

THE HIGH COURT

[2012 No. 635 S.P.]

BETWEEN

MUINTIR SKIBEREEN CREDIT UNION LIMITED

PLAINTIFF

AND

CORNELIUS CROWLEY

FIRST DEFENDANT

AND

[2012 No. 636 S.P.]

MUINTIR SKIBEREEN CREDIT UNION LIMITED

PLAINTIFF

AND

BRENDAN HAMILTON

SECOND DEFENDANT

JUDGMENT delivered 23rd day of January, 2015 by Mr. Justice Michael White

1. These proceedings relate to two separate special summonses issued by the Plaintiff against the Defendants seeking a Well Charging Order and the sale of separate properties. The First Defendant owns jointly the property comprised in Folio 77272F Co. Cork, with his wife Breda Crowley. The Second Defendant owns jointly the property comprised in Folio 5079F Co. Cork, with his wife Breda Hamilton. Both properties are family homes.

2. The orders are sought pursuant to Section 31 of the Land and Conveyancing Law Reform Act 2009.

3. The Defendants procured a loan from the Plaintiff for commercial purposes to develop property. Due to financial difficulties and the collapse of the property market, they were not able to repay the loan.

4. Judgment was obtained by the Plaintiff on the 5th October, 2011 for the sum of €562,500 and costs of €355.98.

5. On the 9th December, 2011 judgment was registered in the Land Registry on Folio 77272F Co. Cork. Similarly on the 9th December, 2011, judgment was registered in the Land Registry on Folio 5079F Co. Cork.

6. The First Defendant married on the 9th October, 1993 and has three children aged 13, 8 and 6 respectively. The First Defendant's spouse Breda Crowley never signed any documentation providing the family home as any security for the commercial loan.

7. The Second Defendant married his wife Breda on the 2nd May, 1978. They have three children who are no longer dependant. Both the Second Defendant and his spouse Breda Hamilton suffer from ill health. Breda Hamilton never signed any documentation providing the family home as security.

8. The Defendants have made some submissions on technical issues. They have submitted as the jurat on the judgment mortgage affidavit is on a separate sheet it renders the judgment mortgage invalid, and that Donal O'Driscoll is not authorised as an authorised agent within the meaning of Section 115 of the Land and Conveyancing Law Reform Act 2009 to swear the affidavit.

9. The Court does not accept those as valid arguments and is satisfied that the judgment mortgage was registered appropriately on the Land Registry folios and that Donal O'Driscoll was an appropriate person to swear the affidavit for the judgment mortgage.

10. Section 31 of the Land Law and Conveyancing Law Reform Act 2009 states:-

"(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.

(3) In dealing with an application for an order under subsection (1) the court may –

- (a) make an order with or without conditions or other requirements attached to it, or
- (b) dismiss the application without making any order, or
- (c) combine more than one order under this section.

(4) In this section –

(a) 'person having an estate or interest in land' includes a mortgagee or other secured creditor, a judgment mortgagee or a trustee,

(b) 'accounting adjustments' include –

- (i) payment of an occupation rent by a co-owner who has enjoyed, or is continuing to enjoy, occupation of the land to the exclusion of any other co-owner,
- (ii) compensation to be paid by a co-owner to any other co-owner who has incurred disproportionate expenditure in respect of the land (including its repair or improvement),
- (iii) contributions by a co-owner to disproportionate payments made by any other co-owner in respect of the land (including payments in respect of charges, rates, rents, taxes and other outgoings payable in respect of it),
- (iv) redistribution of rents and profits received by a co-owner disproportionate to his or her interest in the land,
- (v) any other adjustment necessary to achieve fairness between the co-owners.

(5) Nothing in this section affects the jurisdiction of the court under the Act of 1976, the Act of 1995 and the Act of 1996.

(6) The equitable jurisdiction of the court to make an order for partition of land which is co-owned whether at law or in equity is abolished.

11. It is within the Court's discretion to decide if it is appropriate to grant the Well Charging order, and to order partition and sale.

12. The Court in its discretion refuses the application of the Plaintiff in respect of both Defendants, for the following reasons.

(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.

13. The orders sought by the Plaintiff are refused.