Swilly Shellfish Growers Co-Operative Society Limited v Bradley* [2013] IESC 16, [2013] 1 IR 227 is relevant in this context. The facts were complicated but, in brief, the High Court had held that the defendants had trespassed into oyster fisheries of the plaintiffs. The plaintiffs had previously been granted aquaculture licences which had expired. They had applied for their licences to be renewed and section 19A of the Fisheries (Amendment) Act 1997 (as amended) had the effect of preserving their entitlements pending a decision on their applications. The defendants did not appeal the substantive order within the time fixed by the rules but subsequently sought leave to

bring a late appeal on the basis that section 19A had never been commenced, with the result (so it was said) that the plaintiffs had never had any entitlement to sue for trespass. Although section 19A had been the subject of extensive debate in the High Court, no argument had been made that it had not come into operation. That argument was, it seems, one which the defendants first heard of at a seminar that they had attended subsequent to the relevant High Court decision.

21. Though the Supreme Court did address the merits of the section 19A ground (holding that section 19A had commenced on the commencement of the amending Act that inserted it in the 1997 Act), it separately held that there was no basis for allowing a late appeal. O' Donnell J (with whose judgment the other members of the Court agreed) stated that

> *"[25] ... the question becomes whether the Court should grant an extension of time to permit the appellant to argue that point. Plainly, the appellants cannot bring themselves within the criteria in Éire Continental Trading Co., Ltd. v. Clonmel Foods, Ltd. [1955] I.R. 170 even generously interpreted. Those criteria are, I accept, guidelines, and the Court retains a residual discretion. However, in litigation, and particularly litigation which has been so drawn out and bitter as this, parties are entitled to believe, and conduct their affairs, on the belief that at some stage the matter has come to an end. The only grounds for extending the time within which to appeal here is the fact that the defendants had heard it suggested that s. 19A might not have come into force. If this was a sufficient ground then logically it could arise at any time and there would never be a point*

> *at which this litigation, or any High Court case, could be said to have terminated. The situation might be otherwise if there was an extant appeal in being, and it was sought maybe to extend the grounds of appeal. That however does not arise here and would in any event raise the issue of the extent to which it is possible to argue on appeal a ground not advanced in the Court below to which I will now turn."*

22. As was the case in *Lough Swilly*, there is no extant appeal in being here. Mr Flynn is not seeking to extend existing grounds of appeal by the inclusion of a ground not argued in the High Court. Rather, his application for an extension, and his intended appeal, rest very significantly on a ground not argued in the High Court. In contrast to the position in *Lough Swilly*, that ground is not in any sense novel. As will be evident from the discussion of *Burns* below, it was open to Mr Flynn to raise the hearsay ground before the High Court but, for reasons which have not been explained, he did not. In my opinion, that puts him in a very much weaker position than the unsuccessful applicants in *Lough Swilly*.

23. A number of decisions from England and Wales were also opened to the Court. The first in time was the decision of the Court of Appeal in *In re Berkeley: Borrer v Berkeley* [1945] 1 Ch 1 but it in turn refers extensively to that Court's earlier decision in *In re Wigfull & Sons Trade Marks* [1919] 1 Ch 52 and it is to that decision that I first turn.

24. In *In re Wigfull* the High Court had directed the removal of certain trade marks from the Register of Trade Marks, based on a particular construction of the Trade Marks Act

1905. That decision was not appealed. Some years later, in unrelated proceedings, the Court of Appeal took a different view of the construction of the Act. That prompted an application to bring a late appeal by the owners of the trade marks. The application failed. Swinfen Eady MR thought that it was "*not necessarily a ground for enlarging the time that in some subsequent case a different view is taken of the construction of an Act of Parliament. The parties in this previous litigation had their advisers at hand; the judgment was pronounced in the Court of first instance; they had an opportunity of considering whether they should or should not appeal; and after considering, they determined not to appeal; and if years are allowed to go by without any appeal being presented, I am of the opinion that a strong case on the facts should be made out before leave should be granted."* [2] Concurring, Eve J thought that the fact that there was a *"decision from which one is able to conclude that the decision in the particular case under review was wrong*" was not in itself a sufficient ground to ask for an extension of time, that seeming to him to be a *"well-settled rule*."[3]

25. In *In re Berkeley,* an issue had arisen as to whether a tax-free annuity payable to Lady Berkeley under her husband's will was affected by a particular statutory provision (section 25 of the Finance Act 1941). On an application by one of the trustees, the High Court held that the application of the section was excluded. In reaching that decision, the judge considered himself bound by an earlier decision on the point, *In re Tredgold* [1943] Ch 69. That decision was, however, subsequently over-ruled by the Court of Appeal: *In re Sebag-Montefiore* [1944] Ch 331. Two of the defendants in the

[2] At page 58.

[3] At page 60.

proceedings (who had life interests in the residue of the estate) then sought leave to appeal out of time. Giving the sole judgment on the application, Lord Greene MR referred to *In re Wigfull* and said that he found:

> *"no difficulty in reconciling the statement that the different decision is not necessarily a ground for enlarging the time with the statement that the court can enlarge the time if it is just in the circumstances to do so. It seems to me that the principle to be extracted is that it is not sufficient for a party to come to the court and say that a subsequent decision of a superior court has determined that the principle of law on which his case was decided was wrong. The court will say to him: "That bald statement is not enough. What are the facts? What is the nature of the judgment? Who are the parties affected? What, if anything, has been done under it?" and so forth. In other words, the whole of the circumstances must be looked at."*

26. The Master of Rolls concluded that, in all then circumstances, the interests of justice required that leave be given.[4] While a number of factors were referred to, a key consideration in his assessment appears to have been the fact that there was at least one tenant for life in remainder in succession that was not a party to the proceedings and thus was not bound by the decision of the High Court. There might also be remaindermen interested in capital who would not be bound. The tenant for life could issue a summons "*tomorrow*" and the judge hearing that summons would be bound by

[4] The Court of Appeal subsequently allowed the appeal: *In re Berkeley: Borrer v Berkeley (No 2)* [1945] 1 Ch 107. However, the House of Lords reversed and restored the order made by the High Court: [1946] AC 555.

the decision in *In re Sebag-Montefiore* to come to a different conclusion to that reached by the High Court in *In re Berkeley*, thus giving rise to conflicting decisions on the same issue – the level of annuity payable to Lady Berkeley. No corresponding factor or consideration arises in this case. The fact that "*to date nothing has been done*" was another factor mentioned by Greene MR and counsel for Mr Flynn laid emphasis on that aspect of his reasoning. Here, he says, nothing has been done by Havbell by way of seeking to execute the Judgment against his client.

27. *In re Berkeley* was considered by the Court of Appeal in *Property and Reversionary Investment Corporation v Templar* [1977] 1 WLR 1223. The parties were landlord and tenant and the High Court had held that time was of the essence in the operation of a rent review clause in the lease and that the landlord was out of time in seeking a rent review. No appeal was brought by the landlord at the time. Some 2½ years later, the House of Lords gave judgment in *United Scientific Holdings Ltd v Burnley Borough Council* [1976] Ch 128, holding that, in general, time was not of the essence in relation to such clauses. The landlord then sought leave to bring a late appeal. Having referred to In re Berkeley, Roskill LJ said that:

> *"It is therefore plain that it is not enough for Mr Goodhart to say that the recent decisions of the House of Lords clearly show that Judge Fay's decision was wrong. He must show that there are special reasons why he should be allowed to argue that the judgment should not stand."*

Cumming-Bruce LJ agreed that "*special circumstances*" had to be shown if leave was to be given. On the facts, the court was persuaded that there were such special reasons/circumstances, arising from the ongoing contractual relationship between the parties and the fact that, unless leave to appeal was given, the future rights and obligations of the parties would continue to be governed by an erroneous decision.

28. The final decision to which we were referred in this context was that of the House of Lords in *Arnold v National Westminister Bank plc* [1991] 3 All ER 41. It concerned a question of issue estoppel rather than an application for an extension of time. The judge had interpreted the expression "*fair market rent*" in a lease in a manner adverse to the tenant. The tenant sought leave to appeal but was refused – wrongly in the House of Lords' view. The tenant then issued proceedings seeking rectification of the lease and a determination of the construction issue, there having been a number of subsequent cases that indicated that the judge's construction had been wrong. The landlord applied to strike out those proceedings on the basis that the construction issue had been finally determined and an issue estoppel has arisen. In all the circumstances, it is hardly surprising that the landlord's application failed at every level, with the House of Lords holding that rule of issue estoppel was sufficiently flexible to accommodate an exception for changes in the law.

29. For the purposes of this appeal, I do not think it necessary to explore whether there is any difference in substance between the approach taken in *Goode Concrete* and that taken in the authorities from England and Wales discussed above. *Goode Concrete* is, of course, binding on this Court. I do not think that Clarke J intended his observations

in *Goode Concrete* to be taken as establishing any absolute exclusionary rule in this context. He was careful to state that a subsequent development in the jurisprudence will not "*of itself*" provide a basis for extending time. Furthermore, any absolute approach would appear to be at odds with the thrust of the Supreme Court's recent jurisprudence, which emphasises that the decision whether or not to extend time should be based on an assessment of where the balance of justice lies in all the circumstances, albeit such assessment will normally be guided by the specific criteria identified in *Eire Continental*. But what is clear from *Goode Concrete* (as well as from the authorities from England and Wales) is that the mere fact that an applicant can point to a subsequent decision which suggests that an earlier unappealed decision is or may be wrong in law will not be sufficient. Something more is required. Were it otherwise, the important interest in the finality of litigation – an interest with both public and private aspects – would be significantly undermined.

30. Furthermore, neither *Goode Concrete* nor the authorities from England and Wales concerned a situation such as that presented here. Here, as already noted, Mr Flynn seeks an extension of time in reliance on subsequent decisions – and in particular the decision in *Burns* – in order to advance arguments on appeal that were not made in the High Court. The observations of O' Donnell J in *Lough Swilly Shellfish Growers Co-Operative Society Limited v Bradley* set out above suggest that – putting the matter at its lowest – this creates an additional, and formidable, hurdle for Mr Flynn. As O' Donnell J says "*[i]f this was a sufficient ground then logically it could arise at any time and there would never be a point at which this litigation, or any High Court case, could be said to have terminated.*" It would seem to follow that something exceptional would

have to be demonstrated in order to justify an extension in circumstances such as the present, such that it appeared that a refusal of an extension might give rise to significant substantive injustice.

31. It is not necessary to address these issues further or to seek to draw more precisely the contours of the Court's discretion in a case such as this or how that discretion might operate at the margins. This is not a marginal case in my view.

THE SIGNIFICANCE OF THIS COURT'S DECISION IN *BURNS*

32. As I was a member of the Court that decided *Burns*, it may seem tempting to accept at face value the suggestion that it was a landmark decision that significantly altered the law. But that is not an accurate characterisation of *Burns* in my view. The hearsay rule was not invented in *Burns* nor was *Burns* the first occasion on which the hearsay rule was considered in the specific context of a summary judgment application. On the contrary, as is clear from the judgment of Baker J., by the time that *Burns* came before this Court there was already a very substantial body of jurisprudence on that issue. Baker J's judgment sought to identify the relevant principles and apply them to the particular facts of *Burns*. While I agreed fully with her analysis and conclusions, I did so without any enthusiasm for the outcome, as is evident from my brief concurring judgment. As Havbell points out, the application of the hearsay rule in civil proceedings has since been significantly modified by the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

33. It is important to observe that a significant number of the decisions considered in *Burns* predated the hearing of Havbell's application for summary judgment here: see paragraphs 37 and 38 of the judgment of Baker J. As she explains in paragraph 40, the decision of the High Court in *Burns* (which this Court upheld on appeal) was largely based on two of those decisions, *Bank of Scotland v Stapleton* [2012] IEHC 549, [2013] 3 IR 683 and *Ulster Bank Limited v Dermody* [2014] IEHC 140. All of those decisions, including *Stapleton* and *Dermody*, were available to be deployed by Mr Flynn and his legal advisors before the High Court and it was open to Mr Flynn to take any objection that he considered to be appropriate to the effect that some or all of the evidence relied on by Havbell was inadmissible hearsay and/or that the evidence relied on by Havbell was insufficient to establish a *prima facie* case that Mr Flynn was indebted to it and/or indebted in the amount claimed.

34. It is common case that no such objection was taken by Mr Flynn. That position has not been explained. In circumstances where it is now said that, if only this Court permits Mr Flynn to bring a late appeal, the decision in *Burns* effectively dictates that that appeal would succeed, it is surprising and unsatisfactory that Mr Flynn has not made any effort to explain the failure to raise any hearsay objection in the High Court. Counsel for Mr Flynn (who did not appear in the High Court) did suggest that the law was "*unclear*" – or at least was such prior to *Burns* – but insofar as that was meant as an explanation for the failure to raise the issue in the High Court, it simply will not do. Uncertainty of outcome does not explain or excuse the failure to raise an argument in this context.

35. In opposing the application to extend time, counsel for Havbell makes the point that, had any hearsay objection been made in the High Court, his client would have had an opportunity to address it. It could, for instance, have sought affidavit evidence from the relevant personnel in Permanent TSB, if advised that such evidence was necessary. It is said that Havbell would be materially prejudiced if it was now compelled to defend an appeal from the Judgment on the basis of a belated hearsay objection. It would not have an opportunity to deploy any such evidence within the confines of an appeal and, in any event, given that it is now seven years since the sale of Mr Flynn's property, there may be greater difficulty in obtaining such evidence at this stage than would have been the case in 2017.

36. There is, in my opinion, very significant force in that objection. It appears to me that it would be a real injustice were this Court to allow a late appeal by Mr Flynn and then proceeded to set aside the Judgment based on an evidential objection that Mr Flynn could have made in the High Court but did not and which, if made, could have been addressed by Havbell.

37. In any event, the basic premise of Mr Flynn's application – that the application of *Burns* would necessarily lead to the Judgment being set aside – has not been convincingly demonstrated in my view. In the High Court, Mr Flynn did not dispute the fact or amount of the loan facility advanced to him by Permanent TSB. In his own evidence he confirmed the terms of the facility (being the terms set out in a facility letter of 29 May 2009 which expressly incorporated a number of other documents all of which were before the High Court), confirmed that he had signed the acceptance of the loan offer

on 8 June 2009 and confirmed that the loan amount of €1.3 million had been advanced to him.[5] Mr Flynn did raise an issue about the assignment of the loan from Permanent TSB to Havbell but the point made by him – that his loan did not transfer because the relevant entry in the Deed of Transfer referred to a facility letter dated *25* rather than *29* May 2009 – was comprehensively answered by Havbell. As their deponent Mr Smith explained, the Deed correctly identified the underlying account and it was that account that the Deed operated to transfer.[6] That evidence – which was not hearsay – was not challenged by Mr Flynn. Mr Smith also exhibited a notice of the assignment which had been sent to Mr Flynn in June 2015, refuting Mr Flynn's suggestion that no such notice had been given to him.[7]

38. Mr Flynn therefore accepted that €1.3 million had been advanced to him and accepted that the terms of the loan were as set out in the facility letter and associated documents. Those terms included terms as to interest and also a term to the effect that, if on the sale of the mortgaged property by the mortgagor (Mr Flynn) with the consent of the Permanent TSB, the net proceeds were insufficient to discharge the total due, *"[Mr Flynn] will immediately pay the amount of the deficiency with interest until fully discharged*". That term (clause 2.11 of the *Mortgage Conditions*) also expressly stipulated that the vacating of the security *"shall not adversely affect or prejudice the right of Permanent TSB to recover the deficiency or the obligation of [Mr Flynn] to pay same with interest."*

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[5] Affidavit of James Flynn sworn on 25 November 2016, at paragraph 3.

[6] Supplemental Affidavit of Karl Smith sworn on 10 February 2017, at paragraphs 14-17.

[7] *Ibid*, at paragraph 13, with the notice exhibited as *"KS 3"*.

39. Mr Flynn did not, it appears, take any issue with Havbell's calculation of the balance due on the loan, query the calculation of interest or suggest that he had made any payments above and beyond what had been credited against the balance arising from the sale of the mortgaged property (that sale having yielded an amount just under €1 million). His only defence (other than the point about the error in the date of the facility letter in the schedule to the Deed of Transfer) was that he had understood that, once the mortgage was discharged and released from the Permanent TSB, he "*would not have a continuing obligation and that the said discharge was a full and final settlement.*"[8] According to Mr Flynn, he had a belief from his "*dealings*" with Permanent TSB that "*when the sale of the security property was being sold that any indebtedness to Permanent TSB would cease on the repayment of sum achieved from the sale of the secured property.*"

40. Mr Smith, on behalf of Havbell, characterised these statements as "*mere bald assertion*" and suggested that any subjective "*understanding*" or "*belief*" that Mr Flynn may have had was irrelevant having regard to clause 2.11 of the Mortgage Conditions. Strictly speaking, these were comment/argument rather than evidence. Mr Smith was clearly not in a position to give any evidence as to the dealings between Mr Flynn and Permanent TSB and did not purport to do so. So there is no question of the Judge deciding this point on the basis of any hearsay evidence. Rather, it appears, she assessed Mr Flynn's own evidence and decided that it did not meet the threshold needed to establish any arguable defence.

[8] Affidavit of James Flynn of 25 November 2016, paragraph 5.

41. Copy Permanent TSB statements of account were put before the High Court by Havbell, apparently without any objection from Mr Flynn. Now, some 4 years later, Mr Flynn says that he did not receive any statements from Permanent TSB after the sale of the mortgaged property in 2013.[9] Mr Flynn could have put that evidence before the High Court but he did not do so. He also avers that he did not receive any statements from Havbell for the period after the assignment of the loan. Again, so far as relevant, that point could have been made to the High Court but it was not.

42. It follows, in my view, that it cannot properly be suggested that the substance of the Judgment here would be liable to be set aside even if reviewed by reference to this Court's decision in *Burns*. In contrast to the defendants in *Burns*, Mr Flynn expressly accepted that the loan had been advanced to him and he accepted the terms of that advance. The assignment of the loan to Havbell was disputed by him but it clearly was established to the satisfaction of the High Court. Mr Flynn accepted that demand had been made of him by Havbell. Apart from a technical point about the Deed of Transfer (which clearly was not accepted by the High Court) his only defence to Havbell's claim was the suggestion that the payment of the proceeds of sale of €977,000 in April 2015 (when the balance on the loan was just below €1.45 million) operated as a full discharge of his liability to Permanent TSB. That defence failed not because the High Court relied on any hearsay evidence from Havbell or misunderstood principles to be applied but because Mr Flynn's own evidence – which went no further than the very general statements set out above – was clearly considered by the High Court not to be enough

[9] Affidavit of James Flynn sworn on 29 October 2020.

to give rise to even an arguable defence. That conclusion is entirely unsurprising given the material before the High Court.

43. Taking *Burns* at its height, it appears to me that the most that can be said by Mr Flynn is that, in the event that a hearsay point had been taken on his behalf in the High Court (which it was not) an issue might have arisen about the calculation of interest in the period after the sale of the secured property (it being accepted by Mr Flynn that he received regular statements of account from Permanent TSB up to the time of sale). It seems reasonable to assume that, had any such issue been raised, it could readily have been addressed by evidence which Havbell could have procured from Permanent TSB (as to the calculation of interest in the period between sale of the property and the assignment of the loan) and/or which it was in a position to adduce itself (as to calculation of interest in the period after the assignment).

CONCLUSIONS

44. I will assess the application in the first instance on the basis that it falls to be determined by the application of the *Eire Continental* criteria, as explained in the more recent Supreme Court jurisprudence referred to above.

45. In applying the first criterion – whether there was an intention to appeal within the prescribed period – it appears to me that the Court must look at the appeal sought to be brought now, rather than the earlier appeal which seems to have run into the sand in early 2018 and was not further pursued by Mr Flynn. That is particularly so in

circumstances where, subsequently, Mr Flynn clearly accepted (and indeed relied on) his indebtedness on foot of the Judgment for the purposes of his failed PIA application. Any intention to appeal was clearly abandoned at that stage.

46. On Mr Flynn's own account, he formed the intention to bring the proposed appeal now before the Court when he read this Court's judgments in *Burns* in August 2020.[10] That was many years after the expiry of the period permitted by the Rules to bring an appeal from the Judgment and it follows that the first criterion in *Eire Continental* has not been met.

47. As regards the second criterion, that of mistake, there seems clearly to have been a mistake made as to the time for the bringing of an appeal initially and some further mistake when an application for an extension of time ended up being made to the Master of the High Court. But it is not clear what mistake might to be said to explain the failure to bring this application for an extension of time before now. Nor has any attempt been made by Mr Flynn to identify what "*mistake*" might explain his failure to raise any hearsay point in the High Court. It may be that the Court is being invited to draw some inference that Mr Flynn and/or his legal advisors made a mistake in not taking such a point at the time but, absent any evidence to that effect (and there is none), such an inference is not an appropriate one in my view. Operative mistake has not been established in my opinion.

[10] Affidavit sworn on 17 September 2020, at paragraphs 54 & 55.

48. As regards the third criterion, in my view Mr Flynn has not succeeded in establishing any arguable error on the part of the High Court, still less any error which could be described "*as having brought about an unjust result.*" While the draft Notice of Appeal and the Affidavit sworn by Mr Flynn grounding the application for an extension of time take issue with the Judge's conclusion that Mr Flynn had failed to establish an arguable defence based on his alleged "*understanding*" that payment of the proceeds of sale of the mortgaged property would operate to discharge all of his liabilities to Permanent TSB, nothing that is said in these documents suggests any error on the part of the High Court. On the contrary, given the paucity of the material put before the High Court by Mr Flynn, it appears to me that the High Court's conclusion was inevitable.

49. As to the various grounds that appear to be advanced specifically on the basis of *Burns*, these in my view require a different analysis. As I have explained, no hearsay point was taken in the High Court. It follows, in my view, that those new grounds cannot simply be analysed as if they are properly within the scope of any appeal that this Court might permit to be brought at this stage. It may be that they cannot properly be accommodated with the standard *Eire Continental* analysis at all. But if they are to be taken into account, it can only on the basis that a compelling case has been demonstrated to the effect that justice requires that Mr Flynn should be permitted to rely on those new grounds, notwithstanding his failure to raise them in the High Court. In my opinion, no such case has been made out here.

50. In any event, for the reasons set out above, even if regard is had to these new grounds for the purpose of the *Eire Continental* analysis, those grounds fall far short of

establishing that any aspect of the hearing in the High Court "*brought about an unjust result.*" I agree with counsel for Havbell that, considered at their height, the grounds now sought to be advanced by Mr Flynn are technical in character and do not go to the substantive justice of the hearing in the High Court or the outcome of that hearing.

51. Looking at the matter more broadly, and asking where, in all the circumstances, the balance of justice lies, the balance appears to me to be all one way. Mr Flynn is a solicitor and at all times was represented by solicitor and counsel. The point successfully taken by the defendants in *Burns* was one which it was open to him to take in the High Court here, to the extent that it was considered to arise on the facts. Mr Flynn has not explained why he did not take the point. While it seems that he initially took steps to appeal the Judgment, he did not pursue that appeal and instead confirmed his liability to Havbell when he made an unsuccessful PIA application to the High Court.

52. *Goode Concrete* states very clearly that "*a development in relevant jurisprudence*" after a decision of the High Court *"does not, in itself, provide a legitimate reason for extending time for an appeal*." Even if the decision of this Court in *Burns* is properly to be regarded as such a development in the jurisprudence – and that seems to me to be very questionable – it would not in itself justify an extension and no other factor weighing in favour of such an extension has been identified by Mr Flynn. No potential for conflicting decisions such as appears to have exercised the Court of Appeal in *In re Berkeley* arises here. Equally, I do not accept that there is any parallel with the position in *Property Investment Corporation v Templar,* where the existence of an ongoing

contractual relationship between the parties was considered to be a "*special reason.*" There is no continuing relationship between the parties here. The law makes available various methods of execution to judgment creditors and the prospect that Havbell may at some point in the future take steps to execute on the Judgement is not a special reason or circumstance in my view.

53. The position here is, of course, all the clearer given the fact that *Burns* relates to a point that was not made by Mr Flynn in the High Court. As O' Donnell J stated in *Lough Swilly*, if that were a sufficient ground for an extension "*there would never be a point at which this litigation, or any High Court case, could be said to have terminated."* It may be difficult to envisage circumstances in which an appeal court would contemplate granting an extension of time on the basis advanced here (a subsequent decision being relied upon to advance an argument(s) on appeal that could have been made in the court below, but was not). As I have indicated, it would appear that some exceptional factor or factors would need to be present. There is nothing remotely exceptional here.

54. Finally, it appears to me that allowing a late appeal by Mr Flynn would inevitably cause prejudice to Havbell, not simply because of the inevitable delay that an appeal would involve but also because of the particular prejudice referred to in paragraphs 35 and 36 above. That Havbell may not have taken steps to execute on foot of the Judgment – a point on which much emphasis was placed by Mr Flynn – does not alter the position. It was, in fact, precluded from taking any such steps while Mr Flynn's application for a PIA was before the High Court, a period of more than 18 months. In any event, I do not see how any inaction on the part of Havbell might properly be regarded as a positive

factor weighing in favour of Mr Flynn's application and, even if some weight was to be attached to it, it would have no material impact on where the balance lies here.

55. The application of the criteria in *Eire Continental* point clearly to the refusal of the application. Counsel for Mr Flynn submitted that his client's application fell outside the parameters of *Eire Continental*. Even if that is correct, a broader assessment points decisively to the same conclusion. In her judgment in *Seniors Money Mortgages (Ireland) DAC v Gately,* O' Malley J explained that *"the objective is to do what is just in the circumstances presented on the facts of each individual case*."[11] Despite the conviction and tenacity with which Mr Donelon made his submissions to the Court, I have no doubt that "*what is just*" in the circumstances here is that Mr Flynn's application for an extension should be refused.

Costs

Given the refusal of the application, it appears to follow that Mr Flynn should pay Havbell's costs of the application. If Mr Flynn wishes to submit that some different costs order ought to be made, he should notify the Court of Appeal Office of that fact within 14 days of this judgment and, in that event, a brief hearing will be scheduled to deal with the costs issue. In the event that the Court proceeds to make an order for costs against Mr Flynn, the additional costs of such costs hearing will be included in that order.

[11] At para. 71.

Judges Faherty and Haughton have indicated their agreement with this judgment.