

**THE HIGH COURT**

**[2010 No. 183SP]**

**BETWEEN**

**GERARD HARRAHILL**

**PLAINTIFF**

**AND**

**HENRY DIXON**

**DEFENDANT**

**Judgment of Ms. Justice Laffoy delivered on 7th day of December, 2012.**

**The proceedings**

1. In these proceedings, which were commenced by a special summons which issued on 16th March, 2010, the plaintiff, the then Collector General of the Revenue Commissioners, sought an order that three judgment mortgages which had been registered by the Collector General stand well charged over the interests of the defendant (Mr. Dixon) in the properties specified in the schedule to the special summons, that is to say:

(a) the property comprised in Folio 44622F of the Register of Freeholders, County Mayo; and

(b) the property comprised in Folio 11401 of the Register of Freeholders, County Mayo.

The usual ancillary relief in proceedings for a well charging order on foot of a judgment mortgage was also sought, including an order that payment of the debts be enforced by an order for sale or for the appointment of a receiver or both.

2. By an order of the Court (Dunne J.) made on 19th July, 2010, which was an order made with the consent of Mr. Dixon, the principal monies secured by the three judgment mortgages were declared well charged on the property comprised in Folio 44622F County Mayo and the usual ancillary orders were made by consent.

3. The dispute between the parties relates to the lands registered on Folio 11401 of the Register of Freeholders, County Mayo. It is the contention of Mr. Dixon that he has no beneficial interest in the said property and that, accordingly, the plaintiff is not entitled either to a well charging order or any ancillary relief in relation to that property.

4. In addressing Mr. Dixon's defence to these proceedings, I propose outlining first what is disclosed on Folio 11401. I then propose outlining the course of proceedings in this Court (Record No. 2004/2094P) between Emo Oil Ltd. (Emo), as plaintiff, and Mr. Dixon and Hill View Farms Ltd. (the Company), as defendants (the 2004 Proceedings). As I advised the parties at the hearing that I proposed to do, I have obtained the file in relation to the 2004 Proceedings from the Central Office. I will then consider the principles of law relied on by counsel for the parties. Finally, I will set out my conclusions as to whether the plaintiff is entitled to the relief claimed at this juncture or, alternatively, the course the proceedings should take from here on.

**Folio 11401 County Mayo**

5. As regards ownership, Folio 11401 discloses the following:

(a) Mr. Dixon was registered as full owner with absolute title on 5th September, 1997. That entry was cancelled on 3rd October, 2003.

(b) On 3rd October, 2003 the Company was registered as full owner in succession to Mr. Dixon. The registration of the Company was cancelled on 17th February, 2006.

(c) Mr. Dixon was registered as full owner on the folio in succession to the Company, with effect from 5th September, 1997, the original date of his registration.

6. The burdens registered on the folio which I consider to be relevant for present purposes are the following:

(a) On 26th August, 2003 Bank of Ireland registered a judgment mortgage against Mr. Dixon, the judgment having been obtained in the Circuit Court, the amount owing on the judgment being stated to be €6,119.01. That judgment mortgage was cancelled off the folio on 9th August, 2011.

(b) On 4th November, 2003 Emo registered a judgment mortgage against Mr. Dixon, the amount owing on the judgment being stated to be €40,489.82. That judgment mortgage was the subject of the 2004 Proceedings. It was cancelled off the folio on 1st December, 2006.

(c) On 25th March, 2004 Corby Rock Mill Ltd. registered a judgment mortgage in respect of a judgment obtained in the Circuit Court against Mr. Dixon, the amount owing on the judgment being stated to be €17,977.34. That judgment mortgage remains registered as a burden on the folio.

(d) On 29th January, 2008 Ann Mangan registered a judgment mortgage against Mr. Dixon arising from a judgment obtained in the Circuit Court, the amount owing on the judgment being stated to be €68,628.14. That judgment mortgage remains registered on the folio. The Court was furnished with a copy of the order made by the Judge of the Circuit Court, Western Circuit, County of Mayo (Record No. 273/08) in the proceedings between Ann Mangan, as plaintiff, and Mr. Dixon, as defendant. The Court's attention was drawn to the fact that the order discloses that, when it was made, Mr. Dixon was represented by counsel, instructed by solicitors, who made representations on his behalf.

(e) A judgment mortgage registered on 12th November, 2008 by the plaintiff against the interest of Mr. Dixon, the amount owing on the relevant judgment being stated to be €318,282.85. This is the first of the three judgment mortgages in respect of which the plaintiff seeks a well charging order over the interest of Mr. Dixon in the lands registered on the folio. This judgment mortgage remains registered as a burden on the folio.

(f) A judgment mortgage registered on 9th March, 2009 by the plaintiff against the interest of Mr. Dixon, the amount owing on the relevant judgment being stated to be €10,806.43. This judgment mortgage remains registered as a burden on the folio. It is the second of the three judgment mortgages which are the subject of these proceedings.

(g) A judgment mortgage registered on 28th April, 2009 by the plaintiff against the interest of Mr. Dixon, the amount owing on the relevant judgment being stated to be €55,960.43. This is the third judgment mortgage which is the subject of these proceedings and it remains registered as a burden on the folio.

(h) A judgment mortgage registered on 20th July, 2011 by Ulster Bank Ireland Ltd. against the interest of Mr. Dixon, which judgment mortgage remains registered as a burden on the folio.

### **The 2004 Proceedings**

7. The 2004 proceedings were commenced by plenary summons which issued on 19th February, 2004. The first relief sought in the endorsement of claim on the plenary summons was for a declaration that the purported transfer of interest in the lands registered on Folio 11401 from Mr. Dixon to the Company was void and of no effect pursuant to the provisions of the Conveyancing Act (Ireland) 1634 (the Act of 1634), which purported transfer was registered in the Land Registry on 3rd October, 2003. There followed the usual claims to enforce a judgment mortgage, the judgment mortgage in question being Emo's judgment mortgage referred to at (b) in para. 6 above. A statement of claim was subsequently delivered to each of the defendants.

8. Obviously what happened next was that a motion for judgment in default of appearance which was dated 20th May, 2004 was issued. It came on for hearing on 21st June, 2004. The notice of motion dated 20th May, 2004 is not on the Central Office file. However, the grounding affidavit of Paul Nolan sworn on 18th May, 2004 is on the file. In that affidavit Mr. Nolan prayed for an order granting the plaintiff judgment in default of appearance against the defendants in the terms of the general endorsement of claim on the plenary summons.

9. By order of the Court (Finlay Geoghegan J.) dated 21st June, 2004, after reciting the notice of motion dated 20th May, 2004, the presence of counsel for Emo and the fact that there was no attendance by or on behalf of Mr. Dixon or the Company, the following declaration was made:

"The Court doth declare that the purported transfer of interests in the lands and premises referred to in the Schedule hereto from [Mr. Dixon] to [the Company] is void and of no effect pursuant to the provisions of the Conveyancing Act (Ireland) 1634 which said purported transfer of interest was registered in the Land Registry on the 3rd day of October, 2003."

The lands registered on Folio 11401 were referred to in the schedule. There followed a "well charging" order in relation to the monies secured by Emo's judgment mortgage and the usual ancillary orders.

10. It is clear from the file that in 2005 Emo took steps to proceed to a court sale of the property registered on Folio 11401 under the aegis of the Examiner's Office. Obviously, when the title was investigated, it became obvious that there would be a difficulty making title as it was the Company, and not Mr. Dixon, which was registered as owner on the folio at the time. In early January 2006 a motion was brought on behalf of Emo seeking an order directing the Land Registry to amend Folio 11401 by substituting Mr. Dixon as owner in place of the Company. That motion was successful. By order of the Court (Clarke J.) made on 13th February, 2006 it was ordered that the Registrar of Titles amend Folio 11401 for the purpose of giving effect to the order dated 21st June, 2004. It was that order, in which it was recited that there was no appearance on behalf of Mr. Dixon or the Company, which led to the cancellation on 17th February, 2006 of the registration of the Company as owner and reinstatement of Mr. Dixon as owner with effect from 5th September, 1997.

11. The final step in the 2004 proceedings was on foot of a motion dated 7th November, 2006 issued on behalf of Emo on notice to the solicitors for Mr. Dixon, the Company, the solicitors for Bank of Ireland and the solicitors for Corby Rock Mill Ltd. In the notice of motion, to which counsel for the plaintiff attached considerable weight, what was sought was an order "discharging the Well Charging Order and Order for Sale dated 21st June, 2006". Presumably, it was intended to refer to the order of 21st June, 2004. The motion was grounded on the affidavit of John O'Donovan, a member of the firm of solicitors acting on behalf of Emo, which was sworn on 7th November, 2006. In that affidavit Mr. O'Donovan averred that the proceedings had been settled "to the satisfaction of the plaintiff and defendant (*sic*)" and that Mr. Dixon was consenting to the discharge of "the Well Charging Order". A letter of consent from his solicitors was exhibited. The order of the Court (Finlay Geoghegan J.) made on foot of the notice of motion was dated 18th December, 2006. It was recited that the solicitor for the plaintiff and counsel for Corby Rock Mill Ltd. were present at the hearing of the motion. It also recited the existence of a letter dated 1st November, 2006 from the solicitors for Bank of Ireland consenting to the order made. Having recited that the Court was satisfied by the evidence adduced that all parties interested in the lands and premises set forth in the schedule to the order of 21st June, 2004 were before the Court or were otherwise bound by the order made, it was ordered –

"... that said Order dated the 21st day of June 2004 and the same is hereby discharged."

It was further ordered that the 2004 Proceedings be struck out.

### **Response of Mr. Dixon on affidavit**

12. In his first replying affidavit in these proceedings sworn on 18th May, 2010, Mr. Dixon averred that he is not the owner of the lands comprised in Folio 11401 and that by a deed of transfer made on or about 3rd October, 2003 he had transferred his interest in the lands to the Company. He referred to the process whereby the Company was removed from the folio and he was reinstated as owner. He averred that he had settled the claim of Emo and that, as part of the settlement, the order of 21st June, 2004 was to be vacated. He averred that the judgments on foot of which the plaintiff was seeking declaratory relief had been obtained against him subsequent to the 2003 transfer taking place. He averred that he had been advised that at all material times the legal and beneficial interest in the lands had been held by the Company and not by him. In my view, the documents exhibited by Mr. Dixon in that affidavit do not advance matters.

13. Mr. Dixon swore a supplemental affidavit on 24th June, 2010. In that affidavit Mr. Dixon referred to an attested copy of the order made on 18th December, 2006 and averred that he had been advised that, as a consequence of that order, the legal and beneficial interest in the lands remained, at all material times, vested in the Company and not in him.

14. Mr. Dixon's final affidavit was sworn on 15th June, 2012. In that affidavit he averred that, at all material times subsequent to the order of 18th December, 2006, the Company, of which he is a director, had acted and proceeded on the basis that the legal and beneficial ownership of the lands registered on Folio 11401 was vested in the Company. He further averred that the Company had accounted for the lands as an asset in its balance sheet and used the lands for the purpose of trading activities. He exhibited the various copy documents to corroborate that averment. These included:

- (a) the Company's audited accounts for the years ended 2008, 2009, 2010 and 2011;
- (b) the Company's fixed asset register as at July 2011;
- (c) Department of Agriculture & Food Single Farm Payments documentation evidencing payments received by the Company in respect of the lands and lodged in the Company's bank accounts;
- (d) copies of bank statements in respect of the Company's account with Ulster Bank; and
- (e) corporation tax returns filed for the accountings periods ending in 2008, 2009, 2010 and 2011.

All of the foregoing would be more convincing as evidence of Mr. Dixon's contention that the Company is the owner of the land registered on Folio 11401 but for the status of the Company at the time.

#### **Status of the Company**

15. The Company was dissolved with effect from 27th May, 2005, as I understand it, for failure to file annual returns. The Company was restored to the register in the recent past. I understand that occurred some time in mid-2012, when the outstanding returns were filed, although no evidence, such as an up-to-date CRO search was put before the Court of the precise date.

16. A so-called "company report", carried out by Creditsafe UK Ltd. handed into the Court, which was dated 19th November, 2012, discloses that Mr. Dixon is the sole member of the Company. He is also a director of the Company. While, it would appear that, in reality, he is the Company, the Company has a separate distinct legal personality.

#### **The law**

17. Prior to the commencement of the Land and Conveyancing Law Reform Act 2009 (the Act of 2009) the effect of the registration of a judgment mortgage on registered land was governed by s. 71(4) of the Registration of Title Act 1964 (the Act of 1964) which provided:

"Registration of an affidavit which complies with the said sections and this section shall operate to charge the interest of the judgment debtor subject to –

- (a) the burdens, if any, registered as affecting that interest,
- (b) the burdens to which, though not so registered, that interest is subject by virtue of section 72, and
- (c) all unregistered rights subject to which the judgment debtor held that interest at the time of registration of the affidavit,

and the creditor shall have such rights and remedies for the enforcement of the charge as may be conferred on him by order of the court."

Each of the plaintiff's judgment mortgages was registered before the commencement of the Act of 2009 on 1st December, 2009. As counsel for the plaintiff pointed out, the effect of s. 71(4) was considered by the Supreme Court in *Tempany v. Hynes* [1976] I.R. 101. Apart from recalling that in his judgment in that case Henchy J. stated (at p. 110) that "a judgment mortgage is a process of execution and is not a charge created for valuable consideration", in my view, the judgments in that case do not assist in resolving the issues which arise in this case.

18. Counsel for Mr. Dixon relied on the decision of the High Court (Clarke J.) in *ACC Bank Plc v. Markham* [2007] 3 I.R. 533. In particular, counsel referred to paragraph 19 of the judgment of Clarke J. in which he addressed the effect of s. 71(4) of the Act of 1964 and the decision of the Supreme Court in *Tempany v. Hynes* and pointed out that Kenny J., delivering his judgment, had reaffirmed (at p. 117) that a "judgment mortgage is a process of execution and the judgment mortgagee is not a purchaser for valuable consideration". Later, Clarke J. stated that s. 71(4) does no more than recognise the historical position as analysed in the authorities which he had considered. He continued (at p. 540):

"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."

19. Counsel for Mr. Dixon also referred the Court to the judgment of the High Court (Murphy J.) in *Criminal Assets Bureau v. A.C.* [2009] IEHC 351. Murphy J. recorded a submission made on behalf of the Criminal Assets Bureau as follows:

"A party having the benefit of a judgment mortgage may raise issues in relation to an application for a declaration that the sums referred to in the affidavit are well charged and that accounts (as to ownership or encumbrances) and enquiries (as to priorities) be held, into any other claims to ownership. This is the routine course by which an argument as to the ambit of the judgment debtor's interest in the property would be determined.

The existence of competing claims is therefore no barrier to the making of the declaration which the applicant seeks once a *prima facie* case is made that the respondent has some legal or beneficial interest in the property – although it may be appropriate for an order for sale to be deferred until the competing claims have been adjudicated upon."

In addressing that submission in setting out the decision of the Court, Murphy J. stated:

"It is not a matter which can be left to the examiner for an order to be made for appropriate accounts and enquiries. The determination of ownership is a matter for the court. (*NIB v. O'Connor*, supra.)."

The case cited by Murphy J. is the decision of the High Court (Finlay Geoghegan J.) in *National Irish Bank v. O'Connor* [2007] IEHC 382.

### Conclusions

20. The general thrust of the plaintiff's contention that he is entitled to the relief sought is that he relied on Folio 11401 and, in particular, on the registration of Mr. Dixon as the owner of the property. It is not surprising that such reliance was placed on the folio, because s. 31(1) of the Act of 1964 provides:

"The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon . . ."

21. However, when the manner in which Mr. Dixon was reinstated on the folio in consequence of the order of the High Court dated 13th February, 2006, and the existence of the order of 18th December, 2006 came to light, the plaintiff should have taken cognisance of the effect of the latter order. *Prima facie*, it discharged the order dated 21st June, 2004 in its entirety, including the declaration that the transfer by Mr. Dixon to the Company was void and of no effect. While the order of 13th February, 2006 was not discharged, that order flowed from the order of 21st June, 2004 declaring the transfer from Mr. Dixon to the Company void and of no effect, as is clear from the first recital in it. Because the registration of ownership on Folio 11401 is regulated by three orders made in the 2004 Proceedings, the Court is faced with a dilemma.

22. While I consider that the approach of the plaintiff in pressing for the relief sought in the special summons in relation to Folio 11401 at this juncture is wholly unrealistic, the dilemma now facing the Court is largely attributable to failure on the part of Mr. Dixon to comply with the requirements of the Companies Act 1963, as amended, in relation to the Company over a span of at least seven years, including the period during which the orders of 13th February, 2006 and 18th February, 2006 were made. It is the Company who should have sought an express order discharging the order of 13th February, 2006, if it was entitled to such a discharge. Further, it was the Company which should have applied to the Land Registry to have the folio amended.

23. The dilemma with which the Court is faced is that there is evidence, which cannot be ignored, which suggests that the Company was the beneficial owner of the lands registered on Folio 11401 and was entitled to be registered as owner on the folio when each of the plaintiff's judgment mortgages was registered on the folio. If, as a matter of fact and law, the Company was the beneficial owner, then Mr. Dixon has no interest which could be captured by a well charging order. However, the Company is not before the Court, and, obviously, could not have been joined as a party while it did not exist because it was struck off.

24. There is also the curious circumstance that the judgment mortgage of Bank of Ireland against Mr. Dixon was cancelled of Folio 11401 as recently as 9th August 2011.

25. The problems identified above have to be resolved before the Court can proceed further with the matter.

### Order

26. Accordingly, on the Court's own motion, I propose joining the Company as a co-defendant in these proceedings. I propose adjourning the proceedings for a sufficient period to allow all of the parties to address the issues identified by the Court, that is to say, to Tuesday, 19th March, 2013.

27. Finally, the plaintiff should give consideration to whether the title to the proceedings should be amended to substitute the current Collector General for the former Collector General as plaintiff.