Neutral Citation: [2012] IEHC 352

THE HIGH COURT

[1996 No. 217 SP]

IN THE MATTER OF THE REGISTRATION OF TITLE ACT 1964

BETWEEN

IRISH NATIONWIDE BUILDING SOCIETY

AND

PLAINTIFF

PATRICK RAFTERY PATRICIA RAFTERY

DEFENDANTS

Judgment of Mr. Justice Hedigan delivered on 9th day of August, 2012.

1. On the application of the plaintiff the Irish Bank Resolution Corporation was substituted as plaintiff herein. The plaintiff is the successor in title to the Irish Nationwide Building Society. The defendants are husband and wife and reside at 14, Clonbracknagh Court, Roscommon, County Roscommon.

2. The plaintiff seeks possession of the above house pursuant to an indenture of mortgage dated the 12th November, 1992 and made between the defendants as mortgagor of the one part and the Irish Nationwide Building Society as mortgagee of the other part whereby it was agreed that:

> (i) the defendants covenanted to repay a loan of IR£69,000 with interest thereon;
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> (ii) in order to secure the payment of the said monies, the defendants charged onto the plaintiff their interest in all that and those the premises known as 14, Clonbracknagh Court, Roscommon, in the County of Roscommon and more particularly being all of the property comprised in Folio 1769F ofthe Register, County Roscommon.

The said indenture of mortgage dated the 12th November, 1992 was duly registered as a burden on the aforesaid Folio 1769F of the Register, County Roscommon on the 5th September, 1994. In breach of the covenant and agreement for repayment, the defendants have failed to repay the said loan. In the result the plaintiff claims in these proceedings possession of the premises comprised in Folio 1769F of the Register, County Roscommon.

3. In this case the plaintiff seeks possession of a dwelling house which constitutes the family home of the defendants. It relies upon the terms of the above mortgage executed between it and the defendants as joint tenants of the property. The defendants argue that no family home declaration was signed by the second defendant and thus the mortgage conveyance is void pursuant to s. 3 of the Family Horne Protection Act 1976. If this is not so, then they argue that the second defendant did not have independent legal advice when she received a joint share in the family home from her husband nor when she subsequently signed the mortgage itself as a co- owner.

4. The defendants counterclaim that a second property which was a licensed premises and which had also secured the loan in question was repossessed by the plaintiff and sold improvidently as a result whereof both defendants have suffered loss.

5. The plaintiff claims on foot of a mortgage dated the 12th November, 1992. This mortgage secured a loan that had originally been advanced in December 1991 by way of a bridging loan to purchase the licensed premises "The Hob" in Charlestown, County Mayo. This premises and a house at Clonbracknagh, County Roscommon, constituted the mortgaged property in this indenture. Immediately prior to the execution of this mortgage, the first defendant also on the 12th November, 1992 had transferred to himself and the second defendant the entire of the house at Clonbracknagh as joint tenants. Thus, as appears from the mortgage, the first and second defendants executed that deed as joint owners. Both were parties to the transaction. The property was comprised in Folio 1769F County Roscommon which describes the first and second defendants as full owners. In fact, the defendants seemed to have regarded themselves as joint owners before the above transactions as they described themselves thus in their mortgage application form to the plaintiff company dated the 22nd November, 1991.

6. The defendants further argue that the charge does not specify the payments to be made. This argument lies uneasily in the hand of those who made no repayments whatever in repayment of the loan secured. In any event, I can find no merit in the argument because the mortgage deed at C(3)(a), 7(a),7(c) and C14 clearly charge payment of the amounts specified in the letter of loan approval, i.e. the interest and capital due. In 1996 the plaintiff repossessed the licensed premises and sold it in December 1996 for a sum realised and applied to the account of IR£72,541.86. This left outstanding at that time an amount of IR£67,722.99 after deduction for the cost of realising the premises. No repayments were made after this date and applying standard applicable rates, the balance of the account as at the 17th July, 2012, was €262,031.16. The unchallenged evidence before the Court was that sometime prior to the sale of the licensed premises, the defendants had reached a settlement with their neighbour in the premises, one Mr. Crean, in respect of damage caused to the premises by renovation works in his adjoining property. No part of this settlement was used to pay the loan outstanding. No payment has ever been made in respect of the loan.

7. The plaintiff concedes that the house in Clonbracknagh is a family home. It does not rely on any Family Home Protection Act consent. It argues that the Family Home Protection Act does not apply to the mortgaged transaction because the second defendant was a party to that transaction. It relies upon the unanimous decision of the Supreme Court in *Eamonn Nestor v. Michael Murphy and Rita Murphy* [1979] I.R.326. In that case, the Supreme Court held that the purpose of the Family Home Protection Act 1976 precluded an interpretation of s. 3, subs. (1) which would have the result of applying the provisions of that sub-section to a conveyance or a contract of sale which had been executed by both sides by mutual consent. Delivering the unanimous judgment of the Supreme Court,

Mr. Justice Henchy stated as follows (at p. 328);

> *"A surface, or literal, appraisal of s. 3, sub-s. 1, might be thought to give support to the defendants' objection to the contract. That sub-section states: Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2) and (3) and section 4, the purported conveyance shall be void ' Sub-sections 2 and 3 of s. 3, and s. 4, are not applicable to this case. By reason of the definition ins. 1, sub-s. 1, the contract signed by the defendants is a 'conveyance. ' Therefore, the argument runs, the provisions of s. 3, sub-s. 1, make the contract void because a spouse (the husband), without the prior consent in writing of the other spouse, 'conveyed' an interest in the family home to the plaintiff*
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> *The flaw in this interpretation of s. 3, subs. (1) is that it assumes that it was intended to apply when both spouses are parties to the "conveyance". That, however, is not so. The basic purpose of the sub-section is to protect the family home by giving a right of avoidance to the spouse who was not a party to the transaction. It ensures that protection by requiring, for the validity of the contract to dispose and of the actual disposition, that the non-disposing spouse should have given a prior consent in writing. The point and purpose of imposing the sanction of voidness is to enforce the right of the non-disposing spouse to veto the disposition by the other spouse of an interest in the family home. The sub-section cannot have been intended by Parliament to apply when both spouses join in the "conveyance". In such event no protection is needed for one spouse against an unfair and unnotified alienation by the other of an interest in the family home. The provisions of s. 3, subs. (1) are directed against unilateral alienation by one spouse. When both spouses join in the "conveyance", the evil at which the sub-section is directed does not exist.*
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> *To construe the sub-section in the way proposed on behalf of the defendants would lead to a pointless absurdity. As is conceded by counsel for the defendants, if their construction of s. 3, subs. (1) is correct then either the husband or the wife could have the contract declared void because the other did not give a prior consent in writing. Such an avoidance of an otherwise enforceable obligation will not be required for the protection of the family home when both spouses have entered into a contract to sell it. Therefore it would be outside the spirit and purpose of the Act. "*

Henchy J. continued:-

> *"Because it is evident from the pattern and purpose of the Act of 1976 that the primary aim of s. 3, sub-s. 1, is to enable a spouse who was not a party to a 'conveyance ' of the family home, and did not give a prior consent in writing to it, to have it declared void, and because an extension of that right of avoidance to spouses who have entered into a joint 'conveyance' would not only be unnecessary for the attainment of that aim but would enable contracts to be unfairly or dishonestly repudiated by parties who entered into them freely, willingly and with full knowledge, I would hold that the spouse whose 'conveyance' is avoided by the provisions of s. 3, sub-s.1, is a spouse who has unilaterally (i.e., without the other spouse joining) purported to 'convey' an interest in the family home without having obtained the prior consent in writing of the other spouse. It is only by thus confining the reach of the sub section that its operation can be kept within what must have been the legislative intent. "*

8. In this case, it is plainly evident that the mortgage was executed by both Mr.and Mrs. Raftery. They both signed it. They had on the same day previously executed a transfer whereby the house at Clonbracknagh was transferred from the ownership of the first defendant to the ownership of both of them as joint owners. This reflects the nature of their ownership of the house as represented by them to the Building Society in their application for a mortgage dated 22nd November, 1991. They both describe themselves in that form as owners of the house at Clonbracknagh. Moreover, in order to obtain the loan, John J. Quinn & Co., Solicitors, acting on behalf of the defendants and holding themselves out without contradiction from the defendants as solicitors in the transaction, gave on the defendants' instructions a formal solicitors' undertaking in the standard form in respect of the monies to be advanced. It was on the basis of that application that a letter of offer was made to both defendants and a bridging loan subsequently was afforded to them. Thus, the mortgage executed on the 22nd November, 1992 was one in which both co-owners participated as co-owners and falls to be considered in the light of *Nestor v. Murphy*. It did not require the consent of the second defendant because no formal consent to her own act is required. Section 3(1) of the Family Home Protection Act 1976 does not apply to this transaction and the mortgage is thus valid. The equitable mortgage created in 1991 was displaced by the second legal mortgage which the plaintiff, not surprisingly, sought in order to secure their position on the loan advanced to the defendants. It was a perfectly proper and sensible thing to do. The plaintiff's right to possession arises from this charge.

9. As to the claim that the defendants entered into these transactions without independent legal advice, nothing I heard in evidence satisfied me that there was anything untoward in obtaining this charge. The defendants had both been parties to all the transactions involved herein. The mortgage application was signed by both parties, the letter of offer was addressed to both parties, the acceptance was by both parties. Both were represented by their solicitor when he gave the letter of undertaking. Both parties committed themselves to repaying a substantial loan advanced to them to purchase a business and neither has ever made any effort to repay the loan. It is remarkable that not one single payment was ever made. The second defendant may well be a woman of limited education but she struck me as a sensible, rational person who gave evidence clearly and without hesitation. She seemed a woman who in all probability understood very well what she was doing and what she was signing when she was involved in the various transactions herein.

10. The defendants have counterclaimed that the licensed premises was sold improvidently by the plaintiff following its repossession in 1996. I heard evidence from James Cleary, Auctioneer, who actually sold the premises. In fact, according to his uncontradicted evidence he had originally been instructed by the first defendant to sell the premises when it was repossessed. The plaintiff subsequently engaged him to the same end. He testified that the business was not trading, there were consequently no turnover figures. The premises was closed and all but derelict- all the rooms have been knocked out. It had lost a section of its floor. Mr. Cleary gave evidence of marketing the property over a few months. Eventually it was sold for the best offer received which was IR£72,500 including premises and licence. He considered it a fair price. The purchaser was the neighbour - Mr. Crean. Mr. Cleary in 1991 had valued the property at IR£70,000. The market then had been depressed but business then was a going concern and the premises was in good condition. I also heard evidence called by the defendants from John Early, Auctioneer, who valued the licensed premises at IR£100,000. He, however, did not know that the premises had been stripped back almost to bare walls nor that a section of the floor was gone. He also did not know that it had not been trading. He testified that the sale price achieved was at the bottom of the scale. Patrick McManus stated it was generally better to sell premises and licence together.

11. In order to demonstrate on the balance of probabilities that an improvident sale was effected, there needs to be clear evidence of that fact. Valuation of any premises is an art rather than a science. Comparators need to be distinguished carefully if they are to have any meaning. Properties are only worth what a buyer will pay. The most telling evidence was really that of Mr. Early who said the premises was sold at the bottom of the range. To sustain a case of improvident sale, the defendants would need to show a sale

was made for a price clearly below the scale. This they have manifestly failed to do.

12. In the result, the plaintiff is entitled to an order for possession of the premises comprised in Folio 1769F of the Register, County Roscommon and to an order dismissing the defendants' counterclaim.