THE HIGH COURT

[2017 No. 29 SP]

IN THE MATTER OF THE LAND AND CONVEYANCING LAW REFORM ACT 2009

BETWEEN

MICHAEL FLYNN

PLAINTIFF

AND

PETER CREAN AND MICHELLE CREAN

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 1st day of February, 2019

1. The plaintiff seeks a declaration that a judgment mortgage registered on 14 September 2016 against the interest of the first defendant in the lands comprised in folio KY67603F of the Registrar of Freeholders, County of Kerry stands well charged. He also seeks an order pursuant to s. 117 and/or s. 31 of the Land and Conveyancing Law Reform Act 2009 ("the Act") partitioning the said lands and providing for the sale of the property for the purposes of discharging the amount secured by the judgment mortgage. Various other ancillary orders are sought, including an order for the taking of all necessary accounts and inquiries and an order for possession.

2. The plaintiff is a married man and he engaged the first defendant, Mr. Crean, to build an extension to his principal private residence in Ballybunion, County Kerry, to provide for a new family room and a new bathroom. He commenced proceedings by civil bill on 12 February 2015 seeking damages for breach of contract arising from defects in the premises including damp penetration and inadequate foundation works. By order of the Circuit Court made on 19 January 2016, judgment was entered against the first defendant in the sum of €30,000 together with costs to be taxed in default of agreement. That judgment was not discharged and a judgment mortgage was then registered against the first defendant's interest in the folio lands on 14 September 2016. While the first defendant had appealed the order of the Circuit Court, the appeal was withdrawn and thereupon the order became final and conclusive.

3. An attempt to execute through the Sherriff has proved fruitless.

4. The folio lands are the family home or principal private residence of Mr. Crean and his wife, Michelle Crean who has properly been joined as co-defendant, as her interest in the continued possession of the premises is now in issue. No argument is made or could be made that the judgment mortgage affects her interest in the home.

5. An examination of the burdens on the folio shows the judgment mortgage registered as a second burden on 14 September 2016, subsequent to a charge in favour of KBC Bank of Ireland plc registered on 17 September 2008 and in respect of which the outstanding balance is approximately €330,000.

6. Both defendants swore replying affidavits in each case on 24 March 2017. The matter first came on for hearing before me on 12 April 2018 and, following consideration of the evidence on affidavit and submissions made by counsel, I took the view that I did not have sufficient evidence of a coherent and vouched form to enable me to exercise the discretion vested in the Court by virtue of s. 31 of the Act to order the sale or partition of the premises. This is consistent with the approach taken by the authorities, especially the judgment of Dunne J. in *Drillfix Ltd v. Savage* [2009] IEHC 546.

7. On that date, however, being satisfied that the proofs for the making of a well charging order had been met, I made an order declaring that the judgment mortgage registered against the folio stood well charged against the interest of the first defendant in that property.

8. The matter was further adjourned, and the first defendant was directed to provide information in a sufficiently coherent and vouched manner to enable me to make further orders or directions.

9. Having regard to the fact that Mr. and Mrs. Crean were shown, by Mr. Crean's second affidavit, to pool their income and resources and jointly meet family and household expenses, when the matter came before me again on 21 November 2018, I directed that Mrs. Crean would furnish an affidavit showing her means and expenditure in the form of a statement of means and the matter was then adjourned and came on for hearing before me on 17 January 2019.

10. On 6 December 2018, when the matter came on for mention, the plaintiff indicated a desire to cross-examine both defendants on their respective affidavits and in regard to their respective means and outgoings, and I directed both defendants to present themselves for cross-examination on 17 January 2019 and dispensed with the service of a formal notice of cross-examination.

11. On the return date of 17 January 2019, Mr. Crean attended and presented himself for cross-examination but Mrs. Crean produced a letter furnished at the last minute to counsel and solicitor for the plaintiff indicating that her work commitments made it impossible for her to travel from County Kerry to attend court on that day as her work as an editor of a local commercial newspaper meant that Thursdays were particularly busy days for her. In those circumstances, and in order to avoid any further costs and expenses in the prosecution of the claim, counsel for the plaintiff reluctantly accepted that the attendance of Mrs. Crean for cross-examination would not now be required but asked that her non-attendance be noted by the court in its considerations.

12. Some of the evidence is uncontroverted. Mr. and Mrs. Crean reside in the subject property with their two young school going children. Their home was built on lands provided to the couple, or to Mr. Crean before the marriage, by his parents and immediately adjoins his parent's home and his siblings, or some of his siblings, also have homes nearby. In her affidavit, Mrs. Crean argues that it would be oppressive, disproportionate, and unjust that her family home be sold in order to discharge a judgment that has nothing to do with either her or her children.

13. Mr. Crean is a carpenter and in his affidavit expresses his intention to satisfy the judgment, an intent he expressed also in the course of his oral evidence, albeit he says that he is not in a position to meet the judgment in his present circumstances, and he has not paid any part of the judgment since it was entered. In his first replying affidavit sworn on 24 March 2017, he said he had then secured employment with a construction company and was in a position to make instalment payments for the satisfaction of the debt. No payments were made at that juncture, and no amount was identified that he believed he could then afford to pay.

14. In the course of his evidence before me on 17 January 2019, Mr. Crean said that he expected to return to work full time in his own business "in the next few weeks" and that he hoped the business would be successful. In that content, he offered an instalment payment of €200 per month which was rejected by the plaintiff as the plaintiff correctly argued that it would take twelve years to pay off the debt, or more, if the costs were to be included.

15. Somewhat curiously, Mr. Crean, in the course of his oral evidence, said he had been unable to work due to a neck injury, but this is not referred to at all in his affidavit of 24 March 2017 by which he first replied to the plaintiff's claim.

16. In his oral evidence, Mr. Crean says that his previous construction business collapsed during the recession and that he was unemployed and had no source of income until relatively recently. He says he has a number of creditors to whom he makes payments, but his affidavit of means sworn on 8 November 2018 shows no debts other than the debt secured by mortgage on the family home, nor is there any reference to any repayments of other creditors in the expenditure accounts furnished by him.

17. It is noteworthy, also, that Mr. Crean gave no direct oral evidence regarding other creditors or the amounts owed or being paid to them, save in regard to a small Revenue debt or fine which he disclosed after he was pressed by counsel for the plaintiff and after he had first given evidence that he was Revenue compliant. His evidence was, however, that he had discharged a debt of €50,000 to Revenue in 2014.

18. Mrs. Crean, in her affidavit of 26 November 2018, identifies a monthly payment being made by her husband in the sum of €150 to Revenue but does not identify the amount of the Revenue debt which did not appear as a liability in any of the affidavits, notably not in her husband's affidavit made only three weeks earlier, either as a liability or an expenditure.

19. The valuation of the home of the defendants is not agreed. In the affidavit of 24 March 2017, a valuation from a local auctioneer, which gave an estimate of €225,000, was provided, but the defendants accept that the value is now closer to €270,000. The defendants argue, in those circumstances, that the sale of the property would be futile, as the plaintiff could not hope to be repaid any of the judgment debt if the property was sold having regard to the amount outstanding on the KBC mortgage to which the judgment mortgage takes subject. The valuation evidence of the plaintiff was on a drive-by basis and is, therefore, not a reliable guide.

20. The first defendant furnished updated evidence regarding his means by sworn affidavit of 9 November 2018, in which he described himself as an "unemployed builder" and averred that he was in receipt of weekly social welfare payments in the sum of €198. The schedule of his liabilities and expenses totals €2,424 a month excluding mortgage payments which, when added to that figure, bring the total monthly outgoings to €3,668.

21. Having reviewed the personal expenditure of the couple, I am of the view that it could not be said that any one item of expenditure appears to be overstated, although I do note the argument made by counsel for the plaintiff that the expenditure on petrol, having regard to the fact that Mr. Crean has been out of gainful employment, would seem excessive. The oral evidence was that the couple have two cars, that Mrs. Crean works full time outside the home, and that she now works some fifty kilometres from home.

22. However, one matter that I do notice from the bank statements furnished is that the couple do not maintain any appreciable overdraft, the current account is mostly in credit, and when the account falls into overdraft, it does so only in very small amounts and for short times. That would suggest, in general, that the couple do manage to make ends meet from their income and that the shortfall identified in means after child benefit and the income of both spouses is taken into account does not find reflection in the bank statements.

23. Some statements of the KBC mortgage account have been furnished and some credits into that account are not easily reconcilable with what Mr. Crean says is the sole bank account held by the couple, a current account with Permanent TSB. Two payments were identified in the year 2018, one on 6 July 2018 in the sum of €750 which is shown to be by giro payment but which cannot be reconciled with any debit in the Permanent TSB current account. Mr. Crean explained this payment as having been made by his brother, but when pressed as to whether this was payment for work being done for his brother on the construction of a home or holiday home, he was elusive and said that he was doing "some work" for a different brother but not being paid by him. Another payment, also by giro, on 31 May 2018 in the sum of €250 is also not explained.

24. When pressed regarding the operation of the joint current account, Mr. Crean's evidence was that the family paid for day-to-day living expenses, such as groceries, in cash and that, on occasion, he paid the mortgage by withdrawing money from the current account and making a payment in his local post office to the mortgage account. He said that the family, in effect, operated a cash day-to-day spending and withdrew money and spent that money in local shops or for groceries and day-to-day expenditure for the family. To a large extent, that description is borne out by the bank statement which shows some direct debit payments such as TV license, insurance, TV cable, etc., but a large enough number of ATM withdrawals, many of them on the same day. Though not possible, in those circumstances, to extrapolate as to how Mr. and Mrs. Crean manage their personal family finances and the day-to-day expenditure that they incur, it is improbable, in my view, that the couple meet mortgage repayment partly in cash directly withdrawn from their current account, as the bulk of the mortgage payments are made by direct debit.

25. What is of concern and material, in my view, is the very significant and regular payments to a Paddy Power bookmaker account which appears on a very regular basis in the Permanent TSB current account. Just by way of example, on 4 May 2018, €90 was shown as paid to a Paddy Power phone account. On 3 July 2018, €130 was shown as being paid in. On virtually every week for which the accounts were produced, which admittedly is only from April 2018 until October 2018, there are regular small payments to Paddy Power of €100 or more on a weekly basis.

26. In cross-examination, the suggestion was made to Mr. Crean that he might be using the Paddy Power account to hide money from his creditors and that the payments out of the Paddy Power account might be transactions by which moneys were passed through that account into another account. It was also pointed out that Mr. Crean did not show any earnings from any of his betting activities. He was adamant that there was no other bank account and that the Paddy Power transfers were not used as a means of disguising payments to another account or for any purpose other than betting and he explained that when he did win, he collected his winnings in cash.

27. Mr. Crean did not bring with him to court any statement of account from Paddy Power, and I rose to permit him to obtain one by email or through his online account, but the best he could offer was that Paddy Power would post a statement of account which would be available in a few days.

28. Having been pressed with regard to his betting activity, Mr. Crean accepted that he "spent too much" on betting, but he did not say, in response to my question, that he considered that he had an addiction problem or that his betting was something he felt personally unable to control. He did not express any regret that the plaintiffs had been left in a house the refurbishment works of which are wholly unsuitable for their needs, when not one euro of the judgment debt has been paid at a time when spending over €400 a month on betting activity, even taking the figures at their lowest.

29. Mr. Crean is unable to explain a PayPal credit into the current account, but accepted that it might have something to do with his wife's photography business which, he says, she no longer operates in any serious way, and he was unable to assist with regard to her Facebook account put to him in evidence which showed that she was a well-regarded photographer in the area. The €300 paid into the current account by PayPal credit is the advertised charge stated in the Facebook page for a particular photography service.

Conclusion on the evidence regarding the family's means

30. I must conclude that Mrs. Crean has, in the recent past, earned some income from her photography business, and that that business is not wholly dormant. The family have, in my view, the capacity of earning some additional money from that source.

31. I also must take into account that Mr. Crean expects, in his own words, to go back to work in the next four weeks, and while he did have an injury for which he has had physiotherapy, he accepts that he is physically well and is a young man who, at least in his younger days, was actively involved in sports.

32. I consider that, notwithstanding that Mr. Crean was somewhat elusive with regard to payments, the evidence does suggest that Mr. Crean does offer some work as a builder to his brother, and even if this is not, as he puts it, "working as such" and even if he is only signing off on materials and acting as a class of foreman, I consider his evidence that he is not available to work, and is not actually working, not to be wholly credible. He was much too elusive regarding the work he is doing on his brother's house, the expression that he is not "working as such" suggest to me that he is, in fact, working, albeit perhaps not at full capacity.

33. I also consider that Mr. Crean was evasive when he said he did not remember the payment by one or other of his brothers of €750 into his mortgage account in the summer of 2018, and the fact that this was a very recent payment made in the currency of the present proceedings and after they had first come on for hearing on 12 April 2018, when I had given express directions that Mr. Crean coherently explain and vouch his current means, leads me to believe that Mr. Crean's evidence of his current income or income capability is understated.

34. Mr. Crean had no satisfactory answer to my question as to whether he could obtain a Credit Union loan for some or all of the judgment debt.

35. I also consider it more probable than not that the Revenue debt of which Mrs. Crean gives some, but not complete, evidence relates to the fine of €1200 imposed on Mr. Crean for failure to make returns, and is not related to the much larger liability of €50,000 which he said he incurred some years ago, in 2014 and 2015, as he said, in evidence, that he had paid this amount to Revenue in the past.

36. I did not consider Mr. Crean's evidence to be truthful. He was not frank about his Revenue compliance and cross-examination elicited evidence of some form of court prosecution in 2014/2015 and that he was on the Tax Defaulters List in 2017 in respect of a fine of €1250. I find his explanation regarding his betting to be largely incredible, and I do not consider that he had any personal frailty in the form of an addiction to betting, and that the betting is a wholly personal choice and an expenditure that he could readily discontinue.

37. It is possible that Mr. Crean does make some money from his betting activities but not whether they are likely to be able to contribute to the repayment of the debt. Such winnings could not reasonably be regarded as available income because of their contingent nature.

The law

38. The judgment mortgage has already been declared well charged upon the folio lands, and the sole question for consideration now is the remedy available to enforce that judgment mortgage.

39. Section 117 of the Act sets out the remedy available to a person who has registered a judgment mortgage as a process of execution and in its material part provides as follows:

> "(1) Registration of a judgment mortgage under section 116 operates to charge the judgment debtor's estate or interest in the land with the judgment debt and entitles the judgment mortgagee to apply to the court for an order under this section or section 31.
>
> (2) On such an application the court may make
>
> (a) an order for the taking of an account of other incumbrances affecting the land, if any, and the making of inquiries as to the respective priorities of any such incumbrances,
>
> (b) an order for the sale of the land, and where appropriate, the distribution of the proceeds of sale,
>
> (c) such other order for enforcement of the judgment mortgage as the court thinks appropriate.
>
> (3) The judgment mortgage is subject to any right or incumbrance affecting the judgment debtor's land, whether registered or not, at the time of its registration".

40. The folio lands are jointly owned between Mr. and Mrs. Crean and, accordingly, the provisions of s. 31 of the Act are relevant.

41. Section 31 of the Act reads as follows:

> "(1) Any person having an estate or interest in land which is co-owned whether at law or in equity may apply to the court for an order under this section.

(2) An order under this section includes

(a) an order for partition of the land amongst the co-owners,

(b) an order for the taking of an account of incumbrances affecting the land, if any, and the making of inquiries as to the respective priorities of any such incumbrances,

(c) an order for sale of the land and distribution of the proceeds of sale as the court directs,

(d) an order directing that accounting adjustments be made as between the co-owners,

(e) an order dispensing with consent to severance of a joint tenancy as required by section 30 where such consent is being unreasonably withheld,

(f) such other order relating to the land as appears to the court to be just and equitable in the circumstances of the case."

42. That section permits a person having an estate or interest in land defined as including a judgment mortgage to apply for an order for partition of the land among the co-owners, for an order for sale, and ancillary orders such the taking of an account or the making of adjustments.

43. Prior to the enactment of the Act, a judgment mortgagee holding a judgment mortgage over the interest of one of the co-owners of jointly owned land had no standing to seek partition under the Partition Acts 1868 (see *Irwin v Deasy, Judge Mahon v. Lawlor* (*Administrator Ad Litem of the Estate of Liam Lawlor*) [2010] IESC 58, [2011] 1 IR 311, and see Professor Wylie's *Irish Land Law* (5th ed., Bloomsbury Professional, 2015) para. 8.41).

44. The court is given the express power under s. 31(2) of the Act to make any such order "relating to the land" as appears to be "just and equitable" in the circumstances of the case. The partition and sale may be made with or without conditions or other requirements and an order under the section providing for sale may be combined with other orders under the section.

45. For the purpose of the present application and notwithstanding some suggestion at an earlier hearing, which was not pursued, that Mr. and Mrs. Crean do not have an equal interest in their family home, it is not necessary for me to make an order regarding the respective interests of Mr. and Mrs. Crean in the property for present purposes, and I will adopt a working assumption that each of them is equally entitled to 50% of that beneficial interest.

The discretionary nature of the power

46. The order under s. 31 of the Act is made in the exercise of an express statutory jurisdiction. It is clear from the use of the word "may" in the sanction.

47. In *Yippee Trading Ltd. v. Costello* [2013] IEHC 564, Ryan J. considered that the discretion of the court to partition contained in s. 31 of the Act had to be exercised in the light of the feasibility "in both the practical and legal sense" of division, but this was a question of "practicality rather than a principle". While Ryan J. was dealing with the question of physical division of the land, it seems clear that his judgment entailed consideration of the general discretion of the court under s. 31 of the Act which he described, at p. 10 of his judgment, as a "wide discretion" to decide "how best to reconcile the competing interest" of the relevant parties.

48. Those interests include, to a material degree, the interest of the non-debtor co-owner. As Laffoy J. said, in *Irwin v. Deasy* [2011] IESC 15, [2011] 2 IR 752, an order for partition or sale of jointly owned property would affect the property rights of the non-debtor joint tenant, and this is likely to impact to a large extent on the exercise by the court of its jurisdiction to order sale. That reluctance is also shown in the judgment of Dunne J. in *Drillfix Ltd v. Savage*, where she considered whether there was good reason why she should not grant an order for sale, and at pp. 6 and 7 of her judgment, noted a number of factors which might arguably be relevant to the exercise of that discretion. I will return later to her judgment.

49. Keane J. considered the discretionary factors in his judgment in *Quinns of Baltinglass Ltd v. Smith* [2017] IEHC 461, the most recent judgment of the Superior Courts opened to me which directly considered the provisions of s. 31 of the Act.

50. The matter was previously considered by White J. in his judgment in *Muintir Skibereen Credit Union Ltd v. Crowley* [2015] IEHC 107, where he was dealing with two applications for well charging orders and orders for sale of jointly held properties each of which was the principal private residence of the defendants, and where the debt was that of one of the co-owners only. White J. refused to order the sale of the property for the reasons given in para. 12 of his judgment, *viz*. that:

"(1) Both the properties are the family homes of the respective Defendants.

(2) Breda Crowley and Breda Hamilton the spouses of the respective Defendants were never consulted about the commercial loan drawn down by the Defendants from the Plaintiff.

(3) The spouses Breda Crowley and Breda Hamilton never signed any documentation providing the family home as security.

(4) The personal circumstances of Breda Crowley with responsibility for three dependant children of ages 13, 8 and 6 and those of Mrs. Hamilton who is suffering from ill health are taken into account by the Court.

(5) Both Defendants are in serious debt, and 50% of the net proceeds of any sale of the family homes due to the spouses, would not provide either family with sufficient resources to purchase another family home."

51. That judgment was upheld on appeal in *Muintir Skibereen Credit Union Ltd v. Crowley* [2016] IECA 213, [2016] 2 IR 665, which is the first time that the provisions of s. 31 of the Act were considered by the Court of Appeal. Hogan J., giving the judgment of the Court, considered the discretionary nature of s. 31 of the Act and factors that might be taken into account in the exercise of that discretion. In summary, these factors are as follows:

(a) that the Act must be exercised in a constitutional fashion and that the court must endeavour to balance

competing constitutional rights, including the property rights of the judgment mortgagee and those of the spouses (para. 24),

(b) the fact that the debts were personal and unsecured and that the non-debtor spouses had not been consulted before the loans were taken out;

(c) that the loans were business debts of the respective husbands and, in that regard, the court noted the judgment of Denham J. in *First National Building Society v. Ring* [1992] 1 IR 375, for a long number of years the leading judgment on the enforcement of judgment mortgages, where the fact that the wives had no involvement in the business affairs of their husbands was treated as a relevant and significant consideration (paras. 27-30).

52. Critical to the consideration of Hogan J. was also the fact that the partition of the family home was not a realistic possibility and the sale of an undivided moiety in a family home was effectively not marketable, or, probably, not even possible.

53. In his conclusions, at para. 39 of his judgment, Hogan J. stressed that his primary consideration was that it would not be just to "direct the sale of the family home over the wishes of the innocent spouse that was not party to the loan transaction", and did not express a view whether, in a suitable case, if the net proceeds were likely to enable the non-debtor spouse to purchase another family home, an order would be made, leaving that consideration to another suitable case, a factor was material in *Trinity College v. Kenny* [2010] IEHC 20 considered below.

54. The present case is not such a case and I am satisfied, having regard to the evidence, albeit the valuation evidence adduced by Mr. and Mrs. Crean was, perhaps, an understatement of the value, that the sale of the subject property would not produce any funds for the judgment mortgagee. I am satisfied, having regard to the amount of the KBC loan, even if the valuation of the family home is more than the maximum for which Mr. and Mrs. Crean contend, namely €270,000, that the property is in very significant negative equity and that the consequence of the sale of the property would not result in the payment to the plaintiff of any proceeds of sale whatsoever. A further consequence which would be unavoidable is that Mr. and Mrs. Crean would not just find themselves homeless but would, more likely than not, find themselves encumbered with an unsecured debt of perhaps €50,000, or even €75,000, which would render their capability of meeting the judgment debt even more remote.

55. Further, even if there were to be a small equity remaining after the sale of the property and the discharge of the KBC first charge, only half of those net proceeds would be available for distribution to the judgment mortgagee, as the other half enures to Mrs. Crean.

56. For that reason, it seems to me in those circumstances, while the judgments of the Court of Appeal and of White J. in *Muintir Skibereen v. Crowley* state the broad proposition of fairness and proportionality regarding the exercise of the court's discretion, and while the judgment of Keane J. in *Quinns of Baltinglass v. Smith* agrees, the question of feasibility is a primary guiding factor in my discretion in the present case, and I turn now to examine the authorities on that factor.

Feasibility of sale

57. In *Quinns of Baltinglass v. Smith*, Keane J. noted the argument made by Mr. Quinn, a judgment debtor against whose interests in jointly held land a judgment mortgage had been registered, that he was, for all purposes, insolvent. The lands in that case comprised two separate folios which Keane J. considered were capable of being treated separately for the purposes of the application.

58. Keane J. expressly rejected the argument of Mr. Smith that the mere fact that the sale of the land was likely not to result in the discharge of some or all of the judgment debt would lead him to refuse relief. Keane J. correctly noted the observations of Finnegan J. in *Judge Mahon v. Lawlor* that the discretionary factors which might operate under s. 31 of the Act would be developed on a case-by-case basis, in the absence of express statutory guidance. Keane J. considered the approach taken by the plaintiff not to seek an order for the sale of the family home as a sensible concession in the light of *Muintir Skibereen v. Crowley*, and accordingly, the judgment of Keane J. does not offer a full answer to the proper treatment of an application for sale of jointly held property which is a family home.

59. The observations of Keane J. are primarily relevant in a case where a judgment mortgage is not registered against a family home and the judgment of the Court of Appeal in Muintir Skibereen v. Crowley would suggest that in the case of a family home, a constitutional and proportionate response to an application for partition and sale of the family home by a judgment mortgagee is required.

60. In *Drillfix v. Savage*, Dunne J. followed the authority of Denham J. in *First National Building Society v. Ring* that the mere fact that the proceeds of sale would not meet the debt was not a reason why the courts would refuse to grant a sale. She considered that the question was whether the defendants, or either of them, had shown a good reason that the court should not direct a stay on the sale of jointly held premises which were the family home and where the judgment mortgage was registered against the interest of one co-owner, and she noted, at pp. 6 and 7 of her judgment, the relevant matters relied on by the defendants as:

(a) that the premises were the family home of the sisters for over 30 years;

(b) that the second defendant was an innocent party and had no part in the debt but had limited means;

(c) that they were approaching retirement and had made an offer to make monthly repayment in reduction of its indebtedness;

(d) that they failed to obtain alternative funds to pay the debt; and

(e) that the effect of ordering sale would be to render the "innocent" sister homeless.

61. Dunne J. found herself unable to make an order regarding the feasibility of the sale of the property, in particular, in the light of the then prevailing economic climate in 2009, when the property market was particularly low. She did make a well charging order and directed the furnishing of further information, including the costs of a sale, the likely net proceeds that would be available to meet the debt, whether the distribution of the proceeds of sale might be sufficient to deal with the interests of the second defendant, and whether alternative loan finance could be obtained. There was an equity, in the property, of approximately €168,000, but the judgment mortgage was registered for the sum of more than €165,000 which had the effect that the sale would not have achieved more than approximately half of the amount due on foot of the judgment debt. Dunne J. adjourned the matter and no later judgment is available to elucidate the consequences of her order. What is relevant, however, is that she considered the practical financial circumstances to be of importance and the question of the feasibility of alternative financing and the appropriate means to respect

the interests of the non-debtor co-owner were factors which were key to her thinking.

62. Counsel for the plaintiff relies on the judgment of Laffoy J. in *Trinity College v. Kenny,* where she did order the sale of one property on which a judgment mortgage had been registered against the interest of one co-owner. She was satisfied, in the circumstances, that the value of that property was sufficient such that, following the sale, the co-owning non-debtor spouse would have sufficient funds to purchase alternative accommodation, and that, while "there would be a degree of disruption", it did not deprive the couple of an alternative home. She regarded the fact that, following sale, Mrs. Kenny would have sufficient resources to provide alternative accommodation for herself and her husband as being the "crucial factor in determining whether the Court's discretion should be exercised in favour of ordering a sale", at p. 20 of her judgment.

63. In the light of the authorities, the correct approach is that the financial consequences of the making of an order for sale are a relevant and, sometimes, central discretionary factor that falls for consideration, but the mere fact that a sale may not release sufficient funds to discharge the debt is not a factor which, taken alone, might defeat the interest of the judgment mortgagee. To hold otherwise would be to fail to recognise the security interest created by the registration of a judgment mortgage and well charging order.

The burden to show cause
64. Laffoy J., albeit *obiter*, in *Irwin v. Deasy*, at para. 26, and Dunne J. in *Drillfix v. Savage,* at pp. 6 and 7, noted that an application under the Partition Act 1868 would require a defendant to show good reason why a court should not direct a sale of the property, and that the onus was on a defendant meeting such a claim to satisfy the court that a good reason existed for not ordering a sale.

65. Keane J. took the same approach in regard to the commercial or non-family home folio by holding that, having regard to the fact that sufficient evidence was not adduced to him by the defendant concerning his means, or the value of the lands, beyond the mere assertion that he was practically insolvent, and in the circumstances, Mr. Smith had not discharged the onus of establishing that there was good reason why the land should not be sold.

Application to the facts
66. In the present case, a number of factors are relevant to the exercise of my discretion. The first and critical factor is that the respective interests of the plaintiff and the defendants concern their family home or principal private residence. This is not a commercial debt to a lending institution. The plaintiff's claim derives from poor workmanship to the principal private residence where the plaintiff resides with his wife and very young children and his elderly mother-in-law, who is unwell. His supplementary affidavit sworn in reply to the affidavits of the defendants says that his dwelling was left in a "poor, dilapidated condition with exposure to the elements" when the first defendant walked off the job in October 2014, and that he has been compelled to live in a very cold house as a result of which his family has suffered.

67. He exhibited an engineering report which suggests that the extension has inadequate foundations, that there is visible evidence of damp penetration, that a new floor slab is required, and that the service pipes and space for the location of the new bathroom is too narrow to accommodate a WC. His evidence is that the extension needs to be demolished and reconstructed, and that he needs the money directed to be paid by the Circuit Court decree to remedy the defects in his own family home. The premises were to have a downstairs bathroom which was not completed and which was unsuitable for the use for which it was intended.

68. The interest of the plaintiff in those circumstances is a personal interest and not a commercial one.

69. The other factor that is relevant is that the property subject to the judgment mortgage is the family home of Mr. and Mrs. Crean, a young couple with young children and the judgment mortgage affects one spouse only and Mrs. Crean is precisely in the position of the non-debtor spouses in *Muintir Skibereen v. Crowley*. She is "innocent" of the debt and her interest in the family home is capable of being impacted by order of a sale. That is a factor which, in the light of the authorities, must bear considerable weight.

70. The other factor which is of significance is that the net proceeds of sale of the property in County Kerry is not likely to discharge even some of the debt of the plaintiff. That factor is a very significant factor and one which is reflected in the judgment of Laffoy J. in *Trinity College v. Kenny,* by Dunne J. in *Drillfix v. Savage*, and by Keane J. in *Quinns of Baltinglass v. Smith.*

71. The authorities do bear out the general proposition that the mere fact that the sale of a property will not achieve a discharge of the debt is not, in itself, a reason to refuse sale. There are a number of reasons for this and part of the thinking of the courts in those cases must be that the making of an order for sale is a draconian remedy which might, in suitable cases, lead to a settlement in relation to the indebtedness before an order for sale becomes operative (see Laffoy J. in *Trinity College v. Kenny*, at p. 21). This is a factor that influenced Dunne J. in *Drillfix v. Savage*, where she adjourned the matter pending further information and investigations. The making of an order for sale could, in many cases, lead to some move to reach an alternative accommodation with a judgment creditor to the mutual satisfaction of the parties.

72. Apart from this is the fact that the valuation evidence given to a court in a mortgage suit often does not properly reflect the true value of a property, and this is a factor that may operate to the advantage of the judgment creditor or, as the case may be, to the advantage of the judgment debtor. A property could achieve more or less than the amount estimated by a valuer. There is a certain risk of putting the property on the market, but equally there may be a certain advantage in doing so in that a property may achieve more than the family expected. Valuation could not ever be said to be an exact science.

73. In those circumstances, a court exercising its discretion may be constrained by the practical fact that, in many cases, the evidence before it might be some months, or even years, out of date, and in a rising property market, the sale might well achieve sufficient to discharge in whole or in part a judgment debt, notwithstanding apprehension that that would not happen.

74. In general, mere impecuniosity or the mere likelihood that the sale of property would not satisfy a debt does not properly recognise the interest of the judgment creditor and the recognition of that interest and the making of an order to protect that interest is one that the court has the statutory power to make and a statutory imperative to, at least, consider.

75. However, when, as a matter of high probability, the sale of principal private residence would render a couple homeless and leave them with an unsecured debt to their primary mortgage holder, and when the result is as a matter of high probability likely to lead to there being no funds available to meet the judgment creditor, then the question of feasibility must be an important factor in the court's consideration. A further factor is that the making of an order for sale and the consequent sale of the property will have the effect that the judgment debt would no longer be secured, and the preservation of the well charging order and its continued presence as a burden on title may well be, in many cases, the preferred means by which the interest of the judgment creditors is best to be recognised.

The orders that may be made
76. Section 31 of the Act relating to jointly held land where the debt is that of one of the co-owners permits the court to make any other order "relating to the land" as appears just and equitable. An order under s. 31 of the Act may include an order for sale with or without conditions under sub-s. (3)(a).

77. I consider that the provisions of s. 31(2)(f) of the Act, which permits the court to make an order "relating to the land", does not permit the making of an order *simpliciter* providing for periodic payment of the debt. But an order for sale with a stay conditional upon the meeting of instalment payments in regard to the debt would be an order relating to the land with conditions to which combined provisions of s. 31(2)(f) and s. 31(3)(a) of the Act apply.

78. I do not, in the circumstances of the present case and taking into account the factors which bear on my discretion set out above, propose adjourning the making of an order for sale in lieu of partition but will make an order that the sale be stayed on conditions.

79. Section 117 of the Act provides that the court hearing an application for an order under that section, including an order for the sale of the land, may make "such other order for enforcement of the judgment mortgage if the court thinks appropriate." That arguably broader power is not engaged in the present case, as I do not propose making an order for a partition at this juncture and the differences, if any, between the powers vested by s. 31 and s. 117 of the Act do, therefore, not need to be further considered.

Conclusion
80. In those circumstances, I consider that the prudent and just approach to the present case is to make an order for sale with a long stay and with conditions.

81. With that in mind, I must consider the means of the defendants, or more especially, those of Mr. Crean. I am satisfied, in the first place, that, having regard to Mr. Crean's betting practice, he can afford to discharge the sum of €400 a month, at least, to the plaintiff in respect of the debt, and that payment will not materially affect the means of the couple. The payment of that amount, however, would leave Mr. Flynn and his family without any hope of a sufficiently large lump-sum to deal with the remedial works and it would take six years minimum to discharge the debt at that level of payment.

82. I am also satisfied that Mr. Crean will return to work in the very near future, and on the evidence I find that, as a matter of probability, he does have some gainful employment by which he receives cash payments and which do not find their way into his joint current account. In that regard, I note that the payment made by Mr. Flynn for the works to be done on his property was made wholly in cash. Accordingly, I am of the view that Mr. Crean can now, or will, at least in the very near future, be in a position to, discharge much more than €400 a month. I consider that in those circumstances, the proper figure is €700 per month. This would mean the primary debt (excluding costs) would be discharged in less than four years.

83. Counsel for the plaintiff urged me to make an order for the payment of a lump-sum forthwith, but I am conscious that, at present, while Mr. Crean was not helpful in his answer to my question regarding the availability of a Credit Union loan, it would be unjust and possibly unworkable to direct the payment of a lump-sum immediately. However, I am satisfied that, having regard to Mr. Crean's previous successful business as a carpenter, he has an ability to earn large sums of money from his business. The couple have largely met their ongoing personal and family needs from the income of Mrs. Crean with the social welfare payments of less than €800 per month currently being received by Mr. Crean. Mr. Crean was confident his business would be successful once he returns to work, as he said he will, in a matter of a few short weeks. In those circumstances, I am satisfied that within a period of six months, Mr. Crean will have re-established his business, a business which, even on his own evidence, he accepts is likely to be successful having regard to the current economic climate, and that he will be in a position, within ten months of the date hereof, to pay an additional lump-sum payment of €5,000 to Mr. Flynn in discharge of the debt secured by the judgment mortgage. This time will give Mr. Crean the opportunity to accumulate some savings during the summer months when it is likely, on his own evidence, he will be working.

84. The combined orders will accelerate the payment to the plaintiff and take account of his uncontroverted evidence that he needs the judgment debt enforced to carry out essential works of repair to his dwelling.

85. I am satisfied that the order I propose does justice between the parties and, accordingly, I will grant an order for sale of the property comprised in Folio KY67603F, County Kerry, with a stay, with such stay to continue provided a payment of €700 per month is made to the plaintiff, first payment on 15 March 2019, and thereafter monthly on 15th of each month, and provided payment is made on or before 15 December 2019 in the sum of €5,000.

86. The stay is to continue to subsist provided payments are met, and on default of payment, the plaintiff is at liberty to return to court for the making of further orders on the giving of two days' notice to the defendants. I will not, at present, make an order that, in default of the making of any one payment, the property should be sold, as it is not possible, at this juncture, to anticipate whether that would be a just result in the event that default occurred in, for example, three years' time, where there would be relatively little outstanding on the judgment amount.

87. In due course, and on discharge of the debt, or at such earlier time as the relevant court shall deem fit, application may be made for the discharge of the order for sale.