

**THE HIGH COURT****2008 1277 SP****BETWEEN:****DRILLFIX LIMITED****PLAINTIFF****AND****MABEL SAVAGE AND RUTH SAVAGE****DEFENDANTS****JUDGMENT Delivered by Ms. Justice Dunne on the 9th day of December, 2009**

On the 5th November 2007 the plaintiff herein obtained judgment against the first named defendant herein for the sum of €165,247.75 together with costs in proceedings entitled "Drillfix Limited, plaintiff and Mabel Savage, defendant - High Court, record number 2006/726S". Subsequently, that judgment was registered by the plaintiff as a mortgage against the interest of the first named defendant in the lands, tenements, hereditaments and premises known as 22 Ardagh Road, Crumlin, Dublin 12 (hereinafter referred to as "the premises"). The second named defendant herein is a joint owner of the premises.

These proceedings were commenced by the plaintiff on 24th March 2009 in which the plaintiff sought the following reliefs:

- (I) A declaration that by virtue of the said judgement mortgage, the sum of €165,247.75 together with interest thereon at a rate of 8% per annum in the sum of €13,219.82 until payment stands well charged upon the interests of the first named defendant in the premises.
- (II) A declaration that is due and going by the first named defendant to the plaintiff on foot of the said mortgage the said sum of €165,247.75 with interest there on.
- (III) Alternatively, and if necessary, an order directing the taking of all necessary accounts or enquiries as to what sum is due to the plaintiff on foot as the judgement mortgage together with an order directing payment of this sum when ascertained.
- (IV) An order directing the enforcement of all sums due to the plaintiff by the sale of the land and property or by a receiver or by polls, as this honourable court shall direct.
- (V) An order that in default of payment by the first named defendant of the above sums that the premises be sold in lieu of partition pursuant to the Partition Acts 1868-1876 with an order for the taking of all necessary accounts and enquiries including as to distribution of the proceeds of sale.

A number of affidavits were filed in the course of the proceedings. The first affidavit sworn herein is an affidavit of Maria Priestly grounding the plaintiff's claim herein. That affidavit was in a standard form appropriate for proceedings such as these. Each of the defendants swore replying affidavits. In her affidavit the first named defendant set out a number of matters which help to explain the background to this matter and how the plaintiff came to obtain judgment against her in the first place. She also set out a number of matters relating to her personal circumstances and those of her sister, the second named defendant. She pointed out that she and her sister reside together in the premises; they are both approaching retirement; her sister has ceased full-time work due to poor health and in the event that an order for sale is made they will probably be unable to secure accommodation wherein they both might continue to live together. In the circumstances, although there was no objection to the entitlement of the plaintiff to seek the declaratory reliefs sought herein the first named defendant urged the court not to make an order for sale.

The second named defendant went into some more detail about the background circumstances relating to the premises themselves and the circumstances which have led to the current proceedings. She explained that she and her sister have resided at the property since 1979 when the property was purchased for the sum of £16,000 with the assistance of a mortgage. The property is owned by the defendants as Tenants in common. They continue to discharge the mortgage repayments due on the property.

The second named defendant states that she and her sister were never served with a copy of the order of the 5th November 2007 against the first named defendant but she acknowledges and accepts that the plaintiff was granted judgment on that date against her sister. They were aware that proceedings had been commenced against the first named defendant. Unfortunately, the first named defendant who worked for many years for the plaintiff had embezzled money from its accounts by drawing upon cheques made out on the plaintiff's bank account. This had occurred for approximately 8 years prior to April 2005. The first named defendant informed her sister of that fact around that time. As a result of that information the defendants together with the family doctor arranged to meet representatives of the plaintiff company. They informed Mr. Alan Spiller of the plaintiff's company of what had occurred. Initially, it appears that the plaintiff was not aware of the full extent of the losses. A further meeting was arranged and at that meeting a request was made on behalf of the plaintiff to have the defendants sign over their premises to the plaintiff. The second named defendant indicated at the meeting that she was not prepared to facilitate this, but did indicate that she would attempt to find some other way of repaying the plaintiff.

Subsequently in July 2005 a letter was received seeking payment of the sum of €160,000 approximately. That was the first time that the second named defendant became aware of the amount involved. Following receipt of that information the defendants obtained an offer of a loan in the amount of €40,000 from a building society. They offered to pay that sum to the plaintiff and thereafter to make instalment payments of €100 per month, this offer was rejected. Thereafter, the proceedings were commenced which led to the judgment in the sum of €165,297.75. Although no issue is raised on this point, it appears that it was sometime before the defendants became aware of the fact that the plaintiff had obtained judgment.

The second named defendant then proceeded to outline the fact that there was a total of €181,855.30 due on foot of mortgages in respect of the premises. (These are described in her affidavit as "eight undischarged mortgages". A search on the premises which is exhibited in the affidavit of Maria Priestly discloses only one mortgage apart from the judgement mortgage the subject of these proceedings. It seems to me likely that the reference to eight undischarged mortgages is a reference to top-ups on the original mortgage). The repayments being made monthly in respect of the mortgage is €1646.93. She then set out details in relation to her income and that of her sister and the amount that they would be able to pay on a monthly basis to discharge the indebtedness due. Unfortunately it appears that the €40,000 obtained with the intention in part of compensating the plaintiff for the losses incurred by the first named defendant appears to have been spent. It is no longer available. The second-named defendant concluded her affidavit by saying that the plaintiff in seeking to deprive her of her home is being unjust and inequitable in the circumstances. It is pointed out that the plaintiff would receive little if any money in reduction of its claim if the property is sold and that the second named defendant would be deprived of her home despite having committed no wrongdoing. In those circumstances she has asked that an order for sale should not be made. She has indicated willingness on her part and on the part of her sister to discharge the indebtedness by way of payments "by way of instalment order".

In the course of submissions, it was indicated that the premises had a value of approximately €350,000. Given the level of borrowing secured on the premises it was anticipated that the equity was approximately €168,000. It was estimated that a sale of the premises would achieve no more than a sum of €84,000 for the plaintiff representing approximately the value of the first named defendant's interest in the equity. The estimates of the figures set out above take no account of the cost of these proceedings and the costs involved in a sale of the property. No doubt if those figures were taken into account, but some realisable by the plaintiff through the sale of the premises would be less than the figure of €84,000.

Counsel on behalf of the first named defendant accepted that the plaintiff was entitled to seek the orders against his client. It was contended on behalf of the second-named defendant that she was an innocent party and was indeed the person who first alerted the plaintiff to the wrongdoing. Counsel pointed out that the defendants have not been able to obtain any additional funds since the registration of the judgment as a judgement mortgage against the premises. It was urged that the court had a discretion to refuse to make an order for the sale of the premises given the hardship to the second-named defendant, an innocent party.

By way of response, counsel on behalf of the plaintiff contended that there were no other funds available and that the plaintiff had a right to the relief sought against the defendants.

The premises at issue in these proceedings consist of unregistered land. Accordingly, the principles set out in the case of *Irwin v. Deasy*, [2006] IEHC 25, dealing with judgement mortgages over registered land is not of particular assistance.

In the course of submissions I was referred to the decision in the case of *First National Building Society v. Ring* [1992] 1 I.R. 375, in which the court (Denham J.) considered the provisions of s. 4 of the Partition Act, 1868, which provides:

"In a suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one Moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or consequent directions."

The question I have to consider in this case is whether the defendants or either of them has shown a good reason such that this court should not direct a sale of the premises. The matters relied on by the defendants which are relevant are:

- (i) The premises constitute the home of the defendants (albeit not a "family home" within the meaning of the Family Home Protection Act 1976) and has been their home for 30 years.
- (ii) The second named defendant is an innocent party and had no part in the wrongdoing by the first named defendant which led to the plaintiff's losses.
- (iii) The defendants are approaching retirement and are of limited means. They have made an offer to make a monthly payment to the Plaintiff in reduction of the first named defendant's indebtedness.
- (iv) Since the judgment they have tried but failed to obtain alternative funds to pay off the sum due to the plaintiff.
- (v) It would be inappropriate to order a sale in lieu of partition against a co-owner and an innocent party against whom no judgement mortgage has been registered where to do so would render her homeless.

In the case of *First National Building Society v. Ring*, one of the arguments raised was that the sum realisable by a sale would not nearly meet the debt due. Denham J. rejected that argument, saying:

"However, this itself is not a valid reason to refuse an order for sale."

Denham J. on the facts of that case went on to hold as follows:

"There is no valuation of the premises now or at other relevant times. There is no determination of the various proportions and shares of any other interests in the property. Clearly it is in the second defendant's interest to try

to retain this property if at all feasible. This matter has not been enquired into at all. There is no information on the real likelihood of sale of this house. The court would not ordinarily make an order which would be futile.

The second defendant who is a co-owner and who is an innocent party and has no judgment registered against her would undoubtedly suffer a significant sacrifice if her property, part of the family home, were sold now. In the circumstances it does not appear appropriate now to order Partition or sale in lieu of Partition."

In that case, Denham J. went on to make a well charging order in respect of the first named defendant's interest in the property at issue in that case. She also made a declaration as to the amount due and owing by the first named defendant to the plaintiff on foot of the judgement mortgage in that case. She also directed an enquiry to be made as to the persons interested in the lands and premises, their shares and proportions, the current market price valuation of the property, the feasibility of its sale, and an enquiry as to whether there is any possibility of the second-named defendant making financial arrangements to purchase the first defendant's share at an agreed price. For that reason she adjourned generally the proceedings with liberty to re-enter.

If I were to take a similar approach in this case, it seems to me that it would be appropriate to consider a number of matters in relation to which there is, to my mind, some uncertainty. The first issue relates to the value of the property. In the course of the hearing before me I was told that the property had an estimated value of €350,000. I am not sure as to the basis for that valuation. That valuation was furnished by Counsel in the course of argument. There was no evidence before me by way of valuation by an auctioneer. There was some information as to the extent of the mortgage on the premises. Although that was a reference to eight undischarged mortgages, it does not appear to be clear that there were in fact eight such mortgages. As I mentioned earlier, it appears to me that the reference to such mortgages is probably a reference to top box on the various mortgages. One of the documents exhibited in the affidavit of the second named defendant is a document described as "ICS mortgages balance as at 17th April 2009" which refers to what appear to be eight different loan accounts. The position on foot of the ICS mortgage requires to be clarified.

I think it is important to ascertain the feasibility of a sale of the property given the current economic climate. I think it would also be important to find out the costs involved in a sale of the property. In other words, the court should have the information necessary to ascertain precisely the likely net proceeds available following a sale in respect of the first named defendant's interest in the property. If that figure was ascertainable it may be possible for the second-named defendant to attempt to purchase the first named defendant's interest in the property. I am conscious of the fact that it has been deposed on affidavit that the second-named defendant has attempted to seek a loan from a financial institution to assist in discharging the plaintiff's claim. Nonetheless, with the information described above it may be possible to obtain which would represent the value of the first named defendant's interest after a sale had taken place. At the very least, I think no order should be made until those enquiries have been carried out.

I propose to make at this stage a well charging order over the first named defendant's interest in the property. The plaintiff is entitled to a declaration that there is due and owing by the first named defendant to the plaintiff on foot of the said judgement mortgage the said sum of €165,247.75 with interest thereon. I will adjourn the proceedings to enable the enquiries I have indicated above to be made. I will hear the parties further on this aspect of the matter at a later stage.