Neutral citation number: [2007] IEHC 239

THE HIGH COURT

[2006 No 380 SP]

BETWEEN

DOVEBID NETHERLANDS BV

PLAINTIFF

AND

WILLIAM PHELAN TRADING AS THE PHELAN PARTNERSHIP AND DENISE O'BYRNE

DEFENDANTS

Judgment of Ms. Justice Dunne delivered on the 16th day of July, 2007

1. I have already given judgment in respect of a number of issues that arose in relation to the claim of the plaintiff to have a judgment mortgage declared well charged on a property situated at 49, Mountainview Road, Ranelagh, in the city of Dublin in which I had held that the non-compliance of the judgment mortgage affidavit with the strict requirement of the Judgment Mortgage Ireland Act, 1850 was not fatal to the well charging application.

2. The plaintiff herein has obtained a judgment against the first named defendant herein in the sum of €173,994.40 plus costs in the amount of €402.60 against the first named defendant. Judgment was registered on or about the 1st December, 2005 against the interest of the first named defendant. The first named defendant is a joint owner of the fee simple interest in the said lands and premises. The second named defendant was joined in these proceedings because of her interest in the said lands and premises. There was no appearance on behalf of the first named defendant before me. The defendants herein were married but have now separated. It appears from the affidavit of the second named defendant herein that family law proceedings between the first and second named defendant were instituted in 2001, those proceedings were finally concluded in the Circuit Family Court by order dated the 9th March, 2007. It appeared that an order was made in those proceedings pursuant to a settlement and there was no dispute between the parties before me that the proceedings had in fact been settled. The order made in those proceedings which is of relevance to the application to have the judgment mortgage declared well charged is as follows:-

> "An order pursuant to s. 9(1) of the Family Law Act, 1995 directing the respondent to transfer to the applicant, his entire legal and beneficial interest in the premises situate at 49, Mountainview Road, Ranelagh, Dublin 6 for her sole use and benefit.
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> Folio No: Unregistered lands "All That and Those the dwelling house and premises known as 49, Mountainview Road, Dublin 6 in the City of Dublin being part of the lands of Cullenswood otherwise Cullen's Farm, Ranelagh, Dublin 6.
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> It is further ordered by the court pursuant to s. 9(5) of the Family Law Act, 1995 that the County Registrar shall do all such acts and execute all such documents on behalf of the parties to give effect to the said transfer, if the parties fail to sign the necessary documents having been requested to do so."

3. When the matter came before me for hearing on the 11th June, 2007 it was clear from the submissions made on behalf of the plaintiff, that counsel on behalf of the plaintiff sought to be represented at the hearing before the Circuit Court but having appeared was not permitted to be heard in circumstances where the first and second named defendant had entered into an arrangement which was the subject of a consent order. Counsel on behalf of the plaintiff made the submission that the plaintiff could not be prejudiced by the order made in the family law proceedings in circumstances where the plaintiff in these proceedings was not given an opportunity to be heard in relation to any order that might be made which could effect their interest. Reference was made to the s. 15(5) of the Family Law Act, 1995 provides as follows:-

> "Where a spouse has a beneficial interest in any property, or in the proceeds of the sale of any property, and a person (not being the other spouse) also has a beneficial interest in that property or those proceeds, then, in considering whether to make an order under this section or ss. 9 or 10(1)(a)(ii) in relation to that property or those proceeds, the court shall give to that person an opportunity to make representations with respect to the making of the order and the contents thereof, and any representations made by such a person shall be deemed to be included among the matters to which the court is required to have regard under s. 16 in any relevant proceedings under a provision referred to in that section after the making of those representations."

4. Having referred to the provisions of that section, counsel on behalf of the plaintiff expressed concern at the fact that although an order was made, albeit by consent, the plaintiff herein did not have that opportunity to make representations in relation to the making of the order. It was submitted on behalf of the plaintiff that in circumstances where the first and second named defendant argued that the plaintiff was not entitled to be heard in the course of the family law proceedings that in those circumstances it was intended by them that the order made in the family law proceedings should not have any effect on the interest of the plaintiff in these proceedings. It was noted that as the order in the family law proceedings was made by consent it was not open to either of the parties to the order, to appeal the order and further that as the plaintiff had not been allowed to make representations to the court in respect of the order to be made, the plaintiff herein was not in a position clearly to appeal the order. It was further submitted on behalf of the plaintiff that the effect of the issue of the Matrimonial Civil Bill could not have severed the joint tenancy because it contained a claim for a property adjustment order because that claim only crystallised when the order was made. On the other hand the judgment mortgage crystallised in accordance with s. 7 of the Judgment Mortgage Act, and from the time of registration of its judgment as a judgment mortgage it had a property interest. It was submitted that the second named defendant herein could not rely on the property adjustment order to deprive the plaintiff herein of its interest in the property by virtue of having excluded the plaintiff from making representations in those proceedings.

5. Counsel on behalf of the second named defendant pointed out that whatever the concerns of the plaintiff in regard to the family law proceedings, it was clear that they were aware at all times of the family law proceedings in that they sought to be represented in those proceedings. It was also pointed out that these proceedings were adjourned in the knowledge that the family law proceedings were taking place.

6. The issue of priority as between the interest of the plaintiff herein and the second named defendant were discussed. Counsel submitted that as an order had been made pursuant to s. 9 by way of property adjustment, that order was binding and as such there was nothing to which a judgment mortgage could attach. Reliance was placed on the decision in the case of *S. v. S.*. and *A.C.C. v. Markham*, finally it was submitted that the plaintiff herein is not entitled to seek an order for sale in lieu to partition as that relief was a discretionary remedy and only available to a party if support considered it appropriate.

7. By way of response it was reiterated that the plaintiffs herein were not a notice party and were not made a notice party in the family law proceedings. The application to be allowed to make representations as to whether an order could or should be made under s. 9 of the Family Law Act, 1995, was refused. Consequently the plaintiff was unable to make representations. It was submitted that in those circumstances an order made pursuant to s. 9 could not affect the priority of the plaintiff on foot of its judgment mortgage. It was pointed out that during the course of the application to be permitted to make representations in the Circuit Court, both the first and second named defendants herein objected strongly to the entitlement of the plaintiff herein to be heard. Counsel conceded that the decision in *S. v. S.* whilst a case concerning registered land also applies to unregistered land and it was conceded that the decision in *A.C.C. v. Markham* was also a case that applied to registered land. Notwithstanding it was submitted that the plaintiff was entitled to succeed in its application regardless of those decisions.

8. As can be seen from the brief outline of the submissions before me, the principal concern of counsel for the plaintiff related to the fact that the plaintiff was not enabled to make representations to the Circuit Court on whether an order pursuant to s. 9 by way of property adjustment order should be made. It appears from the submissions before me that the Circuit Court was presented with a *fait accomplis* in that the Circuit Court proceedings were settled by the parties where the court was simply asked to rule the settlement which contained an agreement that there should be a s. 9 order. It is not for me to consider whether the approach of the Circuit Court in relation to this aspect of the matter was correct or not. Suffice it to say that the issue before me is whether or not the plaintiff is entitled to an order for sale in lieu of partition in respect of unregistered land notwithstanding the making of the order pursuant to s. 9 of the Family Law Act, 1995.

9. It was necessary to consider some of the authorities that were opened in the courts of hearing. Both parties referred to the decision in the case of *S. v. S.* (Unreported, High Court, Geoghegan J. 2nd February, 1994). In that case the court was dealing with an application for judicial separation. The respondent was hopelessly in debt. A bank was about to register a judgment as a judgment mortgage against the family home. An order was sought under s. 11(c) of the Judicial Separation and Family Law Reform Act, 1989 for the protection of that family home, effectively seeking to injunct the registration of the judgment mortgage. The bank was a notice party to the application and contended that it would be unjust to make the property adjustment order to its detriment. In the course of his judgment Geoghegan J. (p. 3) commented that an order under s. 11(c) was analogous to an interlocutory injunction and that a party affected could argue at the final hearing that the applicant was never entitled to an order under s. 11(c).

10. In that case it was argued that an application for a property adjustment order was a *lis pendens* capable of registration under s. 10 of the Judgments Ireland Act, 1844. Geoghegan J. came to the conclusion that an application for a property adjustment order was a registerable *lis* albeit with "some hesitation". Notwithstanding that, he concluded after considering the nature and purpose of a *lis pendens* that once the bank in that case had notice of the claim for a property adjustment order it could not register a judgment mortgage which would take priority over the property adjustment order. In that case reliance had been placed on the actual notice given to the bank by the application for protective orders. Geoghegan J. was of the view he did not have to go that far. He noted:-

> "The protection given to 'purchasers and mortgagees' in the 1844 Act is intended only for persons acquiring an interest for value. But a judgment mortgagee has long been held to be a volunteer (see Re: *Murphy v. McCormack* [1930] I.R. 322 and *Re: Strong* [1940] I.R. 382). It would seem to me that a volunteer is bound by a *lis pendens* irrespective of whether he has notice of it and irrespective of whether the lis has been registered. This is an added reason why I should make the property adjustment order without first giving A.I.B. an opportunity of registering a judgment mortgage."

11. He went on to point out that in that case the property in question was registered land. He expressed the view:-

> "In my opinion, a subsisting *lis pendens* relating to registered land but not entered as a burden will, nevertheless, affect persons acquiring interest from the defendants who are either volunteers, such as a judgment mortgagee or have actual notice of the *lis* as in this case."

12. Accordingly, he made the property adjustment order in that case without lifting the injunction and giving an opportunity to the bank to register the judgment mortgage. It was conceded by counsel for the plaintiff herein that *S. v. S.* although it was a case concerning registered land was applicable to unregistered land.

13. Reference was also made to the decision in the case of *First National Building Society v. Ring* [1992] 1 I.R. 375. In that case an application was made for a well charging order in respect of a judgment mortgage and for an order for sale in lieu of partition. The court considered whether an order for sale in lieu of partition should be made. The second named defendant was the wife of the first named defendant. A judgment mortgage had been registered against the family home over the first named defendant's interest therein. The second named defendant had no part in the acts of the first named defendant which caused the indebtedness. The second named defendant submitted that there should be no order for sale in lieu of partition on the grounds that there were good reasons to the contrary. The court in considering the interpretation of s. 4 of the Partition Act, 1868 made a well charging order over the first named defendant's interest in the property; a declaration as to the sum due; and order that an enquiry be made as to the persons interested in the property, their shares and proportions, the current market price valuation, the feasibility of selling the family home and the possibility of the second named defendant making financial arrangements to purchase the first named defendant's share at an agreed price and an order adjourning the proceedings generally with liberty to re-enter. It was also held that although the monies achieved on the sale of the premises on the market at that time would not nearly meet the debts, that was not a valid reason to refuse an order for sale. It was also held that the fact that the premises was a family home could be considered as a relevant factor by the court in exercising the discretion set out in s. 4 of the Partition Act, 1868. It was further held that the court would not ordinarily make an order which would be futile and in the instant case there was no information regarding the feasibility or effect of an order for sale or the possibility of the second named defendant purchasing the first named defendant's interest in the premises. Finally it was held that it would not be appropriate in the circumstances (where the second named defendant was a co-owner and an innocent party who had no judgment mortgage registered against her and would suffer considerably if her part of the family home were sold) to now order partition or sale in lieu of partition. Relying on that authority, counsel on behalf of the second named defendant herein had submitted that she was in a similar situation to the second named defendant in those proceedings.

14. The case of *A.C.C. Bank plc v. Markham and Another*, (Unreported, High Court, 12th December, 2005, Clarke J.) was also referred to in the course of submissions. That was a case in which the plaintiff obtained a judgment which was subsequently registered against the interest of the first named defendant in a property which was a family home. The defendants in that case were married but had separated in 2001, upon separation both parties had left the family home and went to live at separate addresses. In March 2003 the second named defendant had instituted proceedings against the first named defendant for judicial separation together with ancillary relief including an order under s. 9 of the Family Law Act, 1995. The plaintiff in those proceedings had registered its judgment as a judgment mortgage on the 6th July, 2004. the issue before the court was whether any interest in the property which the second named defendant might obtain as a result of the family law proceedings, but which was then currently owned by the first named defendant would rank in priority to the judgment mortgage of the plaintiff. Reliance was placed in that case on the decision in *S. v. S.*

[1994] 1 I.R. 407. In considering that decision, Clarke J. at p. 4 of his judgment concluded:-

> "In summary, therefore, A.S. would appear to be authority for the following propositions:
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> 1. A party who makes a claim in appropriate family law proceedings for a transfer of an interest in property owned by the other party to those proceedings is entitled to register a lis pendens in respect of such property;
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> 2. If such a *lis pendens* is registered then its registration will bind a party who is a purchaser or mortgagee for value, so that any direction to transfer the property which may ultimately be made will rank in priority over the interests of any purchaser or mortgagee for value who acquired their interest subsequent to the registration of the lis pendens; and
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> 3. By virtue of the fact that a judgment mortgage is taken to be a volunteer rather than mortgagee for value such judgment mortgagee (and in principle any other volunteer) will (even in the absence of actual notice or the registration of a lis pendens) rank behind the interest of a spouse to whom a transfer order is made provided the relevant family law proceedings had been commence before the registration of the judgment mortgage."

15. Accordingly Clarke J. was of the view that if that decision was correct it applied to the facts of the case before him and the second named defendant would rank in priority to the judgment mortgage in favour of the plaintiff. As that case was a case which concerned registered land, counsel on behalf of the plaintiff therein argued whether the decision in *S. v. S.* could be correct in the light of the wording of the Registration of Title Act, 1964. Clarke J. noted as follows:-

> "With respect to registered lands, s. 71(4) of the Registration of Title Act, 1964 provides that a charge on the interest of a judgment debtor in favour of a judgment mortgagee is subject to existing registered burdens and burdens effecting the interest without registration and 'all unregistered rights subject to which the judgment debtor held that interest at the time of registration of the affidavit.'
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> In *Tempany v. Hynes* [1976] I.R. 101 the Supreme Court held that a purchaser from the registered owner of the land had such an 'unregistered right' under a contract for sale before execution of the transfer or payment of the registered money. Therefore such purchaser took free of a post contract judgment mortgage registered against the vendor. Indeed Kenny J. delivering the judgment of the court reaffirmed at p. 117 that:-
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> > 'A judgment mortgage is a process of execution and the judgment mortgagee is not a purchaser for valuable consideration: *Eyre v. McDowell*. [1861] 9 H.L. Cas. 619.'
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> The real question is, therefore, whether Ms. Casey, as a person who has a claim which may, if successful, entitle her to a direction that certain lands be transferred to her, may be said to be a person who has an unregistered right subject to which Mr. Markham held his interest at the time of the registration of the affidavit. If she is, then it is clear from the provisions of s. 71 that the judgment mortgage is subject to that right and thus that her right has priority over the judgment mortgage.
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> It seems to me that the use of the phrase 'all unregistered rights subject to which the judgment debtor held that interest at the time of registration of the affidavit' does no more than recognise the historical position as analysed by Kenny J. in *Giles* and Geoghegan J. in A.S. It acknowledges the position of a judgment mortgagee as a volunteer. It therefore specifies that, as such, the judgment mortgagee will take subject to unregistered rights. In equity such rights include the rights of persons who had prior to the registration of the judgment mortgage commenced a suit or *lis* in respect of the lands. There is nothing, therefore, in the wording of s. 71 of the 1964 Act which would cause me to depart from the view expressed by Geoghegan J. in A.S."

16. The decisions in the case of *S. v. S.* and *A.C.C. Bank plc. v. Markham* whilst dealing with registered land contain principles that are applicable to unregistered land. It is clear from those authorities that a judgment mortgagee is a volunteer. Therefore a judgment mortgagee will take its interest subject to unregistered rights. A person who has commenced legal proceedings in respect of the lands prior to the registration of the judgment mortgage are therefore entitled to rank in priority to the interest of a judgment mortgagee. The fact that the property in the instant case is unregistered does not seem to me to alter the question of priority. That, that is so, seems to me to be clear from the decision of Clarke J. in A*.C.C. Bank v. Markham* in which he acknowledged that s. 71 of the 1964 Act, did not require a departure from the views expressed by Geoghegan J. in the case of *S. v. S*.

17. Undoubtedly the plaintiff in this case is aggrieved by the fact that the property adjustment order made herein in favour of the second named defendant was made by consent in circumstances where the plaintiff was not given an opportunity to make representations on whether such order could or should be made, I have to deal with this matter on the basis that there is an order pursuant to s. 9 of the Family Law Act, 1995 and that being so, it is clear from the authority of *S. v. S*. that in the words of Geoghegan J. at p. 8 of his judgment:-

> "It would seem to me that a volunteer is bound by a *lis pendens* irrespective of whether he has notice of it and irrespective of whether the *lis* has been registered."

18. In those circumstances it seems to me that the interest of the second named defendant herein ranks in priority to that of the plaintiff herein. In those circumstances I refuse to make the order sought herein.