Neutral Citation Number: [2009] IEHC 586

THE HIGH COURT

1995 233 SP

BETWEEN

ALLIED IRISH BANKS PLC.

PLAINTIFF

AND

CONCEPTA DORMER

DEFENDANT

AND

ROBERT ROE

NOTICE PARTY

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 13th day of March, 2009

1. On 14th October, 1993, Mr. Roe, the notice party, obtained judgment in the sum of IR£26, 139 against the defendant. On 17th December, 1993, that judgment was registered as a judgment mortgage against the defendant's interest in the lands in folio 14365 County Laois. In this application, the notice party seeks an order pursuant to O. 33, r. 8 of the Rules of the Superior Courts, directing the sale of the defendant's interest in the lands and premises comprised in folio 14365 County Laois in these proceedings brought by Allied Irish Banks plc, as plaintiff, against the defendant. The application arises in the following way.

2. On 17th July, 1995, by order of the High Court (Laffoy J.) it was declared that the principal monies secured by an equitable mortgage created by a deposit made on 9th August, 1989, by the defendant with the plaintiff of the land certificate to folio 14365 in the County of Laois, together with interest and costs stand well-charged on the defendant's interest in the said lands and premises. Findings were made as to the amount then owing, liberty was given to the defendant to dispute the amount and the order then provided:

> "AND IT IS ORDERED that in default of the defendant so disputing the said sum within the time aforesaid and in default of payment to the Plaintiff of the said some together with further interest on the principal sums of £32,967.78 and £45,242.53 at current Bank rates until payment and the costs hereinafter awarded within three months from the date of service aforesaid that the said lands and premises be sold at such time and place subject to such conditions of sale as shall be settled by the Court and the following Account and Inquiry are to be taken and made in the Examiner's Office namely:-
>
> No. 1 An Account of all incumbrances subsequent as well as prior to and contemporaneous with the Plaintiffs demand
>
> No. 2 An Inquiry as to the respective priorities of all such demands as shall be proved."

3. Notice to proceed was issued by the plaintiff in the Examiner's office on 2nd October, 1997.

4. Court counsel were briefed to advise on title and draft particulars and conditions of sale; an auctioneer was appointed as Court auctioneer. The plaintiff's claim against the defendant was settled prior to any further steps being taken.

5. No advertisement for incumbrancers had been placed prior to the settlement between the plaintiff and the defendant.

6. In preparation for an application to discharge the order of 17th July, 1995, on 12th August, 2008, the solicitor for the plaintiff wrote to the incumbrancers then appearing on an up-to-date copy of folio 14365. These were the holders of three judgment mortgages. The plaintiff then brought an application to have the well-charging order of 17th July, 1995, and order for sale discharged. Two of the incumbrancers had indicated that they had no further interest in pursuing the matter. The notice party, Mr. Roe, who is the holder of a judgment mortgage registered in respect of a judgment obtained in the sum of IR£26,139 on 14th October, 1993, was put on notice of the application.

7. The notice party has applied by motion dated 19th December, 2008, pursuant to O.33, r. 8 of the Rules of the Superior Courts for an order directing the sale of the defendant's interest in lands and premises comprised in folio 14365 of the Register of Freeholders, County of Laois, and, if necessary, a consequential order substituting the notice party for the plaintiff in the proceedings. This judgment is given on that application.

8. I heard the application of the notice party in these proceedings immediately before a similar application brought by the notice party in 1996, No. 371 SP between Allied Irish Banks plc, plaintiff, James Vickers and Catherine Vickers, defendants, and Andrew J. Brennan, notice party. In each set of proceedings, the notice party is a judgment mortgagee whose claim pursuant to the judgment was not statute-barred at the date of the well charging order and order for sale, but would probably now be statute-barred pursuant to the provisions of the Statute of Limitations 1957 (as amended) if the notice parties were to institute new proceedings seeking well charging orders and orders for sale. In both cases, no advertisement for incumbrances had been placed and the notice parties had not come in and proved in the proceedings. The legal submissions made by the defendants and notice parties in both sets of proceedings were similar but not identical.

9. The principal issue in both applications is whether the Court does now have jurisdiction under O. 33, r. 8 to make an order in favour of the notice parties and, if so, whether their claims should now be regarded as statute-barred so as to preclude the making of an order for sale.

10. There is a second issue, which is that even if the claims of the notice parties pursuant to the judgment mortgages are not now statute-barred, whether O. 33, r. 8 gives the Court a discretion and, if so, whether that discretion should be exercised in favour of the notice parties. If this arises, it may turn on the facts of the individual applications.

11. This judgment, while based upon the facts of this case, takes into account in the legal analysis of the primary issue the submissions made in both sets of proceedings. I propose delivering a separate judgment in 1996 No. 371 SP subsequent to the delivery of this judgment.

12. Counsel for the defendants and notice parties in each set of proceedings prepared detailed and helpful legal submissions for this Court which they supplemented by oral submissions at the hearing. The issues raised on the applications in relation to the nature of the plaintiffs' claims in the proceedings, the effect of the proceedings and/or orders for sale for the notice parties who were unaware of the proceedings, and the inter-relationship between the proceedings and orders for sale in accordance with case law (most of which dates from the 19th Century), and the Statute of Limitations 1957, as amended, are complex. Since hearing the applications, I have considered in great detail the issues raised, the authorities referred to and cases referred to in those authorities but not necessarily opened before me. Insofar as I have considered the latter, I formed the view that they do not raise any new issue which was not addressed in submissions and which required me to re-list the applications for further submissions. However, some of those decisions are relevant to the final views which I have formed.

13. There is no judgment since the passing of the Statute of Limitations 1957, which deals with the issues raised. As will appear from this judgment, the decisions made during the 20th Century are limited and do not contain any analysis of certain of the issues raised in relation to the application of any limitation provisions analogous to, in particular, ss. 33 and 38 of the Statute of Limitations, 1957.

14. It is important to note, prior to considering the issues in dispute, that it is agreed in accordance with the decision in *Johnson v. Lowry* [1900] 1 I.R. 316, that the right of action of the notice party to enforce the judgment mortgage by a well charging order and order for sale accrued on the date of judgment and not the later date of registration of the judgment mortgage and the reason for this decision.

15. In *Johnson v. Lowry*, there was a gap of almost five years between the date of judgment and the date of creation of the judgment mortgage. The judgment mortgagee sought a well charging order and order for sale. The proceedings were commenced more than twelve years after the date of judgment but within twelve years of the date of registration of the judgment mortgage affidavit.

16. In *Johnson v. Lowry*, it was held, initially, that the Statute of Limitations ran from the date of registration of the judgment mortgage. On appeal, the Court of Appeal reversed the decision and held that it ran from the date of judgment. The underlying reasoning is succinctly stated in a short concurring judgment of Holmes L.J. at p. 323, where he stated:

> "I concur, for reasons which can be stated very briefly. Where a judgment is registered as a mortgage, the debt is due upon the judgment, and the effect of registering it under the statute is only to supply machinery by which it can be enforced against a certain portion of the debtor's property. Once the judgment is satisfied, or if for any reason the debt cannot be recovered, the judgment mortgage ceases to operate. Here the judgment debt is barred by the Statute of Limitations, and the remedy under the mortgage is barred with it."

It is relevant to the later analysis that, in accordance with the above, once, for any reason, the debt cannot be recovered, the judgment mortgage ceases to operate.

17. Subsequent to the registration of the judgment mortgage, the notice party took no steps to recover the debt due to him or enforce the judgment mortgage. Further, he was unaware of these proceedings or the fact that the plaintiff had obtained an order for sale of the lands over which he had registered a judgment mortgage.

18. The submission of the notice party that he is entitled to an order pursuant to O.33, r. 8 of the Rules of the Superior Courts and that his claim to enforce his judgment mortgage by a sale of the defendant's lands is not statute-barred, is primarily based upon the decision of O'Connor M.R. in *Harpur v. Buchanan* [1919] 1 I.R 1. He submits that, as decided therein, the order for sale, made herein in 1995, was for the benefit of all incumbrancers, including the notice party, and as a result he is within O. 33, r. 8 and the Statute of Limitations ceased to run against the notice party from the date of the order for sale.

19. Counsel for the defendant relies upon the wording of O. 33, r. 8 of the Rules of the Superior Courts and submits that it only applies to an incumbrancer who has proved in the proceeding and thus not the notice party. He also relies upon the express provisions of the Statute of Limitations in ss. 32 (2)(a), 33 and 38 according to which he submits the notice party's claim to enforce his judgment mortgage is now statute-barred. He makes a number of differing submissions in relation to the decision in *Harpur v. Buchanan*. He submits, first that it does not apply to the notice party, when properly understood in the context of all the relevant prior and subsequent decisions, as the notice party at the date of this application is not an incumbrancer who has come in and already proved in these proceedings and is not seeking to claim against proceeds of sale. He also submits that it does not appear from the decision in *Harpur v. Buchanan* that any provision of a Statute of Limitations analogous to ss. 33 or 38 of the Act of 1957, were brought to the attention of O'Connor M.R. in that case and that if the Court were to apply the decision in *Harpur v. Buchanan* to the facts of this case, as contended for by the notice party, that it would be contrary to the express provisions of ss. 33 and 38 of the Statute of Limitations 1957, which must now be applied. If necessary, he submits that the Court should not now follow the decision in *Harpur v. Buchanan*.

20. In *Harpur v. Buchanan*, the plaintiff obtained on 18th July, 1910, a declaration that the mortgage was well charged upon lands and they were ordered to be sold. There was also an order directing an inquiry as to what charges and incumbrances affected the land subsequent as well as prior to or contemporaneous with the plaintiff's demand. The defendant had mortgaged the lands to Mr. Buchanan on 20th May, 1902. No payment for either principal or interest was

ever made. Mr. Buchanan made a claim in the proceedings for principal and interest. At the date he made the claim, more than twelve years had elapsed from the date upon which the mortgage debt had become due. The claim was disallowed in the certificate made up by the chief clerk (the then equivalent of the current procedure before the Examiner).

21. On appeal to the Court, O'Connor M.R. allowed the claim for the principal sum, with six years arrears of interest prior to the date of commencement of the plaintiff's action.

22. The conclusion reached by O'Connor M.R. in *Harpur v. Buchanan*, at p. 4, was that the then action in Ireland by a mortgagee is, "for a sale of lands and a distribution of the proceeds of sale among all the incumbrancers who have claims upon them. In such an action each incumbrancer is entitled to regard it as an action brought in his interest as well as in the interest of the plaintiff". Earlier in the judgment, at p. 3, he had explained the way in which he understood the mortgagee's suit to be a suit on behalf of all the incumbrancers, "in the sense that all the incumbrancers must be ascertained and paid out of the proceeds of sale so far as they go". He also referred to the decision in *Archdall v. Anderson* 25 L.R. Ir. 433, where the Vice Chancellor said, "he was of opinion that the action enured for the benefit of all incumbrances coming in and obtaining payment under the proceeding, just as in cases of a creditor suing on behalf of himself and all other creditors". O'Connor M.R. appears to have placed reliance upon the analogy with a creditor's administration suit then regarded as being one on behalf of all creditors in accordance with the principle in *Sterndale v. Hankinson* 1 Sim. 393.

23. *Harpur v. Buchanan* was considered by Black J. in the *Royal Bank of Ireland Ltd. v. Sproule* [1940] Ir. Jur. Rep. 33. That case concerned an application by a plaintiff in a mortgagee suit to discontinue the proceedings after the property had been sold out of Court and its debt had been discharged in full. It does not appear that there were any other incumbrancers. If it were a creditor's administration suit, it was accepted that the plaintiff could not discontinue. The issue was whether or not a similar principle applied to the mortgagee suit. The judgment records that there was no reported precedent on the right of a plaintiff mortgagee to discontinue. Black J. stated, at p. 34, "*Harpur v. Buchanan,* at first sight seems to put a creditor's administration suit and a mortgagee suit on a par. But this is really only in the sense that the former is on behalf of all the creditors and the latter is on behalf of the incumbrancers enuring for the benefit of all those coming in and obtaining payment under the proceeding". Black J. then referred to the position in *In Re Alpha Co. Ltd*. [1903] 1 Ch. 203, a debenture-holder's action, where the plaintiff sued on behalf of all debenture-holders and was permitted to discontinue, and stated at p. 34:

> "There seems to be no reason why in a mortgagee's suit the plaintiff, in circumstances like the present, should not discontinue, just as a debenture-holder plaintiff was allowed to discontinue in *In Re Alpha Co*."

24. Counsel for the defendant herein accepts that there were no other incumbrancers in the *Royal Bank of Ireland Ltd. v. Sproule.* Nevertheless, he relies upon that decision as explaining the decision in *Harpur v. Buchanan* in the sense for which he contends, namely, that insofar as it was held that the mortgagee's suit is an action on behalf of all incumbrancers, it is only on behalf of all the incumbrancers coming in and claiming payment under the proceeding.

25. Counsel has also drawn my attention to the decisions in *Re Nixon's Estate* (1874) 9 Ir. R. Eq. 7 and the earlier decision of *Re Colclough* (1858) 8 Ir. Ch. R. 330 considered therein. These decisions do not appear to have been opened to O'Connor M.R. in *Harpur v. Buchanan*. *Re Colclough* was an appeal from the Incumbered Estates Court and *Re Nixon's Estate* from the Landed Estates Court. Each were petitions by incumbrancers for orders for sale where sales took place and a similar issue in relation to an objection to a claim by an incumbrancer to a share in the proceeds of sale by reason of the then Statute of Limitation. In *Re Colclough* it was held, similar to *Harpur v. Buchanan*, that the suit in the Incumbered Estates Court was an answer to the defence of the Statute of Limitations. That decision included the following statement of principle by the Lord Justice of Appeal (Blackburne L.J.) at p. 338:

> "I am clearly of the same opinion as the Lord Chancellor; and as this is the first time that one of the points has been brought forward (I allude to the question raised by the defence of the Statute of Limitations), it is right that our opinion should be stated; and that is, that where an order for a sale has been made, that order is to be considered as having been made on behalf of every person who has an interest in the proceeds of sale; and a party thus interested is therefore exonerated from the necessity of taking proceedings which might otherwise have been necessary. The suit in the Incumbered Estates Court in 1854 is therefore an answer to the defence of the Statute of Limitations, having regard to the fact that in 1835, this claim was an indisputable charge on the lands."

The relevant period under the Statute of Limitations was then twenty years. The commencement of the suit in the Incumbered Estates Court was within twenty years.

26. In *Re Nixon's Estates*, the Lord Justice of Appeal (Christian L.J.) considered in some detail the decision in *Re Colclough* and expressed a number of reservations. However, in application of what he termed "a proper judicial reserve", he determined to abstain from overruling it but stated that he was equally bound not to sanction or act upon it beyond the scope of its true *ratio decidendi*. In short, he determined the true *ratio decidendi* to be that it was the order for sale, rather than the commencement of the proceedings, which was a bar to a defence pursuant to the Statute of Limitations. His reasons for so concluding, in my view, are of considerable interest in attempting to marry the procedures in applications for orders for sale by incumbrancers or mortgagees, and the objections of the defendant pursuant to the Statute of Limitations 1957, as amended. Having quoted the above statement from the judgment of Blackburne L.J. in *Re Colclough* (concurring with the opinion of the Lord Chancellor Brady in the same case), Christian L.J. continued at p. 15:

> "Nothing could be more precise and explicit than that is, so far as it goes; but it is perhaps to be regretted that that great master of condensation did not, on this occasion, a little expand his proposition. If he done so, probably what we should have found would have been something to this effect: - The form of the order for sale is that the lands be sold for the purpose of discharging incumbrances thereon. Two things seem to be thereby adjudged - first, a conversion of the land into money; second, a distribution of that money among the incumbrancers, that is to say, among those whose claims *then*, i.e. at the date of the order, bind the land. So that when, after an interval which might be more or less, according to the delays of the Court, or of the party having carriage of the matter, a claimant against whom the twenty years had not run at the date of the order, but have run since, files his claim, or

> rather his objection to the omission of his claim from the schedule of incumbrances, that objection is not an 'action, suit, or other proceeding brought to recover a sum of money charged upon or payable out of any land or rents', but rather a complaint that he has not been placed in that position against the money fund which the order for sale had adjudged to all who were *then* incumbrancers. Thus, the question of the statute would be thrown back from the time of filing the objection to that of the order for sale - but not, as was Lord Chancellor Brady's notion, to the time of lodging the petition for sale. It is not to be wondered at that no authority for this was cited either by the Lord Justice, or by counsel in arguing the present case; for the question could never have arisen under the ordinary Chancery procedure, insasmuch as there they never decree a sale until after the account of incumbrances has been taken; whereas the peculiarity of these Irish special Land Courts has been that they order a sale first, and take the account of incumbrances afterwards. Such, however, I take to the *rationale* of the decision in *Colclough's Case*, that is to say, that it rests on the order for sale, and not on the lodging the petition, and it is in that sense that I now submit to and follow it."

27. It is interesting to note in the above analysis the reference to what was termed the "peculiarity" of the Irish special Land Courts insofar as "they order a sale first and take the account of incumbrances afterwards". This is, of course, the form of order made herein in accordance with long-standing practice in proceedings by a mortgagee or charge holder for a well charging order and order for sale and gives rise to the present difficulty. The analysis by Christian L.J. as to why an incumbrancer who makes a claim to be entitled to share in the proceeds of sale was not barred by the then Statute of Limitations is the only such analysis in all the judgments I have read. As appears, it turns on his conclusion that a claim by an incumbrancer against the money fund, i.e. the proceeds of sale, was not a proceeding barred by the wording of the then Statute of Limitations. That is not the claim now being made by the notice party who seeks an order for sale.

28. O'Connor M.R. in *Harpur v. Buchanan* undoubtedly took the view that the commencement of the proceedings by the plaintiff was for the benefit, *inter alia*, of Mr. Buchanan and that it stopped the Statute of Limitations running against Mr. Buchanan in respect of his claim as an incumbrancer to participate in the proceeds of sale as he allowed Mr. Buchanan recover interest for six years prior to the commencement of proceedings. This appears inconsistent with the decision of the Court of Appeal in *Re Nixon's Estate* which does not appear to have been opened to him. The reasoning in *Re Nixon's Estate* appears to me persuasive. Whilst *Re Nixon's Estate* was a petition for sale by an incumbrancer in the Landed Estates Court, I am satisfied that there is nothing in the form of that proceeding which makes the reservations expressed by Christian LJ therein not applicable to a mortgagee suit. If anything, the Court had a greater role in the sale in the Landed Estates Court as the Land Judges executed the conveyance to the purchaser. However, it is not necessary for me to determine for the purposes of these proceedings what is the relevant date for the Statute of Limitations for an incumbrancer who comes in and proves against proceeds of sale. I would expressly reserve my decision for a case where it is relevant whether, whether having regard to the Statute of Limitations 1957, it is now the position that an order for sale stops the Statute running against an incumbrancer who subsequently proves and claims in the distribution of the proceeds of sale. There appear to be arguments both ways.

29. The above and other authorities to which I was referred do not expressly consider the impact of an order for sale on the application of a Statute of Limitations (and obviously not the Act of 1957) to an incumbrancer who has not yet made a claim or proved in the proceedings and who, as a puisne incumbrancer, applies for or to take over an order for sale where the plaintiff's debt has been discharged and the plaintiff does not want to proceed with the sale. As the notice party relies on *Harpur v. Buchanan* it is necessary to consider what O'Connor M.R. intended when he stated at p. 3:-

> "A mortgagee suit is also a suit on behalf of all the incumbrancers in the sense that all incumbrancers must be ascertained and paid out of the proceeds of sale so far as they go."

On one view, O'Connor M.R. was stating that in a mortgagee suit once the plaintiff commenced the proceedings he was obliged to conduct them for the benefit of all incumbrancers, sell the property (presumably only if an order for sale was obtained), ascertain the incumbrancers and distribute the proceeds in accordance with the respective priorities. For the reasons set out below, this cannot be the effect of the current proceedings and probably not of those in *Harpur v. Buchanan*. I do not think O'Connor M.R. so intended.

30. Black J. in *Royal Bank of Ireland v. Sproule* [1940] Ir. Jur. Rep. 33 expressed his understanding of what was decided in *Harpur v. Buchanan* as being that the action enures "for the benefit of those coming in and obtaining payment under the proceeding". This appears more probable and is similar to the approach of the Court of Appeal in *Re Nixon's Estate*. This appears to assume that there is a sale and that incumbrancers come in and prove. I would respectfully agree that certainly, when both a sale takes place and incumbrancers claim or prove then the proceedings and/or order for sale enures for the benefit of such proving incumbrancers. However, what is the position if neither of these have happened as in the present proceedings?

31. The issues in dispute between the parties as to the proper scope of O. 33, r. 8, (and how it should be applied) *i.e.* whether or not it includes an incumbrancer of the lands the subject matter of the order for sale who has not yet proved in the proceedings, (and whether or not that person's right to claim an order for sale is now barred by the Statute of Limitations), depends at least in part upon an analysis of the obligations, if any, of a plaintiff to other incumbrancers in relation to the proceedings and the rights of other incumbrancers, such as the notice party, who may be unaware of the proceedings commenced by the plaintiff. I think it necessary to look at the position of the plaintiff and the other incumbrancers at different stages in a typical proceeding brought by a plaintiff, as a mortgagee or chargee, seeking, a well charging order and an order for sale such as the plaintiff in these proceedings. There appears to be potentially three different periods which need consideration:

> (i) From the date of commencement of the proceedings to the date upon which the order for sale comes into effect, and
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> (ii) From the date upon which the order for sale comes into effect until an advertisement for incumbrancers is published, and
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> (iii) Subsequent to the advertisement for incumbrancers.

32. While several of the judges in the decisions to which I have been referred have spoken of a mortgagee suit as being a suit for all incumbrancers, it does not appear to me that during the first period, prior to the order for sale, the plaintiff in such proceedings owes any obligation to any other incumbrancer nor does any other incumbrancer acquire any right by reason of the existence of the proceedings. During this period, the plaintiff is *dominus litis*, *i.e*. a person who has control over the action and can dispose of it as he sees fit. On the facts of this case, until at earliest the order for sale in the order of Laffoy J. of the 17th July, 1995, came into effect, it appears to me that the proceedings were proceedings brought by Allied Irish Banks plc for its own benefit and purely *inter partes* between it and the defendant in the sense that the plaintiff was at liberty at any time to compromise or discontinue the proceedings, without regard to the position of any person other than the defendant. Even in accordance with the express terms of the 1995 order, it was only in default of payment within three months of the date of service of the order that the court ordered that the lands be sold and the account and inquiries specified therein be taken.

33. This view is consistent with the decision in *Re Coloe's Estate* 25 L.R. Ir. 86 referred to below.

34. What then is the position between an order for sale coming into effect and the placing of an advertisement for incumbrancers? In considering this period, I am doing so in the context of the procedure and facts in this application. No order was made that the proceedings be served on any party. The Court has jurisdiction to do this under Order 15, rule 31. Further, no other party and, in particular, the notice party, had joined in the proceedings. In terms of parties, the proceedings remained proceedings between the plaintiff and the defendant. No other person has joined as a claimant or otherwise. However, a notice to proceed was served in the Examiner's Office. Certain steps were taken in preparation for a sale pursuant to the order for sale, but prior to the placing of the advertisement for incumbrancers the matter was settled between the plaintiff and the defendant. I am satisfied that there is nothing in any of the judgments referred to which suggests an obligation on a plaintiff, even after an order for sale becomes absolute, to proceed with the sale if it wishes to vacate the order for sale and discontinue. The decision in *Royal Bank of Ireland v. Sproule* [1940] Ir. Jur. Rep. 33, supports this view albeit in the absence of any other incumbrancers. If it is correct that even after an order for sale comes into effect a plaintiff is not under any obligation to continue with the proceeding, can it be said that an incumbrancer who was not notified of the proceedings, or the order for sale, has gained any actual rights as distinct from potential rights by reason of the order for sale coming into effect and and the steps before the Examiner. This may be answered by considering the following.

35. If, as in this case, the plaintiff and defendant by agreement apply to vacate the well charging order and order for sale and strike out the proceedings, does the fact that the order for sale has come into effect give an incumbrancer who has not yet proved or otherwise joined in the proceedings a right to be notified of the proceedings, order for sale and proposed application and a right to apply in the proceeding for an order for sale for the purpose of realising its debt? I have concluded that the answer to this question must be no. In reaching the above conclusion, I have taken into account those decisions to which I was referred in which Judges have stated that an order for sale is made for the benefit of all incumbrancers. However, on a careful reading of those judgments, the benefit identified appears to have been that those incumbrancers who came in and proved in the proceedings were entitled to be paid in accordance with their respective priorities out of the proceeds of sale (if any). I have added the words "if any" because it seems to me that this was not being referred to as an absolute entitlement in the sense of there being an obligation on the plaintiff to proceed with the sale but, rather, that if the properties were sold pursuant to the order of the Court, then a proving incumbrancer was entitled to participate in the proceeds of sale in accordance with the respective priorities. In *Re Colclough, Re Nixon's Estate and Harpur v Buchanan*, at the time of the judgments, the sales had taken place and the incumbrancers had proved. Insofar as the judgments refer to the separate benefit of an order for sale stopping time running for the Statute of Limitations, it again only appears to me to relate to the incumbrancer's entitlement to prove in the proceeding and participate in the proceeds of sale. It does not appear to me that any of the authorities to which I have been referred determined that an order for sale should be considered as enuring, for the benefit of incumbrancers, in the sense of giving them rights if the plaintiff decided not to proceed with the sale prior to the incumbrancers being invited to prove in the proceedings.

36. In reaching this conclusion, I have also considered the decision in *Re Coloe's Estate* 25 L.R. Ir. 86, referred to above which might appear contrary to the view I have formed. That was a judgment given in an application brought by a third incumbrancer for an order that the solicitor having carriage of the proceedings should proceed to prosecute the proceedings and that the first incumbrancer be restrained from attempting to sell without the agreement of the third incumbrancer or otherwise than in accordance with the Court order. The proceedings had been brought by the second incumbrancer as petitioner. It appears that in the then procedure, the practice was to make a conditional order for sale. Thereafter, there was a period for objections and, if none were made or any objection was dismissed, a petitioner then applied for an absolute order for sale. After the conditional order, the first incumbrancer had asked the petitioner not to proceed in Court as it proposed to sell out of Court. The petitioner agreed and the order for sale was not made absolute. The third incumbrancer then brought an application objecting to the sale out of Court, seeking, *inter alia*, the orders referred to above. In a short judgment, Monroe J. at p. 88 stated:

> "As far as I am aware this is the first instance of an application of this kind being made in this Court. There is no reported case of such a character, and I have never heard of one. The petitioner filed his petition, and it could not be contended but that, if he had come in here, his conditional order not having been made absolute, and had asked to have his petition dismissed, he would have been entitled to have it dismissed as a matter of course. The reason for this is obvious. As long as the order is conditional only, it is a matter simply between two parties; but when the order is made absolute, it is so made for the benefit of all parties, and is followed by various important consequences, as, for instance, the prevention of the Statute of Limitations from running against any incumbrancer whose charge is ultimately payable out of the funds in Court. But in this case, even if the conditional order had been made absolute, I should have had no hesitation in stopping the proceedings, and giving the first incumbrancer permission to sell out of Court, because it is clear from the evidence that the premises are in danger of eviction, and that the renewal of the licence would be imperilled by delay. For these reasons I must refuse the application, with costs."

Insofar as Monroe J. was expressing views about the position once an order for sale was made absolute, he would appear to be doing so *obiter* as the order in that case had not yet been made absolute. However, as with a number of judges, insofar as he states that the absolute order is made for the benefit "of all parties", the consequence which he cites is the prevention of the Statute of Limitations running against incumbrancers "whose charge is ultimately payable out of the

funds in Court". He is again referring to incumbrancers who come in and prove and not to the position before they do so.

37. In forming the above view, I am aware that it has been the practice for some time in the Examiner's office to direct a plaintiff who, after the notice to proceed has been served and before the advertisement for incumbrances, wishes to apply for an order vacating the order for sale to give notice to all incumbrancers appearing on searches. It appears that this practice may have commenced in the late 1980s when efforts were made to require plaintiffs to deal with a significant number of old cases which simply remained in the Examiner's list without either a sale of the property or an application to vacate or discharge the primary orders and strike out the proceedings. Notwithstanding the practice, it does not appear that there is any decision recording a judicial view that an incumbrancer who had not yet proved in, or otherwise become a party to, the proceedings, has a right to prevent a plaintiff and defendant, by agreement, applying to vacate or discharge the primary order, and have the proceedings struck out.

38. Once the advertisement for incumbrancers has been placed and, one or more incumbrancers have come in and proved in the proceedings within the time specified, then the position would appear to change. There are no longer only the plaintiff and defendant participating in the proceedings. If the sale proceeds, then those incumbrancers who prove benefit under the order for sale in the sense that they are entitled to participate in the proceeds of sale in accordance with their determined priority. If, however, the plaintiff then determines not to proceed with the sale either by reason of the discharge by the defendant of the debt due to the plaintiff or some other reason, it would appear that the incumbrancer who has proved is still not entitled to require the plaintiff to proceed with the sale but does have a right to apply in the proceedings pursuant to O. 33, r. 8 for an order for sale and (if necessary a well charging order) and that the proceeds of sale be applied, *inter alia*, for its benefit. This was the decision in *Munster and Leinster Bank v. Mackey* [1917] 1 I.R. 49. That was an application by a puisne incumbrancer that the suit be continued by the original plaintiff, the first incumbrancer, who had been paid in full and who was stated no longer to have any interest in the suit against the personal representative of the defendant, a mortgagor, who had died. Part of the lands had been sold and the plaintiff paid off and the balance paid to the applicant puisne incumbrancer in part discharge. The applicant puisne incumbrancer must therefore have proved in the proceedings by the time of this application. O'Connor M.R. at p. 50, stated:

> "The plaintiff having been satisfied, does not wish to continue the proceedings. I think that the defendant's proper course is to take out a summons that the suit be continued in the name of himself as plaintiff against the personal representative of the defendant . . ."

Order XXXIII, r. 8 of the 1905 Rules, which is in substantially similar form to O. 33, r. 8 of the current Rules of the Superior Courts, is not referred to in the judgment of O'Connor M.R. However it appears from the report of argument in the Irish Reports that it was relied upon by counsel for the applicant in submission. This decision is, I believe, the origin of the normal form of order made where an application is brought by an incumbrancer under Order 33, rule 8. Notwithstanding the terms of the rules set out below, the practice has been not to make a fresh order for sale, but to make a well charging order, if necessary, having regard to the nature of the incumbrance held by the applicant incumbrancer and to substitute the applicant incumbrancer for the plaintiff in the proceedings. The sale then continues pursuant to the original order for sale. It may be necessary in an appropriate case to consider whether this is the proper form of order. It is not necessary on the facts of this case.

39. Order 33, rule 8 appears consistent with the conclusions I have reached on the distinction between the position of an incumbrancer before proving and thereafter. It must be considered in the context of Order 33, rule 7. These provide:-

> "7. A judgment or order for an account given or made on behalf of an incumbrancer shall direct an account to be taken of all incumbrances subsequent as well as prior to, or contemporaneous with the plaintiff's demand, and an inquiry as to the respective priorities of all such demands as shall be proved; and when any surplus produce of any sale, had under such judgment or order, after payment of the demands and costs of the plaintiff, and prior and contemporaneous incumbrances shall remain in Court, the same shall be distributed amongst the incumbrancers who may have proved their demands in the cause, according to their priorities, if the Court shall so order: Provided always, that if the Court shall be of opinion that extending the account to incumbrances subsequent to the demand of the plaintiff will improperly delay the plaintiff in recovering his demand, the account shall be confined to the rights of the plaintiff and of incumbrancers prior to and contemporaneous with him.
>
> 8. Any incumbrancer subsequent in order of priority to the demand of the plaintiff, in case any lands or property the subject of such suit shall remain unsold, after provision for the plaintiff's demands and those of prior incumbrancers, shall be at liberty to apply to the Court for an order directing a sale of such unsold lands or property, or a competent part thereof, for payment of the demands subsequent to that of the plaintiff, which may have been proved as aforesaid; and the Court may accordingly direct such sale, if of opinion that such incumbrancers, or any of them, would be entitled to have their demands raised by a sale of such lands or property; or may direct a receiver to be appointed or continued over such unsold land or property, for the benefit of such subsequent incumbrancers and distribute the funds to be received by such receiver accordingly."

40. I am satisfied that counsel for the defendant herein is correct in his submission that O. 33, r. 8, in its terms, only applies to an incumbrancer who has already proved in the proceeding prior to the date upon which the application is brought. As appears from the wording of the rule, the application envisaged by rule 8 is an application by an incumbrancer for an order directing a sale of unsold lands "for payment of the demands subsequent to that of the plaintiff which may have been proved as aforesaid" (emphasis added). The reference to "which may have been proved as aforesaid" is a reference to proof under the preceding rule 7. The later part of the rule provides that the Court may make such an order if it is of opinion that the applicant incumbrancer and any of the incumbrancers "would be entitled to have their demands raised by a sale of such lands …." As the notice party herein is not an incumbrancer who has proved, I will leave over the issue as to the date upon which this requires the Court to form the view that the applicant incumbrancer who has proved would have been entitled to an order for sale. Such dates potentially include the date of the order for sale, the date upon which it came into effect, the date upon which the incumbrancers claimed in the proceedings or the date of application.

41. Order 33, rule 8 is consistent with the absence of any obligation on a plaintiff to proceed with an order for sale even where incumbrancers have proved in the proceeding. It provides, in the alternative, a procedure by which as is sometimes

said the incumbrancers who has proved may take over carriage of the order for sale. The underlying fairness and purpose of this rule would seem obvious. If a plaintiff whose debt has been discharged is not obliged to proceed with the sale for the benefit of other incumbrancers who have proved in the proceeding, then such incumbrancers as persons who have already participated by making a claim in the proceeding, should be entitled in the existing proceeding to proceed with the sale provided, of course, they are at the relevant date entitled to have their debt realised out of the sale. An incumbrancer who had proved in the proceeding might well have decided not to commence separate proceeding and if he were not permitted to do so might have permitted his claim to become statute-barred. He may also have incurred costs in proving his claim.

42. Order 33, rule 8 appears to have existed substantially in this form since the Rules of the Supreme Court (Ireland) 1905. Interestingly, the notes to the 1905 Rules in Wylie's Judicature Acts, 1906, at p. 519, indicate that O. XXXIII, r. 7 and 8 of the 1905 Rules had no equivalent in the then English Rules of Court as had many of the other rules in Order XXXIII. They appear to have been novel and directed to the Irish procedure of taking an account of incumbrances after the making of the order for sale.

43. I have considered whether there is any basis for contending that, notwithstanding the express terms of O. 33, r. 8, a person who was an incumbrancer at the date the order for sale came into effect but has not yet proved is a person to whom the rule is intended to apply. From the analysis I have made above of the position of an incumbrancer who has not yet made a claim or proved in the proceedings, there does not appear to be any basis for such a general view. There may be certain circumstances in which an incumbrancer who was already joined as a party to the proceedings or participated in some way, though has not formally proved might be considered as coming within the rule. It does not arise on the facts of this case, but I do not wish by my decision to be excluding same.

44. Accordingly, I have concluded that the notice party is not a person entitled to an order pursuant to Order 33, rule 8.

45. The notice party did not contend that the Court has an inherent jurisdiction to consider an application from an incumbrancer who is not already a party to the proceeding or who has not yet proved in the proceeding for an order for sale of the lands, the subject matter of the order for sale obtained by the plaintiff, and to take over the proceeding in the name of the plaintiff. However, in case I am incorrect in my construction of O. 33, r. 8, or it were to be contended that the Court did have such an inherent jurisdiction, it appears to me that I should consider the submissions as to the basis upon which the Court should exercise that jurisdiction and in particular whether the notice party is now barred by reason of the Statute of Limitations, 1957 and in particular ss. 32(2)(a), 33 or 38 thereof, from now obtaining such an order.

46. It follows from my earlier analysis that the notice party as an incumbrancer who has not yet proved is not, in my view, a person who, at the date of this application, was entitled to the benefit of either the plaintiff's proceeding or the 1995 order for sale. At most, he is a person who may potentially have benefited either from the proceeding or the order for sale if the plaintiff had advertised for incumbrances and if he had made a claim within the time specified in any advertisement. If the provisions of O. 33, r. 8 apply to him, or the Court were to exercise an inherent jurisdiction on an analogous basis, then in accordance with its terms the Court must be of opinion that the notice party would be entitled to have his demand, *i.e*. his judgment debt, raised by a sale of the land as he has not yet proved in the proceeding and therefore there has been no adjudication that his purported judgment mortgage is a valid charge on the land in folio 14365 County Laois. Where the applicant incumbrancer has not yet proved that issue must be determined, it appears to me, at the date of the current application. On my analysis as the notice party has not yet proved he is not yet entitled to the benefit of the 1995 Order. For the reasons already stated the *ratio* of the cases referred to on the earlier Statutes of Limitations is confined to incumbrancers proving against proceeds of sale and do not consider an application for a well charging order and order for sale by an incumbrancer who has not proved . Considering that claim on a current basis gives rise to two issues. First, is it barred by some or all of the sections of the Statute of Limitations relied upon by the defendant? Secondly, did the commencement of these proceedings by Allied Irish Banks plc, or the making of the order for sale preclude in some way the application of the relevant section of the Statue of Limitations which bars the claim? The relevant sections are ss. 32(2)(a), 33 and 38 which provide:

> "32 (2) The following provisions shall apply to an action by a person (other than a State authority) claiming the sale of land which is subject to a mortgage or charge: -
>
> (a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it, or, if it first accrued to some person through whom he claims, to that person."
>
> (b) …(not relevant)…
>
> "33. - At the expiration of the period fixed by this Act for a mortgagee to bring an action claiming sale of the mortgaged land, the title of the mortgagee to the land shall be extinguished."
>
> "38. - At the expiration of the period fixed by this Act for a mortgagee of land to bring an action to recover the land or for a person claiming as mortgagee or chargeant to bring an action claiming sale of the land, the right of the mortgagee or such person to the principal sum and interest secured by the mortgage or charge shall be extinguished."

47. Counsel for the defendant sought to rely on s. 33, and s. 38 in particular. Reliance upon s. 33 appears to me to be misplaced as the notice party is a judgment mortgagee of registered land. As such, he has no title to the registered land and therefore there is no title to be extinguished pursuant to section 33.

Section 38 is relevant. This provides that the principal sum (*i.e*. the judgment) and interest secured by the charge shall be extinguished at the expiry of the twelve years referred to in section 32(2)(a). This period has now expired. Counsel for the notice party submitted that the section should not be applied literally. He took the example of proceedings which were commenced a short period prior to the expiry of the twelve years referred to in s. 32(2)(a) but where the hearing did not come on until after the expiry of the twelve years. He pointed out, correctly in my view, that at the date of the hearing if s. 38 were applied literally the right of the mortgagee to the principal sum and interest would by then be extinguished. He also, in my view, correctly submitted that the combined provisions of s. 32(2)(a) and 38, do not intend a mortgagee who commences proceedings within twelve years to be prevented from obtaining relief to which he would

otherwise be entitled simply by reason of the fact that the hearing date is after twelve years and, on a literal interpretation of s. 38, his right to the principal sum was then extinguished. However, it appears to me that the true reason for which s. 38 does not preclude recovery in those circumstances is that a Court will normally (although there are of course exceptions) determine a plaintiff's claim in accordance with the position between the parties at the date of commencement of the proceedings. Hence provided the mortgagee's right to the principal sum and interest is not extinguished at the date of commencement of the proceedings he continues to be entitled to the relief to which he may otherwise be entitled.

48. The notice party seeks by analogy to assert that he should be entitled to have his position determined at either the date of the commencement of these proceedings or the date of the order for sale. It does not appear to me that there is anything either in the nature of the proceedings commenced by Allied Irish Banks plc, the order for sale made by Laffoy J. in 1995 or the judgments referred to or the provisions of the Statute of Limitations, which would permit such a construction. The notice party, as a person who was totally unaware of the proceedings and the order for sale, did not assert any reliance on them or prove in the proceedings and only became aware of them because he was expressly notified in the context of an application to vacate the order for sale, and so cannot be considered as a person who has participated in these proceedings either as a proving incumbrancer or pursuing a claim against the defendant such that it would entitle him to have his claim determined at any date earlier than the date upon which he applied under O. 33, r. 8 for an order for sale. If the Court makes an order under O. 33, r. 8, on the application of a judgment mortgagee, then it must make a well charging order prior to being entitled to make an order for sale. This is required to enforce a judgment mortgage: *Irwin v. Deasy* [2006] I.E.H.C. 25, Laffoy J.

49. Accordingly, I have concluded even if the notice party is a person entitled to make an application in these proceedings for an order for sale pursuant to O. 33, r. 8, or this Court has an inherent jurisdiction to exercise an analogous jurisdiction on an application from an incumbrancer who has not yet proved, it does not appear to me that I could grant the order sought as the notice party has failed to establish that he was at the date of his application entitled to have his judgment debt raised by a sale of the lands. The judgment debt is extinguished by s. 38 of the Act of 1957, and in accordance with the decision in *Johnson v. Lowry* [1900] 1 I.R. 316 the judgment mortgage ceases to operate.

50. I should add that, if contrary to the conclusions reached above on the application of O. 33, r. 8 and the Statute of Limitations to the notice party, the Court does now have a discretion pursuant to O. 33, r. 8 to direct a sale for payment of the demands of the notice party and other incumbrancers subsequent to that of the plaintiff, I would exercise that discretion against making any such order for sale. The reason for which I would do so is that the notice party obtained judgment against the defendant on 14th October, 1993, and registered the judgment mortgage over folio 14365 County Laois in December 1993. It is common case that no steps have been taken since that date by the notice party to seek to enforce the judgment debt or judgment mortgage or to recover in any way the sums found to be due and owing in 1993 by the defendant to the notice party. Further, it is common case that the notice party was unaware of the plaintiff's proceedings against the defendant. It is agreed that were it not for what from the notice party's perspective, is the lucky chance that the plaintiff had brought proceedings against the defendant which resulted in an order for sale in 1995, in respect of a debt which has subsequently been settled by the defendant, and which has not been discharged, the notice party would not now be entitled to proceed against the defendant to recover his judgment debt by reason of the Statute of limitations. The defendant has discharged the plaintiff who is now satisfied to vacate the order for sale. It appears to me, in those circumstances, it would be unjust to direct a sale for the purpose of enabling the notice party realise a debt which is otherwise not now recoverable.

51. Accordingly, I will refuse the application of the notice party. It follows that on the plaintiff's application there will be an order vacating the well charging order and order for sale of 17th July, 1995, and, subject to hearing an application in relation to the costs of this application an order striking out the proceedings.

52. It appears to follow from the above judgment that it may not be appropriate to continue the existing general practice in the Examiner's office of requiring a plaintiff, who wishes to obtain an order discharging the primary well charging order and order for sale and strike out the proceedings to notify incumbrancers in circumstances where there has been no advertisement for incumbrances and no incumbrancer has otherwise already participated in the proceeding. It may be that facts of individual cases may require an incumbrancer who has not proved to be put on notice. This observation is subject to any appeal taken against this judgment or the other judgment I am delivering today.