Neutral Citation: [2014] IEHC 585

THE HIGH COURT

[2008 No. 548 SP]

BETWEEN

IRISH LIFE AND PERMANENT PLC TRADING AS PERMANENT TSB

PLAINTIFF

AND

GARRETH (ORS GARY) PETERS AND DENISE PETERS

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered the 16th day of September, 2014

Introduction

1. This is an application by the second named defendant to set aside an order of the High Court (Finlay Geoghegan J.) made on 2nd September, 2013.

Background to the current application

The Special Summons proceedings

2. The following chronology of events sets out the context in which the current application is made.

3. On 15th March, 2004 the plaintiff advanced a loan to the first defendant in the sum of approximately €500,000. The sum advanced was a residential mortgage loan and was secured over the following three properties

(a) The property known as "Atlantis" at Coast Road, Rush, County Dublin

(b) A property at No. 1 Coolagh Court, Coolagh Street, Drogheda

(c) A property at No. 2 Coolagh Court, Coolagh Street, Drogheda.

4. Subsequently, on or about October, 2004, the first named defendant then sold the properties at 1 and 2 Coolagh Court to another party. These properties were allegedly conveyed to that other person in breach of the mortgage agreement between the plaintiff and the first named defendant. As a result, the proceeds of sale were paid to the first named defendant directly, instead of being paid to the plaintiff to reduce the outstanding loan.

5. On 4th December, 2006 the plaintiff wrote to the first named defendant in respect of the sale of the said properties and also in respect of arrears on the loan account and sought repayment of the loan.

6. On 20th March, 2007 the first named defendant's solicitors wrote to the plaintiff in respect of the property "Atlantis". This letter stated that the property "Atlantis" was now the subject matter of an order of the High Court in family law proceedings with his estranged spouse, the second named defendant. The letter stated that on 9th March, 2007 a family law settlement was entered into between the first and second named defendant and was ruled by the High Court on 9th March, 2007. Given the confidential nature of the family law proceedings the full order and terms of settlement were not set out but as part of the settlement, the first defendant agreed to transfer to his wife, the second defendant, the entire of his legal and beneficial interest in Atlantis free from all mortgages and encumbrances. The husband also agreed that he would procure the release of the mortgage upon this property within a period of six months of the family law settlement. (This, he subsequently failed to do).

7. On 6th June, 2008 the plaintiff wrote to the second defendant at her address at Atlantis, Coast Road, Rush, County Dublin stating that the plaintiff intended to issue proceedings for the purpose of realising the bank's security over the property of her husband at Atlantis, Coast Road, Rush, County Dublin. The letter also stated that the bank had been put on notice by the first named defendant's solicitors of the High Court order made in relation to the property at Atlantis in the family law proceedings. The letter also indicated that the second defendant would be joined in these proceedings by the bank, solely because the bank had been put on notice by the first named defendant's solicitor of the High Court order made in the family law proceedings. The letter also indicated that the second named defendant should take legal advice in respect of this matter.

8. On 24th June, 2008 the plaintiff called in the loan which now amounted to the sum of approximately €526,000 (including interest) from the first defendant. The first defendant failed, neglected and/or refused to pay the outstanding loan.

9. On 30th June, 2008 the plaintiff demanded possession of the property from the first named defendant but the first named defendant failed, refused and/or neglected to deliver up possession.

10. On 3rd July, 2008 the plaintiff issued a special summons against the first and second defendants. This special summons sought

(i) A declaration that the sum of €526,000 (approximately) stands well-charged on the property at Atlantis, Coast Road, Rush, County Dublin.

(ii) An order for possession of the said premises.

(iii) An order for sale of the said premises.

11. The special summons was grounded upon the affidavit of Martin Sills on behalf of the plaintiff.

12. On 22nd July, 2008 solicitors Hennessy and Perrozzi entered an appearance on behalf of the second named defendant (although the second defendant states that they had no authority to do so). (The same solicitors also entered an appearance on 11th July, 2008 on behalf of the first named defendant.)

13. On 16th December, 2008 the first named defendant (Gary Peters) swore an affidavit in response to the special summons proceedings and in response to the affidavit of Martin Sills filed on behalf of the plaintiff. (In this affidavit Mr. Peters rejected the allegations that he breached the mortgage agreement in arranging for the sale of the two properties at Coolagh Court and in not remitting the proceeds of sale to the plaintiff. That however is not an issue which is of relevance in this application and I simply set it out herein for the sake of recording that the issue was contested by Mr. Peters.)

14. On 13th February, 2009 the second defendant also filed a replying affidavit in the special summons procedure. This affidavit was filed on her behalf by Lovett O'Donnell solicitors a new firm of solicitors retained by the second named defendant. In her affidavit Mrs. Peters stated that the first and second defendants had been separated since August 2004 and that the legal proceedings in the High Court between them were settled in March 2007. She also stated that

> *"I say that prior to settling the said proceedings I and our two children did live in "Camelot" Coast Road, Rush, County Dublin but as part of the settlement we moved from same into "Atlantis" Coast Road, Rush, County Dublin some three doors down from the other house. I say that the said house was to be transferred free of any encumbrance into this deponent's name but this has not happened. Further I say that the consent of this deponent was sought when the properties at 1and 2 Coolagh Court, Coolagh Street, Drogheda, County Louth were being sold and it is my understanding that same was given on condition that the net proceeds of sale of same was to go in reducing the mortgage on Atlantis and this was the reason for these properties being sold."*

High Court Order of 7th July 2010.
15. On Wednesday 7th July, 2010 the application by the plaintiff came on for hearing before the High Court (Mr. Justice Murphy). At this hearing the relevant affidavits were opened and the first defendant and the second defendant also made submissions to the Court in person. Thus the second defendant was given a full opportunity to be heard at that stage in respect of the applications being brought against her.

16. Having considered the matter, the High Court made an order

> (i) declaring that the sum of €571,398.67 would stand well-charged on the premises at Atlantis, Coast Road, Rush, County Dublin
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> (ii) that the payments of the said monies would be enforced by a sale of the said lands
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> (iii) That in default of payment within a period of seven months the lands were to be sold at such time and place and subject to such conditions of sale as should be settled by the Court and/or the Examiner's office.

17. On 12th July, 2010 the order of 7th July, 2010 was perfected.

18. Crucially the second defendant has not appealed this order of 7th July, 2010 either within the relevant period permitted by the rules or indeed in the intervening four years. The seven month stay expired in or about February 2011 without the debt being paid.

Application under the slip rule.
19. Subsequently on 12th September, 2011 the plaintiff made an application to the High Court under the slip rule to amend the order made by the High Court on 7th July, 2010 to correct the proper name of the second defendant. The actual name of the second defendant is Denise Peters but the High Court proceedings were instituted recording the second named defendant as Deirdre Peters. The order of the High Court on 7th July, 2010 recorded the second defendant as Deirdre Peters instead of her correct name Denise Peters.

20. In itself, the application to amend the order under the slip rule is not of any great significance. However on 7th September, 2011 Martin Sills (on behalf of the plaintiff) swore a grounding affidavit in this application. In this affidavit he stated that he had met Ms. Peters and that she had vacated the property at Atlantis in January 2011. Moreover Mr. Sills also averred that on 10th May, 2011 he met Mrs. Peters and she handed him the keys of the property.

21. On 15th September, 2011 John Quinn (a private investigator retained on behalf of the plaintiff) filed an affidavit of service averring that he personally served the second defendant on Thursday 15th September, 2011 with a copy of the notice of motion and grounding affidavit returnable for 13th October, 2011 in respect of the slip rule application.

22. On 13th October, 2011 the High Court (Mr. Justice Murphy) made an order permitting the plaintiff to amend the order of 7th July, 2010 in order to substitute the correct name of the second named defendant (Denise Peters) for the name on the proceedings (namely Deirdre Peters.) This order was perfected on 14th October, 2011 and recited the fact that there was no appearance on behalf of either of the two defendants. The said order was perfected on the 14th October, 2011.

23. On 5th March, 2012 John Quinn (the private investigator acting on behalf of the plaintiff) swore another affidavit that he personally served the second named defendant on the 22nd February, 2012 with the copy of the order of the High Court (Mr. Justice Murphy) of 7th July, 2010 together with a certified copy of the order of the High Court (Mr. Justice Murphy) of 13th October, 2011. Thus there is no doubt that the second defendant was aware of the perfected order of the High Court dated the 7th July, 2010 and indeed the amended order of 13th October, 2011. Moreover the second defendant was properly served with the papers in relation to the application under the slip rule but she, for whatever reason, did not attend.

Notice to proceed and Application before Examiner's Office.
24. On 8th June, 2012 the plaintiff served a Notice to Proceed in the Examiner's office which stated that the case would appear in the Examiner's office list on 25th July, 2012. The addressees of the Notice were the first and second defendants. The second defendant's address was given as Atlantis, Coast Road, Rush, County Dublin even though that she had left this address since January, 2011 and this fact was known to the plaintiff from May 2011 (i.e. one year before the Notice to Proceed). In any event the second defendant was not given notice that this application was about to be made.

25. On 1st February, 2013 the plaintiff's solicitors served a notice of motion made returnable to the List of the Examiner's office on

20th February, 2013. The application before the Examiner was an application by the plaintiff for:

(1.) An order permitting the auction of the property at Atlantis.

(2.) An order appointing an auctioneer.

(3.) An order appointing a valuer.

The addressees of this notice of motion are the first defendant at two different addresses and the Examiner of the High Court. The second defendant does not appear to be an addressee of this motion despite the fact that she was still the second defendant on the motion. The second defendant was not served in respect of this application.

26. On 18th February, 2013 the plaintiff's solicitors swore an affidavit of service that the notice of motion had been served on the first named defendant by pre-paid ordinary post at the two known addresses at which the first named defendant resided. There is however no affidavit of service in respect of the second defendant.

27. It appears that this matter proceeded in the Examiner's office on 20th February, 2013 and that the Examiner appointed an auctioneer and valuer and also permitted the sale of Atlantis by way of public auction on 18th June, 2013. The Examiner also fixed a reserve price for the property of €335,000.

Auction
28. On 18th June, 2013 the auction took place but the highest bid achieved at the auction was a bid of €240,000. As the reserve price set by the Examiner was not achieved, the property was withdrawn from auction. Subsequently the auctioneer conducted several viewings of the property and received a higher offer of €265,000 from one Michael O'Hehir on 5th July, 2013.

Application to High Court on 2nd September, 2013
29. In the circumstances the plaintiff on 9th August, 2013 brought a further notice of motion returnable to 2nd September, 2013 to the High Court for an order permitting the sale of the premises at Atlantis by way of private treaty to Michael O'Hehir for the sum of €265,000. This notice of motion was addressed to the first defendant and also to the second defendant at "Sandy Lane, Rush, County Dublin" which was now her correct address. The motion was issued on 9th August, 2013 and made returnable for 2nd September, 2013. It was grounded on an affidavit of Elaine Collins solicitor with O'Sullivan Barnicle Solicitors on record for the plaintiff sworn on 9th August, 2013. It was also grounded on the affidavit of James Flynn auctioneer sworn on behalf of the plaintiff on the 2nd August, 2013. The papers were served on the first defendant.

30. On 12th August, 2013 the plaintiff's solicitors also served a copy of the motion papers on the second defendant by posting them by registered post to the second defendant at Sandy Lane, Rush, County Dublin. An affidavit of service to that effect was subsequently sworn by Elaine Keaveney, a legal secretary within O'Sullivan Barnicle the plaintiff's solicitors on 15th August, 2013. Thus the second defendant was apparently served.

The High Court Order of 2nd September, 2013 (Finlay Geoghegan J.)
31. On 2nd September, 2013 the plaintiff's application was heard before the High Court (Ms. Justice Finlay Geoghegan). Having considered the affidavits and the submissions by counsel for the plaintiff the Court:

(1) directed that the plaintiff should be at liberty to sell the said property at Atlantis by private treaty

(2) approved the sale of the said property to Michael O'Hehir (represented by Seamus Maguire and Company Solicitors) for the sum of €265,000

(3) ordered that the purchase money be lodged in Court in accordance with the lodgement schedule to be settled by the Examiner.

(4) fixed a closing date for the sale of 1st October, 2013.

(5) deemed service of the said motion on the defendants to be good and sufficient service of the said motion on them given what was deposed to in the affidavits of service.

32. Thus on 2nd September, 2013 the High Court (Ms. Justice Finlay Geoghegan) made an order permitting the plaintiff to sell the property by private treaty.

Contract with purchaser
33. On 6th September, 2013 the plaintiff entered into a contract with the purchaser. The contract had as its closing date 1st October, 2013. The purchaser paid a deposit of €26,000 and on 10th September, 2013 the plaintiff issued a receipt in respect of this deposit to the purchaser. The plaintiff's solicitors then prepared the deed of transfer.

34. On 19th September, 2013 the plaintiff's solicitors sent a copy of the deed of transfer to the first named defendant but received no reply.

35. On 26th September, 2013 the plaintiff wrote to the second defendant to ascertain the whereabouts of the first named defendant and in an effort to facilitate the sale of the property. The plaintiff's solicitors wrote to the second named defendant at her address at Sandy Lane, Rush, County Dublin.

36. On 22nd September, 2013 the second named defendant sent an email to the plaintiff's solicitors requesting copies of the relevant documents by email.

37. On 1st October, 2013 the plaintiff's solicitors sent an email to the second named defendant attaching the relevant documents.

38. On 15th October, 2013 the plaintiff sent a reminder email to the second named defendant in respect of this matter.

Motion to appoint Trustee
39. On 13th November, 2013 the plaintiff then brought an application to appoint a solicitor as trustee to execute the transfer on behalf of the first named defendant. (This application was grounded upon an affidavit of Elaine Collins who is a solicitor with O'Sullivan

Barnicle solicitors, solicitors for the plaintiff.)

40. On 22nd November, the plaintiff served the motion papers on the first named defendant but again not on the second named defendant. On 9th December, 2013 the plaintiff's solicitors (Ms Elaine Keaveney a legal secretary within the firm) swore an affidavit of service stating that she served the motion papers on the first named defendant on 27th November, 2013. Again there is no affidavit of service on the second named defendant. However the second named defendant was eventually served with these motion papers before the motion came on for hearing.

41. It appears that at this point the second named defendant was spurred to take further action and she appointed Kane Tuohy as her new solicitors.

42. On 21st January, 2014 the second named defendant then brought a motion to set aside the High Court order of 2nd September, 2013.

The current application – the second named defendant's application to set aside the order of the High Court dated 2nd September, 2013

43. There are therefore two motions before the court with which I am now concerned. These are

> (i) The second named defendant's motion to set aside the High Court order of 2nd September, 2013
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> (ii) The plaintiff's motion to appoint a solicitor as trustee to execute the deed of transfer on behalf of the first named defendant.

44. It was agreed between all parties that it is the second named defendant's motion to set aside the High Court order of 2nd September, 2013 which should be heard first.

Summary of affidavit evidence

45. The second named defendant swore two affidavits of 17th June, 2014 which ground her application to set aside the High Court order (although one of these affidavits appears to be an affidavit in response to the plaintiff's application to appoint a trustee to execute the deed of transfer.) In these affidavits the second named defendant makes the following points:

> (i) She states that she instructed her new solicitors on 10th December, 2013 because she was concerned that her home was about to be sold by court order. (However the second named defendant had previously accepted in a previous affidavit that this was not her family home. She moved out of her family home at Camelot in or about March, 2007. She moved into Atlantis in or about March, 2007 and resided there until in or about January, 2010. Since January, 2010 to date she has resided at Sandy Lane, Rush, County Dublin)
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> (ii) She says that she only became aware that steps were being taken to sell Atlantis when she received the letter from the plaintiff's solicitors dated 26th September, 2013 in respect of requesting information in respect of the first named defendant's whereabouts. She stated that she was not in contact with her estranged husband.
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> (iii) She stated that on 1st October, 2013 she received the documents from the plaintiff's solicitors in respect of the transfer of the property. She states that there is no mention of her name in these papers even though she maintains the property was owned by her.
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> (iv) The second named defendant submits that the property "Atlantis" was transferred to her by order of the High Court (Abbott J.) dated 9th March, 2007 in judicial separation proceedings. She also submits that the High Court order contained as a term that the first defendant would procure the release of "the mortgage" on Atlantis within a period of six months of the making of the family law order. She also states that she was not aware of the mortgage in favour of ACC when the family court order was being made.

46. However the plaintiff in its responding affidavits submits that these submissions are not correct as a matter of law. The plaintiff submits that the owner of Atlantis at all times was the first named defendant and that he executed the mortgage in favour of the plaintiff; moreover the plaintiff maintains that it was a condition of the mortgage that property could not be assigned to any other person without the consent of the plaintiff. The plaintiff contends that its consent was never obtained and therefore as a matter of law any transfer of the property to the second defendant is ineffective at law.

47. In my view this submission is correct. It is clear that the first named defendant purported to assign the property at Atlantis to his wife in the judicial separation proceedings and also that he agreed that he would procure the release of the mortgage on Atlantis within a period of six months of the making of the family law order. However the first named defendant did not in fact do this. It is clear that the consent of the bank was required before any assignment could be valid and such consent was never granted. Therefore any complaint which the second named defendant has in respect of this matter is a matter which she must take up with her estranged husband. The fault for that does not lie with the plaintiff.

48. The plaintiff also refers to the High Court order of 7th July, 2010. It is clear that the second named defendant was present and made submissions to the High Court on 7th July, 2010 in respect of this matter. Indeed the High Court order of 7th July, 2010 records this fact. Despite these submissions and despite the fact that the second named defendant was heard by the Court on that issue, the Court proceeded to make an order declaring that the sum of €571,000 (approximately) stood well-charged over the property at Atlantis and an order that the property should be sold. It is also clear that the High Court granted a stay on the sale of Atlantis for a period of seven months to permit the first named defendant to repay the monies owed by him. This, the first defendant failed to do.

49. The second named defendant does not seek to argue that she was not heard at these proceedings on 7th July, 2010, nor does she explain in any way why she has not brought an appeal in respect of this matter. She states at para. 19 of her affidavit that she has been advised that the High Court erred in law and in fact in its decision of 7th July, 2010 and that she has instructed her solicitor to issue a Supreme Court appeal. However even though this affidavit was sworn on 17th January, 2014 no Notice of Appeal has yet been issued. Moreover I specifically requested counsel for the second named defendant to obtain instructions on whether an appeal to the Supreme Court was to be brought and I was informed (after counsel had taken instructions) that they had no instructions at the moment in respect of this matter. I was informed that their instructions were to await the outcome of this application. In these circumstances it is clear that at present no appeal has been brought by the second named defendant against the order and the order is therefore final and conclusive at this point in time.

50. The second named defendant states that the period of time in or around the conclusion of her judicial separation and the years that followed were particularly traumatic for the second named defendant, that she was sole carer of her two dependant children and that her only concern was for the welfare of her children and that she did not have the funds to maintain legal representation to the conclusion of her separation. I have great sympathy for Ms. Peters given the turmoil and personal upheaval which she experienced at that time of her life. However, having said that, it is clear that she was heard at the High Court application of 7th July, 2010 and it is also clear that some four years later she still has not appealed that order to the Supreme Courts. That is a very significant fact in the context of this application.

51. The second named defendant in her affidavits also purports to set out what she says is a bona fide defence to the plaintiff's claim. In summary, the second named defendant submits that the plaintiff had no proper security over Atlantis; that the plaintiff did not have a copy of its mortgage, that its claim for an equitable mortgage was incorrect in law and that the High Court erred in its decision to make a well-charging order and an order for sale.

52. However these submissions were relevant only to the High Court hearing of 7th July, 2010. Moreover it does appear that the High Court was aware of these arguments because of the points which were made by the plaintiff in its affidavits and its legal submissions. Despite these arguments however, the Court was of the view that the correct order to make was a well-charging order, and an order for sale. Thus these points which are now being made by the second defendant are not relevant to the application which I have to consider.

53. The second named defendant also states, more substantively, that she had no knowledge whatsoever of any further court proceedings since 7th July, 2010. She states that the plaintiff's letter of 26th September came as a complete surprise to her. She states that the orders of the Examiner (of 20th February 2013) and the order of the High Court (in the Examiner's list) (of 2nd September 2013) were made without her being on notice of such applications being made and without her being heard. In those circumstances she seeks an order to set aside the order of the High Court (in the Examiner's list of 2nd September, 2013). In addition she exhibits a valuation of Atlantis which purports to value the property at an amount of €380,000 as at 14th January, 2014.

54. The second defendant also claims that she has been greatly prejudiced in respect of this matter by not being put on notice of the various hearings before the Examiner and before the High Court Examiner's list.

55. On 26th February, 2014 Martin Sills swore a replying affidavit on behalf of the plaintiff. In this affidavit he makes the following points:

(i) That the second defendant participated fully in the hearing of the special summons before Murphy J. on 7th July 2010;

(ii) That the second defendant filed an affidavit in those proceedings (dated the 15th May, 2009) setting out the very matters about which the second named defendant now complains. This affidavit was sworn one year before the hearing of 7th July, 2010 and refers fully to what happened in the family law separation proceedings;

(iii) That the second defendant acknowledged that the property Atlantis was subject to a mortgage in favour of the plaintiff;

(iv) That the first defendant could not have transferred the property at Atlantis to the second defendant without the plaintiff's consent (which consent was never sought or obtained);

(v) That the second defendant was clearly aware, at the time of the special summons, that the plaintiff had, and claimed to have, a security interest in the property;

(vi) That the second defendant was wrong to assert that the property was transferred to her in the marriage separation proceeding;

(vii) That the High Court order of 7th July, 2010 was not appealed;

(viii) That on 10th May, 2011 the second defendant surrendered possession to the plaintiff by giving Mr. Sills the keys to the property at Atlantis when he met her at that property on that date

(ix) That the second defendant had informed Mr. Sills that she had vacated the property at Atlantis in May 2011 in accordance with the court order and was living at Sandy Lane, Rush, County Dublin.

56. Most importantly Mr. Sills confirms that the second defendant was served with the Motion papers for the High Court hearing on 2nd September, 2013. The papers were sent to her address at Sandy Lane, Rush, County Dublin by registered post.

57. Indeed on 22nd May, 2014 Elaine Keaveney (a legal secretary with the plaintiff's solicitors) swore an affidavit which sets out in fact what happened in relation to the service of these documents. That affidavit is stated to be a corrective affidavit to her affidavit of service dated 15th August, 2013. The chronology of events appears to be as follows

- on 12th August, 2013 Ms Keaveney sent the motion papers to the second defendant by registered post to Sandy Lane, Rush, County Dublin where the second defendant accepts she resides at the time.

- On 15th August, 2013 Ms Keaveney swore an affidavit of service in respect of this matter

- On 22nd August, 2013 An Post returned the registered post to the plaintiff's solicitors because it was not called for by the second defendant

- Ms Keaveney was unaware that the papers had been returned to the solicitor's office

- On 2nd September, 2013 the matter came before the High Court – Examiner's list. The High Court was shown the affidavit of service. This affidavit of service, through inadvertence, did not recite the fact that the papers had been returned by An Post to the plaintiff's solicitors.

- On 2nd September, 2013 the High Court – (Examiner's list) made an order deeming the service good and made the other ancillary orders on that date (i.e. permitting the plaintiff to sell the property by private treaty at the sum of €265,000 to

Mr. O'Hehir.)

58. On 22nd May, 2014 the second defendant filed a further affidavit in reply to these matters and stated that she was not on notice of certain applications before the Examiner's list or the Examiner's Court. She also took issue with many of the matters raised in Mr. Sills's affidavit. However many of these disputes are not relevant to this application.

59. On 29th May, 2014 Mr. Sills swore a further replying affidavit in which he disagreed with the second named defendant's version of events. There is clearly a conflict therefore on certain matters on affidavit. However none of these conflicts of evidence relate to the primary issue which I have to consider namely whether the order of the High Court of 2nd September, 2013 ought to be set aside.

Jurisdiction of the Court to set aside final orders
60. I was referred to a number of authorities by both parties.

61. Counsel for the second defendant relied on *Voluntary Purchasing Groups Inc v. Insurco Ltd* [1995] 2 ILRM 145 where McCracken J. stated as follows:

> *"In my view however quite apart from the provisions of any rules or statutes, there is an inherent jurisdiction in the courts in the absence of any express statutory provision to the contrary, to set aside an order made ex parte on the application of any party affected by that order. An ex parte order is made by a judge who has only heard one party to the proceedings. He may not have had the full facts before him or he may even have been misled, although I should make it clear that that is not suggested in the present case. However, in the interests of justice it is essential that an ex parte order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the court. It would be quite unjust that an order could be made against a party in its absence and without notice to it which could not be reviewed on the application of the party affected."*

62. The reasoning in *Voluntary Purchasing Groups Inc.* was followed by Kelly J. *in Adams v. Director of Public Prosecutions* [2001] 2 ILRM 401. In that case Kelly J. stated as follows in referring to the above statement of McCracken J.:

> *"I have no hesitation in following that line of reasoning. It is in my view both good law and good sense. It would be most unjust to deny a party against whom an ex parte order had been made the opportunity of applying to court to set it aside and instead to insist that the only remedy was one of appeal to the Supreme Court."*

63. In my view, the statements of McCracken J. and Kelly J. both represent good law and good sense and I for my part also, have no hesitation in following this line of authority.

64. I was also referred to case law on the principle of the right to be heard - *audi alteram partem* - and also to article 6 (1) of the European Convention of Human Rights.

Assessment
65. However, having considered all the affidavits, the legal submissions and the submissions of counsel, I am of the view that the second named defendant's application to strike out the High Court order of 2nd September 2013 should not succeed for the following reasons:

> (1) It is of course true that the second defendant has a right to be heard. Indeed it is a fundamental principle of constitutional justice that the court should hear both sides. However in this case, in the main hearing on the plaintiff's application in the summary summons (for a well-charging order and an order for sale) the second defendant was given the right to be heard and was, in fact, heard. She filed a replying affidavit in these proceedings and, in addition, she appeared in person and made submissions to Mr. Justice Murphy. Thus the second defendant was fully heard at this application.
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> (2) Secondly, despite the order in this case, which specifically included an order for sale of the said premises, the second defendant decided not to appeal. Indeed four years later the second defendant still has not appealed. As stated above, I specifically asked counsel whether her client intended to appeal and I was informed that there were no instructions to appeal at this time but that the second defendant wished to await the outcome of this decision. Thus there is no appeal pending and in those circumstances the High Court order must be regarded as final and conclusive (certainly for the purposes of this application).
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> (3) Thirdly, what happened thereafter was essentially an administrative process and an administrative hearing in which the major issues had already been decided by the High Court. In effect therefore the hearing before the Examiner's Office and the hearing before the High Court (in the Examiner's list) was a hearing to consider the steps to be taken to enforce the High Court order which the second defendant had declined to appeal. Thus the only issues to be considered at the Examiner's Office hearing and the High Court hearing of the Examiner's list were the appointment of an auctioneer, the appointment of a valuer and an order for sale by auction.
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> (4) Fourthly, it is true that the second defendant was not aware of this first application and was not in a position to make representations on these issues. In those circumstances therefore I asked counsel for the second defendant what representations she would have made at the time had she been present. Her main submission was that her client would have made submissions about the proper value of the property and the marketing and publicity for the auction, in order to maximise the value of the property.
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> (5) I have considered those submissions. However in *Ulster Investment Bank Ltd v. Rockrohan Estate Ltd* [2009] IEHC 4 Irvine J. stated *"a plaintiff who obtains a well-charging order and order for sale is under an obligation to all concerned to obtain the best price possible for the land and this obligation may require the party having carriage of the sale to obtain assistance from the court"* There is no evidence before me that the plaintiff did not use their best endeavours to obtain the best price possible for all concerned for the property.
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> (6) Thus although the second defendant was not heard at the Examiner's Office hearing, I have now had an opportunity to hear what submissions would have been made at that time had the second named defendant been in a position to do so. I recognize that this approach has its limitations. However it is clear that the second defendant's submissions would have been limited, of necessity, to issues of valuation and to issues surrounding the auction. Having considered those submissions I am of the view that even though the second defendant was not heard before the Examiner's Office

nevertheless she suffered no prejudice as a result.

(7) I turn now to the order of the High Court in the Examiner's list of 2nd September 2013. The context in which this hearing took place is also of importance. The Examiner had previously directed that the sale of the house should take place by auction and had fixed a reserve of €335,000. However the auction failed to attract bids at anything like that level. The matter therefore returned to the Examiner's list for directions on one net issue (i.e. whether to permit the sale of the property by private treaty instead of by auction at a price of €265,000 to a specific person).

(8) It is also important to note that the second defendant was in fact served in this matter by way of registered post at the correct address at which she was living. However apparently the second defendant was not in the house at the time the papers were delivered. Moreover it appears that she did not go the post office to collect these papers even though it was accepted by counsel that the usual practice is for the post office to leave notification that it had tried to effect delivery of registered post and to request the recipient to collect the post at the nearest post office. Thus the second defendant was served but, it appears, did not collect her registered post in a timely fashion.

(9) It is unfortunate that the affidavit of service which was accurate at the time of swearing was not corrected by the time of the hearing of 2nd September 2013 so that the High Court was not fully informed that the papers had been returned by the post office. It is possible that the High Court might have adjourned the matter for a further two weeks to permit another attempt at service.

(10) However again the only issue which was before the Court that day was to consider the issue as to whether the property should be sold by private treaty rather than by auction and to approve the sale by private treaty to a specific individual.

(11) However, given that the second defendant was not present at that hearing, I again asked her counsel what submissions her client would have made had she been in Court on 2nd September 2013. The second defendant's submissions to the Court on that date would have been to the effect that the auction was not properly marketed, that there wasn't sufficient publicity around the auction, and that if it had been properly marketed, it might have attracted greater interest and it might have attracted greater bids. However the clear evidence of the auctioneer was that the auction was properly conducted and that no bids in excess of €220,000 were received.

(12) Whilst these submissions were ably made by counsel for the second defendant, when I asked what specific prejudice her client might have suffered (given that the well-charging order was for the sum of (approximately) €571,000 and given that the second defendant's case at its height was that her valuation of the property was only €380,000) the second defendant was not able to point to any prejudice at all that she might suffer in that regard.

(13) In those circumstances I am of the view that although the second defendant did not have an opportunity to be heard on 2nd September 2013, she has now had an opportunity, by virtue of this motion and her submissions here, to make her case and to be heard. Again as stated above I recognise that this approach has its limitations. However, having heard these submissions it is clear that the second defendant can point to no prejudice at all which has occurred to her by virtue of the fact that she was not heard in these limited motions in the Examiner's List which have as their sole purpose the implementation of a High Court order which the second defendant did not appeal.

(14) Moreover the nature of the second named defendant's interest in the property must also be analysed. The property was initially in the first named defendant's name; he executed a mortgage in favour of the plaintiff; therefore the legal title in the property passed to the plaintiff. The debt was in the name of the first named defendant only and the plaintiff had never sought to argue that the second named defendant had any liability for this debt. Moreover the second defendant moved out of the premises in January 2011 and returned the keys to the plaintiff in or about May 2011. It is true that the first defendant purported to assign Atlantis to his wife the second named defendant in the family law proceedings and that he agreed to repay the mortgage within six months. However he failed to do so. Thus the mortgage remained in place and it was a condition of the mortgage that the bank's consent had to be obtained to any assignment. The plaintiff's consent was neither sought nor obtained. Thus the defendant's assignment to the second defendant (whilst it might be effective as between the first and second defendant) was not effective as against the plaintiff. Therefore the second defendant does not own the legal title to the property. Indeed given that the plaintiff obtained a well-charging order and an order for sale the property will sold and the debt paid off. Therefore as a result of this High Court order of 7 July 2010 the only interest which the second defendant has, or could have, is a right to those proceeds of sale which remain after the debt has been paid off. That would mean that the second defendant would have to produce evidence to the Court that the value of the property is in excess of the sum which stands well-charged (i.e. in the sum of €571,000). However there is no such evidence before the Court. Even if there was, that would mean that the second defendant would only be entitled to those proceeds of sale – not to an interest in the property per se.

(15) I must also have regard to the fact that I must balance any perceived prejudice caused to the second defendant with the actual prejudice to the purchaser who is now being delayed in completing the purchase of his property. In this regard counsel for the plaintiff submitted that the Court should exercise extreme restraint in setting aside or otherwise revisiting an order approving a sale of property particularly if there was a reasonable basis for the making of the order. In *Re: Hibernian Transport Companies Ltd* [1972] I.R. 190 (applied by Hogan J. in *Re: Buzreel Ltd* [2014] IEHC 225) property in a liquidation which was subject to an order for sale from the court had failed to sell at auction at a price exceeding its reserve price of £70,000. After the auction, the solicitors with carriage of the sale were approached by an interested party who made an offer to purchase the property for £65,000 which offer had a very limited time duration. As a result of this counsel applied ex parte in chambers to the judge having seisin of the matter for his approval of the sale. The judge indicated his agreement and instructed counsel to apply formally for the order the following day. Early in the morning the court was informed that there might be a second bidder but no details were forthcoming. The High Court (Kenny J.) then enquired of counsel for the liquidator what the current state of the sale was and was informed that at that stage given that the court had approved the sale, it had been agreed between the liquidator and the bidder on that basis. However at that point no court order had been made and no binding contract had been entered into between the liquidator and the bidder. It turned out subsequently that a second bidder was willing to pay some £101,000 for the property and an application was made by the second bidder to set the original contract aside and to compel the liquidator to accept the higher sum. However Kenny J. indicated that he felt himself bound by his approval of the original sale and duly made an order providing for same. The second bidder appealed that decision to the Supreme Court.

(16) The Supreme Court approved the High Court decision and said:

"On that occasion in court, counsel on behalf of the official liquidator indicated that Mr Justice Kenny might consider that the official liquidator should complete his contract with United Dominions on the ground that there had been a prior agreement to do so which had been approved by the judge. After considering both the offer from Irish Permanent and the contract for purchase which had already been signed by United Dominions, Mr Justice Kenny stated that in the circumstances he must confirm the sale to United Dominions and accordingly he made the order."

The Supreme Court also stated that:

"There can be doubt about the fact that the High Court had agreed to the sale and United Dominions had committed themselves to purchasing. It is naturally regrettable that the higher offer was not made in time but, in my view, there was nothing unreasonable in the judge taking the course which he did when the initial application for prior approval was made to him…..in my view it was quite right for the learned trial judge to regard himself as being bound, if not in law certainly in honour, to permit the liquidator to complete the contract already executed by United Dominions. Accordingly I would dismiss this appeal and affirm the order of the High Court."

(17) Likewise in *Re: Van Hool Mcardle v. Rohan Industrial Estates* [1980] I.R. 237 the Supreme Court in allowing a challenge to a High Court order approving a sale distinguished *Re: Hibernian* and stated as follows:

"These cases dealt with an entirely different matter…each of them relates to an application to discharge a court order which had approved a sale, because a higher bid had been received after the court's sanction. In all three of them the court, having approved the sale, had to keep faith with the purchaser".

(18) In the present case the there is absolutely no evidence of any higher offer for the property. The only evidence is a disputed valuation from the second defendant's valuer which says that the property might be worth up to €380,000. In my view however this falls considerably short of what might be required in the present case to overturn the order of 2nd September, 2013. Indeed even if the second defendant could supply evidence of a higher offer, in my view the court having approved the sale would have to keep faith with the purchaser.

Conclusion

66. In the light of the above reasons, I will refuse the application to set aside the order of the High Court of 2 September, 2013.