

THE HIGH COURT

1996 371 SP

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

JAMES VICKERS AND CATHERINE VICKERS

DEFENDANTS

AND

ANDREW J. BRENNAN

NOTICE PARTY

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

1. The plaintiff obtained an order on 18th November, 1996, declaring that the principal monies secured by its equitable mortgage created by a deposit of title documents stood well charged on the defendants' interest in lands in folio 275 County Wicklow. The order declares the amount due; provides for the defendants to come in and dispute the sums declared; and, in default of dispute and payment within three months, orders the sale of the lands and the usual account and inquiry as to incumbrances and their respective priorities.

2. The defendants did not pay the amount within the three months and the plaintiff proceeded in the Examiner's office. However, prior to any advertisement for incumbrances, the defendants settled the plaintiff's claim. By notice of motion dated 22nd October, 2008, the plaintiff seeks an order discharging the well charging order and order for sale of 18th November, 1996 and striking out the proceedings.

3. The up to date folio 275 County Wicklow reveals three judgment mortgages registered against the first named defendant's interest in the lands. One of these is a judgment mortgage registered by the notice party in respect of a judgment obtained on 22nd February, 1991, in the sum of IR£10,050. The remaining two are in respect of judgments obtained on 19th August, 1991, and 16th July, 1990, respectively. All three judgment mortgagees were put on notice of the plaintiff's application.

4. The notice party filed two affidavits and has applied to take over the order for sale. It is common case that the application is made pursuant to O. 33, r. 8 of the Rules of the Superior Courts.

5. The application was heard immediately after the similar application by the notice party in *Allied Irish Banks plc. v. Dormer* [1995 233 SP] in which I have delivered judgment today.

6. The facts of this application are similar to those in *Allied Irish Banks plc. v. Dormer*, insofar as, at the date of the notice party's application, it was more than twelve years since the date of judgment of the notice party in respect of which the judgment mortgage is registered; no advertisement for incumbrances was published; the notice party had not proved as an incumbrancer or otherwise participated in these proceedings prior to making the current application; and the notice party took no other steps to recover its judgment or enforce the judgment mortgage prior to being notified of the plaintiff's proposed application to discharge the 1996 order in June 2008.

7. For the same reasons set out in the judgment delivered today in *Allied Irish Banks plc v. Dormer*, I have concluded that the notice party is not a person to whom O. 33, r. 8 applies as he is not an incumbrancer who has proved in the proceedings. Further, if the Court has an inherent jurisdiction to make an order in favour of an incumbrancer who has not yet proved in proceedings on a basis analogous to O. 33, r. 8, it does not appear to me, by reason *inter alia* of ss. 32 and 38 of the Statute of Limitations 1957 that the notice party herein is now a person who is entitled to an order for sale for the purpose of enforcing the judgment mortgage registered in respect of the judgment debt obtained in 1991. Further, even if as a matter of law I am wrong in that conclusion, I would not now exercise my discretion in favour of making an order for sale in favour of the notice party for the same reasons as set out in *Allied Irish Banks plc v. Dormer* having regard to the length of time which has elapsed since the notice party obtained judgment and registered its judgment mortgage and the absence of any steps taken to enforce same.

8. For the avoidance of any doubt into the future, I wish to make clear that there may be a further obstacle to the notice party obtaining an order for sale on this application, which I had adverted to in the course of the hearing but had indicated that if it became relevant I would give the parties a further opportunity of addressing same as it had not been raised by the defendants. The defendants appear to be the persons entitled to be registered as co-owners of the property in folio 275 County Wicklow pursuant to a Deed of Transfer dated 31st July, 1989, from the registered owner, Michael Herbst. The notice party's judgment is only against the first named defendant, James Vickers, and the judgment mortgage is only against the interest of the first named defendant in the lands described in folio 275 County Wicklow.

9. The 1996 order for sale is an order for the sale of both defendants' interest in the property in folio 275 County Wicklow. The notice party would only be entitled to enforce his judgment mortgage against the first named defendant's interest. There is no application for sale *in lieu* of partition. Further, and more importantly, in *Irwin v. Deasy* [2006] IEHC 25 Laffoy J. determined that the Court does not have jurisdiction to make an order for sale *in lieu* of partition of registered land co-owned by two persons on the application of a judgment mortgagee whose judgment mortgage is registered against the

interest of only one of such persons.

10. By reason of the view which I have formed, irrespective of the complication of co-ownership, it is now unnecessary to put the matter back in for further argument before the parties having regard to the co-ownership issue.

11. Accordingly, I will dismiss the application of the notice party and on the plaintiff's application make an order discharging the well charging order and order for sale of 18th November, 1996, and, subject to the question of costs of this application, intend making an order striking out the proceedings.