THE COURT OF APPEAL

APPROVED

Neutral Citation Number [2023] IECA 265
Record Number: 2023/122
High Court Record Number: 2022/96SP

Whelan J.

Noonan J.

Meenan J.

BETWEEN/

ULSTER BANK IRELAND DAC

PLAINTIFF/RESPONDENT

-AND-

BRIAN MCDONAGH

DEFENDANT/APPELLANT

-AND-

Record Number: 2023/123
High Court Record Number: 2022/107SP

BETWEEN/

ULSTER BANK IRELAND DAC

PLAINTIFF/RESPONDENT

-AND-

MAURICE MCDONAGH

DEFENDANT/APPELLANT

-AND-

Record Number: 2023/124
High Court Record Number: 2022/108SP

BETWEEN/

ULSTER BANK IRELAND DAC

PLAINTIFF/RESPONDENT

-AND-

KENNETH MCDONAGH

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 6th day of November, 2023

1. These appeals are the latest chapter in a long running suite of litigation relating to loans advanced by the respondent ("the Bank") to the appellants who are three brothers. The history of the matter is set out in some detail in the judgment of the High Court (Sanfey J.) of the 14th March, 2023 under appeal. Sanfey J. delivered a single judgment in respect of all three matters, and as the appeal before this Court was run as a single unitary appeal by the same legal team appearing for all three defendants, I propose to adopt the same approach.

2. The proceedings were brought on foot of three special summonses seeking well charging orders over the homes of each defendant, and in addition, in the case of Brian McDonagh, an order for sale. The matter was heard on affidavit in the High Court and the orders sought granted.

3. It is convenient to refer to a brief summary of the background to this matter. In 2007, the Bank loaned almost €22M to the McDonaghs for the purpose of purchasing approximately 80 acres of land at Kilpedder, County Wicklow with the intention of developing a data centre thereon. This ultimately never came to pass.

4. The detail of this and the subsequent history is set out in the Bank's grounding affidavit sworn by Ted Mahon, a senior manager. The loans went into default, receivers were appointed, and debt proceedings issued against the McDonaghs. These were fully contested and were heard over 19 days before Twomey J. following which a reserved judgment was delivered. In the course of that trial, Brian McDonagh, whom I think it is fair to say is the main protagonist in these proceedings, represented himself but his brothers were represented by solicitor and counsel. Twomey J. found in favour of the Bank and granted judgment in the sum of €22,947.202.85 against the defendants. The McDonaghs duly appealed to this Court which delivered a detailed judgment rejecting the appeal. In contrast to the High Court, all parties were represented in the Court of Appeal.

5. In summarising the background, Sanfey J. referred to a number of averments by Mr. Mahon in his grounding affidavit including that Brian McDonagh *"sought to surreptitiously purchase the Kilpedder lands at a significantly reduced price of €1,501,000 whilst at the same time avoid his residual liability to Ulster Bank, then standing in excess of €20M. In attempting to do so Brian McDonagh used a corporate vehicle, called Granja Limited ('Granja'), as a 'front' for his dishonest endeavour"*. The judge also noted the averment by Mr. Mahon that he *"... cannot sufficiently emphasise the extent to which Brian McDonagh has gone to obstruct and frustrate Ulster Bank in recovering the monies due to it from the McDonaghs"*. He refers to the analysis by Twomey J. in the summary proceedings where the latter said (at para. 18):

"For the reasons set out below, this court has concluded that much of the evidence provided in support of the McDonaghs' claim was inconsistent and unreliable. In particular, this court found that Mr. Brian McDonagh was party to two forged declarations of trust and he put a 'fake' letter on his file. In addition, this court concluded that Mr. Brian McDonagh gave incorrect sworn evidence, which he must have known was false. (Although it was not relevant to this court's conclusions, it is worth noting that this is not the first time that Mr. Brian McDonagh's credibility has been called into question in the courts - as noted below, he was found to have misled the High Court on two separate occasions (McDermott J. and Keane J.) by his failure to disclose relevant evidence and the English High Court found him to be an unreliable witness (Morgan J.))."

6. The Kilpedder lands were eventually sold for approximately €3M to a company called Fane Investments Limited ("Fane"). It later emerged that the Bank entered into a profit participation agreement ("PPA") with Fane which broadly provided that in the event of a sale on by Fane at a profit, the Bank would be entitled to a 25% participation in that profit. The Bank has confirmed that if and when any sum is realised by it on foot of the PPA, it will be credited to the account of the defendants. It further transpired that in 2015 Promontoria (Aran) Limited acquired the Bank's economic interest in the loan facility and underlying securities, although the Bank retained the legal interest and thus the right to enforce the judgment mortgages the subject of these proceedings. Those judgment mortgages were registered by the Bank against the interests of each defendant in their respective residences.

7. The spouses of Maurice and Kenneth McDonagh sought to intervene in the proceedings before Sanfey J., as did the life partner of Brian McDonagh. In his replying affidavit to that of Mr. Mahon, Brian McDonagh averred that the application against him

was made with malice on the part of the plaintiff and in the absence of recognition of the rights of *"my spouse"*. He averred that the Bank *"has no entitlement to attack the property rights of my spouse in this application absent her involvement as a party. I say my spouse has a right to be heard in matters pertinent to the family dwelling"*. It was however subsequently demonstrated, and now no longer disputed, that Brian McDonagh has no spouse, but rather a life partner to whom he is not married, and his residence does not constitute a "family home" within the statutory definition.

8. The central issue arising in this appeal is a claim by the McDonaghs that the trial judge wrongly refused to allow them to cross-examine Mr. Mahon on his affidavit. A brief chronology is therefore relevant:

- June 2022 - The special summonses were issued, grounded upon the affidavit of Mr. Mahon sworn on the 24th June, 2022.
- 4th July, 2022 - The matter was entered into the Commercial List of the High Court.
- 13th October, 2022 - The defendants delivered replying affidavits despite having been directed to do so by 30th August.
- 28th October, 2022 - Mr. Mahon swore a supplemental affidavit in response to the defendants' replying affidavits within the time allowed by the court.
- As the affidavits were now complete, the court fixed a hearing date for the first day of Hilary Term, the 11th January, 2023, for two days. This time estimate appears to have been agreed by the parties. It is important to note that at that stage no question of oral evidence being required was raised with the List Judge of the Commercial Court and, in particular, no question of cross-examination on the affidavits.
- 13th November, 2022 - The defendants served interrogatories on the Bank. These appear to have been signed by the defendants personally.

- 19th November, 2022 - The defendants issued a motion seeking to compel replies to interrogatories.
- 1st December, 2022 - Mr. Mahon responded to the interrogatories.
- 19th December, 2022 - The motion was heard by McDonald J. and at the hearing the defendants were represented by solicitor and counsel.
- 20th December, 2022 - McDonald J. gave judgment refusing all of the interrogatories. Here again, it is important to note that no issue concerning cross-examination of Mr. Mahon was raised.
- 11th January, 2023 - Shortly before the hearing was due to commence before Sanfey J., the defendants served a notice to cross-examine Mr. Mahon.

The Hearing before the High Court

9. When the hearing commenced before Sanfey J. on the 11th January, 2023, the McDonaghs were represented by a single team of senior and junior counsel and solicitors. At the outset, the spouses of Maurice and Kenneth McDonagh sought to intervene in the proceedings and deliver affidavits, as did the partner of Brian McDonagh. In opening the matter to the trial judge, counsel for the Bank referred to the fact that a notice to cross-examine Mr. Mahon had been received that morning. Counsel indicated to the court that the Bank would be objecting to Mr. Mahon being cross-examined on foot of this notice which counsel said was in breach of the very strict time limits that apply under the Rules.

10. In response, counsel for the McDonaghs indicated that he intended making submissions as to why Mr. Mahon should be cross-examined. The matter then proceeded in the normal way with counsel for the Bank opening the application to the court.

11. It is at this juncture relevant to note that written submissions were delivered in the High Court by the defendants, signed by counsel, and dated the 19th December, 2022. Those submissions include the following statement:

> *"Ulster Bank achieved the judgment against the defendants as a result of the non-disclosure of relevant information to the courts."*

12. Despite this statement, the submissions go on to accept that judgment has been obtained by the Bank for almost €20M (*sic*) but that this could not be the correct outstanding amount by virtue of the existence of the PPA. This appears to lead to the following submission:

> *"Debt cannot be quantified at this present time and Ulster Bank should wait until they have disposed of their full interest in the Kilpedder site before attempting to well charge the family homes of the defendants. It is submitted that the case should be either dismissed or remitted for plenary hearing."*

13. A number of propositions are advanced in these written submissions in relation to the PPA which include raising issues such as; was the bank entitled to sell the site at all as a result of their participation in the PPA when they were not the beneficial owners; the amount realised did not reflect the true value; and it was arguable that the PPA was constructed by Ulster Bank to deliberately deprive the McDonagh brothers of the true value of the site. These, amongst other matters, are submitted to give rise to a *"clear conflict of facts in the plaintiffs' claim."* The submissions conclude by suggesting that the Bank is not entitled to a well charging order against the *"three family homes"* because it has not fully disposed of the Kilpedder site by reason of the PPA.

14. It is noteworthy that none of these contentions were pursued at the oral hearing before Sanfey J. but, entirely to the contrary, senior counsel for the McDonaghs made clear that he was not seeking to have the proceedings either dismissed or referred for plenary hearing.

15. Rather, counsel indicated that in his submission it was too early for the court to exercise its discretion to grant the relief sought and the only order the defendants were seeking was for Mr. Mahon to be cross-examined. Counsel was suggesting that this was a necessary prelude to the making of any orders.

16. The cross-examination was, counsel said, necessary to deal with two points; first, the alleged *"non-disclosure"* of the PPA by Mr. Mahon and second, the *"failure"* to submit a valuation of the defendants' properties, which counsel argued was a necessary proof.

17. Counsel went on to open O. 38, r. 3 of the RSC:

> *"Save in so far as the Court shall otherwise order, proceedings commenced by special summons shall be heard on affidavit: provided that any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the Court."*

18. Counsel then submitted:

> *"But I am relying upon what is said there as a basic principle; you may serve without leave. So there's no bar to serving a notice to cross-examine as there would be in other matters, you just may do so."*

In the course of his submissions, counsel for the McDonaghs repeatedly emphasised the fact that the leave of the court was not required for him to be entitled to cross-examine Mr. Mahon. Although he accepted that the application was made late in the day, this did not affect his absolute right to cross-examine.

19. When the trial judge asked counsel was he not now way too late to serve a notice to cross-examine on the morning of the hearing, counsel responded as follows:

> *"No, expedition can't sacrifice the justice of the case. It just can't. Look, it should have been done before now. But that doesn't deal with the principles which the court must apply in hearing such an application. There's no rule, there's no statute which says if I deliver that I mean,* ***in fact the order doesn't give a time limit within which I must serve my notice to cross-examine****. I am imposing that upon myself. But the order doesn't do that, weirdly, strangely."* (my emphasis).

20. It is clear from the foregoing passage that the application to cross-examine Mr. Mahon was predicated from the outset on the belief, entirely mistaken as it transpires, that the McDonaghs had an absolute right to cross-examine Mr. Mahon by serving a notice at any time and without any time constraints.

21. In fact, it was not until counsel for the Bank replied to the defendants' submissions that it became clear that there is in fact a time limit provided for in O. 40, r. 36 as follows:

> *"When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial****, such notice to be served at any time before the expiration of fourteen days next after the end of the***

> ***time allowed for filing affidavits in reply****, or within such time as in any case the Court may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the leave of the Court. … The notice shall be in the Form No 21 in Appendix C."* (my emphasis).

22. Counsel for the Bank referred to the judgment of the High Court (McGovern J.) in *Permanent TSB v Beades* [2014] IEHC 81, where the defendant, a litigant in person, served a notice to cross-examine in special summons proceedings where an order for possession was sought. McGovern J. in the course of his judgment said that because Mr. Beades' notice was served late, he was not entitled to rely upon it but as Mr. Beades was a litigant in person, he went on to consider nonetheless whether the circumstances of the case warranted a derogation from the strict application of the Rules in the interests of justice. He concluded that a derogation was not required because the matters upon which Mr. Beades sought cross-examination were matters which were either not in dispute, or not relevant to the issues.

23. In his reply, counsel for the McDonaghs recognised that he had to accept that there was in fact a time limit in the RSC for the service of a notice to cross-examine but, in referring to the judgment of McGovern J. in *Permanent TSB v Beades*, he noted that the court had said that where the notice to cross-examine was not in compliance with the Rules, the person serving it was not entitled to rely upon it. In response to that particular point, counsel said the following:

> *"Now, that may be qualified by 'in the circumstances', but of course the court has, at any time, an opportunity and a discretion to extend that time. And if the court is concerned to hear certain matters, of course the court will do that."*

24. In further exchanges with the trial judge concerning the observations of McGovern J., counsel said:

"Very good. Absolutely. It's just not what's said here, and I accept that. And I accept that there would have been a power and I accept - I am suggesting there is a power, obviously, to do so - sorry, obviously, in my submission, to do so in this case. But I think my friend again misunderstands my argument. I'm saying he should have done something, he should've brought him here. I'm saying this court, whether I say it or not, has the power to ask him to come. And I think he sort of, he seems to misunderstand what I have said in that regard."

25. It appears from the context that counsel was here referring to the fact that the court, as observed by McGovern J., had the power to dispense with the strict requirements of the Rules where the interests of justice required that to be done.

Judgment of the High Court

26. The judge commenced by describing the nature of the proceedings and setting out the background as alluded to above. He then turned to a consideration of the affidavit evidence put before the court in each of the individual proceedings. He also dealt with the applications of the parties seeking to intervene. He then turned to a summary of the parties' respective cases.

27. He noted that the Bank's position was that although partition of the properties of Maurice and Kenneth McDonagh were claimed as reliefs, the Bank had indicated that it was not at present seeking these reliefs but simply well charging orders. The judge referred to the provisions of s. 117 of the Conveyancing and Law Reform Act, 2009:

"(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."

28. The judge noted the Bank's submission that it had satisfied the necessary proofs for the making of orders in each case and, in the context of Brian McDonagh, those proofs were:

(a) the Bank holds judgment in the sum of €19,947,202.85 against Brian McDonagh *i.e.* the judgment order;

(b) Brian McDonagh is the sole registered owner of the property;

(c) the Bank has registered the judgment order as a judgment mortgage against the interest of Brian McDonagh in the property;

(d) the Bank has written to Brian McDonagh notifying him of the registration;

(e) the Bank demanded discharge of the order but Brian McDonagh failed to do so;

(f) Brian McDonagh remains indebted to the Bank on foot of the judgment order.

29. Turning to the defendants' submissions, the judge noted that contrary to what had appeared in the written submissions, their position had substantially altered in the oral submissions that had been made to the court. Effectively three points were made. First, the defendants submitted that each time an application was made for a well charging order, the purpose of which was to procure an order for sale thereby, a fresh application should be made to amend the judgment mortgage which had been registered to reflect the amount currently owing. (This contention has now in substance been abandoned in this appeal).

30. Second, the defendants say that the Bank should have disclosed the PPA which gave rise to a theoretical possibility that the indebtedness of the defendants could be satisfied by profits generated through the PPA. Third, the plaintiffs failed to submit a valuation of the properties which would reveal whether or not there would be likely to be any equity in them. These were suggested by the defendants to be matters that the court could and should take into account in the exercise of its discretion and further, the second and third matters were to be the subject of Mr. Mahon's cross-examination.

31. The court then turned to a consideration of the authorities relied upon by the defendants in support of their submission that the court's discretion to grant the orders sought by the bank should be informed by, in particular, the two matters that were to be the subject of Mr. Mahon's proposed cross-examination. Those authorities included *Bank of Ireland v Cody* [2021] 2 IR 381, *Barrett v Leahy* [2015] IEHC 734, *Flynn v Crean* [2019] IEHC 51 and *Muintir Skibbereen Credit Union Limited v Crowley* [2016] 2 IR 665. The judge then summarised the response of the Bank which submitted that the only application before the court was for liberty to cross-examine Mr. Mahon as to the Bank's view of the valuation of the lands against which orders were sought and why the PPA was not disclosed to the court.

32. Counsel relied on the judgment of McGovern J. in *Permanent TSB v Beades* and suggested that the motivation for seeking cross-examination was to delay and simply *"have a crack at Mr. Mahon and then we'll see where we are"*. Counsel submitted that such cross-examination was in any event entirely unnecessary where there was no substantive dispute on the facts between the parties.

33. The court then analysed each of the propositions advanced by the defendants in turn, firstly discounting the, now abandoned, suggestion that a fresh application has to be made for registration of a judgment mortgage every time a payment is made against the judgment debt.

34. As regards the proposition that the plaintiff was obliged to put valuation evidence before the court to satisfy the court that there will be some equity in the event of a sale being ordered, the judge noted that no authority was proffered to the court to support this proposition and it was difficult to see how it could be justified. There could be many factors affecting the value of the land of which the defendants are aware but of which the plaintiff could have no means of knowledge. In particular, the judge observed that the defendants sought to oblige the plaintiff to provide evidence as to the value of the lands, and yet put forward none themselves, or evidence in relation to their financial circumstances, both of which featured in the defendants' defence in *Flynn v Crean*.

35. The judge observed that irrespective of that, it was well-established that the mere fact that the proceeds of sale would not meet the debt is not a reason for the court to refuse to grant an order for sale and referred to the judgment of the High Court (Dunne J.) in *Drillfix Limited v Savage* [2009] IEHC 546 which held that the onus is on the defendants to show a good reason that the court should not order a sale. The judge also cited with approval the

judgment of the High Court (Keane J.) in *Quinns of Baltinglass Limited v Smith* [2017] IEHC 461 and in particular the following passage from that judgment:

> *"... In so far as the defendants have sought to argue – in a roundabout way – that, in considering whether good reason exists for not ordering a sale, the court should consider what other options, less prejudicial to the defendants, are open to Quinns to enforce its security, it seems to me that the problem here is the same as that identified by Laffoy J [in Irwin v Deasy [2011] 2 IR 752]; namely, that Mr Smith has failed to provide any evidence to the Court concerning his means; the value of the lands; and the value of the debts charged as security over the lands, beyond the bare assertion that he is 'practically insolvent' and that the debts charged on the lands match or exceed their value. ..."*

36. The judge noted that even in *Flynn v Crean*, where the defendants had put evidence of valuation before the court to suggest that there was no equity in the property and further of their means coupled with their proposal to repay in instalments, an order for sale was in fact made, albeit subject to a stay on terms.

37. The judge finally considered the relevance of the PPA, in particular due to the at least theoretical possibility that a sale of the lands could ultimately yield sufficient profits to the Bank to discharge the debt. The judge held that it was not incumbent on a judgment creditor to explain all the ways in which it might be possible to recover the debt before a court would order a sale of the property.

38. The judge's conclusion was that the Bank had complied with the proofs necessary to establish its entitlement to the reliefs sought although the defendants argued that those orders should not be made without first ordering cross-examination of Mr. Mahon. The judge said

that for the reasons he had already given, he did not consider such a course to be appropriate or necessary. He proceeded to make orders accordingly.

The Appeal

39. Although the defendants' notices of appeal contained multiple grounds, I think these in substance boil down to three:

(1) the judge was wrong to find that the only application by the defendants was for leave to cross-examine Mr. Mahon;

(2) the judge erred in refusing an extension of time for the service of the notice to cross-examine Mr. Mahon and failed to give any or any adequate reasons for his refusal;

(3) the judge failed to properly apply equitable principles to the claim for relief by the Bank and, in particular, failed to conclude that the Bank's failure to provide valuation evidence in the context of the potential futility of making an order and the Bank's failure to disclose the PPA were factors which disentitled them to the reliefs sought.

40. These points are reiterated in the defendants' written submissions, but in oral submissions the emphasis was on the refusal to allow cross-examination and the application of discretionary factors in the context of Mr. Mahon's alleged failure to disclose the PPA and his statement on affidavit that the Bank had no ongoing economic interest in the lands despite the PPA.

Did the defendants apply for an extension of time to serve a notice to cross-examine?

41. It is to my mind very regrettable that this appeal was brought and pursued by the defendants without first obtaining a transcript of the hearing in the High Court. They could readily have obtained a transcript by applying for access to the digital audio recording or by the simple expedient of asking the Bank's solicitors for it. They did neither. To put it at its mildest, this gave rise to considerable confusion at the hearing of this appeal.

42. On multiple occasions during the course of his presentation to this Court, counsel for the defendants stated that he had applied to the trial judge for an extension of time to serve notice of cross-examination of Mr. Mahon. Counsel further stated that having made that application to the trial judge, the trial judge refused it during the course of the hearing or, *"there and then"* as counsel put it. Counsel said that the trial judge had simply refused his application and, when asked whether any reasons had been given for the refusal, told this Court that he didn't have a note of them.

43. Unfortunately, each of these statements by counsel were wholly and entirely incorrect. It is in my view quite clear from the transcript passages to which I have referred above that, from the outset, counsel for the defendants laboured under the misapprehension that there was no time limit for serving a notice of cross-examination and the defendants had an absolute right to serve it at any time. Were that in fact the case, it is patently obvious that there would have been no need to apply for an extension of time, nor was such application made.

44. The court undoubtedly has a wide discretion to enlarge or abridge the time appointed by the Rules for doing any act under O. 122, r. 7 of the RSC and for a notice of cross-examination under the terms of O. 40, r. 36 itself. In a case such as the present, had an extension of time been sought, one would have expected an application to be made in the

normal way on foot of a notice of motion and grounding affidavit. Matters relevant to the exercise of the court's discretion to extend time would normally include an explanation as to why the application had not been made in a timely manner first, and secondly why it is necessary in the interests of justice to extend the time. That would necessarily involve explaining to the court what matters would be the subject of cross-examination and how these were relevant to the issues the court has to decide.

45. In the present instance, none of this was done but it seems to me that the judge in any event considered on the merits whether cross-examination was in fact necessary or appropriate, despite no explanation having been offered for the failure to serve the notice beyond senior counsel saying that he had come late into the case. Even then, it is clear that the defendants were represented by counsel in the interrogatories application before McDonald J. on the 19th December, 2022 and at that stage, some three weeks before the trial, no inkling was given to the court of a desire on the part of the defendants to cross-examine Mr. Mahon. Why this was so is wholly unexplained by the defendants.

46. At the hearing of the appeal, counsel for the defendants sought to characterise some of the exchanges that occurred on day 2 of the hearing in the High Court as amounting to an application for an extension of time. Counsel said this was to be inferred from the transcript passages to which I have already referred and in particular in the context of the submissions made regarding the judgment in *Permanent TSB v Beades*. I cannot see how the trial judge was expected to divine from this discussion that the defendants were in fact applying for an extension of time. The *Beades* case was quite different in that Mr. Beades was a litigant in person and McGovern J. engaged in a consideration of whether or not the interests of justice required that the relevant Rule be disapplied, rather than an extension of time granted.

47. I am satisfied that there is nothing evident from the transcript which could be considered to be an application for an extension of time. One might reasonably have thought that where the defendants were not litigants in person but were represented by senior counsel, the court should not have been left in the position of having to somehow guess or infer that such an application was being made. It is hardly too much to expect that if such an application was being made by the defendants, it should have been so stated clearly and unequivocally. Instead, nothing of the kind is to be found in the transcript.

Conclusions

48. In fact, it seems to me in any event that Sanfey J. engaged in an analysis precisely analogous to that of McGovern J. in *Permanent TSB v Beades*, namely whether the interests of justice required that there should be cross-examination.

49. The trial judge here considered the two issues upon which cross-examination was sought. Regarding the first, the alleged *"failure"* to obtain a valuation by the Bank, the judge correctly observed that there was no authority for the proposition that it was somehow a necessary proof to be adduced by a plaintiff in an action of this nature. This is hardly surprising because, as counsel for the Bank correctly submitted, it has never as a matter of practice been a requirement on the part of an applicant judgment mortgagee to adduce evidence of value for the reasons fully explained by the trial judge. I agree with the Bank's submission that the defendants' reliance on *Flynn v Crean* is quite misplaced.

50. In that case, unlike the present, the defendants were litigants in person who themselves put evidence of valuation before the court for the purpose of demonstrating that there was no realisable equity in the property, which was their family home, and if an order for sale were made they would be homeless. They further put evidence of their means before

the court so as to establish what they might be able to pay on a periodic basis going forward. Despite that, an order for sale was in fact made, albeit subject to a stay on terms.

51. By way of contrast, in the present case the defendants have elected to put no evidence before the court concerning valuations of their properties or their means. I agree therefore with the view of the trial judge that cross-examination of Mr. Mahon on this issue would be entirely irrelevant. The authorities, including those relied upon by the defendants, demonstrate clearly that the fact that there may be no equity in the property or a prospect of realising the debt or part thereof is not a good reason to refuse an order for sale. As noted by Baker J. in *Flynn v Crean* (at para. 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, a 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."*

She continued at para. 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…"*

52. Accordingly, it cannot be the case that there is some form of onus as a matter of proof on the plaintiff to adduce valuation evidence so as to satisfy the court that there is utility in its order, or as counsel for the defendants put it, equity will not act in vain. That is clearly

an erroneous premise for the reasons explained by Baker J. in some detail in *Flynn v Crean*. The passage from the judgment of Keane J. in *Quinns of Baltinglass* represents the well-settled position that once the judgment mortgagee's proofs are in order, the onus shifts to the judgment mortgagor to show a *"good reason"* why the order for sale should not be made. Accordingly, even if the question of valuation were relevant, which I am satisfied it is not, that would be a matter for the defendants who have offered no evidence in that regard. It is accordingly clear that cross-examination of Mr. Mahon on this issue could be neither relevant nor necessary.

53. Indeed, it is a matter of debate as to whether general equitable principles of the kind invoked by the defendants have any relevance to an application for a well charging order and/or order for sale on foot of a judgment mortgage. As Baker J. observed in *Barrett v Leahy* [2015] IEHC 734, at para 43:

> *"The right to register a judgment mortgage is a statutory right, and the rights created thereby are statutory in origin, and no equitable principles are in play."*

54. The defendants placed reliance on a footnote in the judgment of Collins J. for this Court in *Promontoria (Oyster) DAC v Greene* [2021] IECA 93, where the judge made the following *obiter* observation (at para. 53 footnote 20):

> *"In the circumstances, it is not necessary to consider the nature and extent of the High Court's discretion on an application for a well charging order and order for sale and, in particular, whether and to what extent the Court is entitled to refuse relief where the essential elements (an outstanding debt due to the plaintiff that is secure on the lands of the defendant) have been established in evidence."*

55. That appears to me to fall well short of establishing the proposition the defendants seek to establish, and as matters stand, there is no authority which supports the contention that the court can, as a matter of general discretion, refuse relief to a judgment mortgagee on broad equitable grounds not amounting to a *"good reason"* as that expression is used in the authorities.

56. Turning now to the PPA, the defendants make much of the alleged failure on Mr. Mahon's part to disclose this and they suggest that he incorrectly avers on affidavit that contrary to what Mr. Mahon said in his grounding affidavit regarding the Bank retaining no economic interest in the property following the sale to Promontoria, this was inaccurate because the Bank did in fact retain an economic interest, or at least a contingent one, under the PPA being its right to a 25% participation in the profits of any onward sale. Whether what Mr. Mahon said on affidavit about the retention or non-retention of an economic interest in the lands was incorrect or not is, it seems to me, at the very least debatable.

57. However, it seems that the defendants' desire to cross-examine Mr. Mahon about this and the alleged *"failure"* to disclose the PPA is somehow aimed at an attempt to suggest some form of impropriety on his part that ought to inform the ultimate exercise of the court's discretion. It appears, although counsel was at pains not to go this far, to amount to some form of *"clean hands"* factor that the defendants seek to deploy. This is something they hope to elicit from cross-examining Mr. Mahon but, as already noted, there is no authority for the proposition that this, without more, would disentitle the Bank to the order it seeks, even were it correct.

58. Insofar as this is advanced as an argument based on the theoretical possibility of the debt being satisfied following a realisation under the PPA, it does not withstand any scrutiny and the authorities are all the other way, as the trial judge found, correctly in my view. As

he pointed out, a creditor may have any number of securities or means of recovery but he bears no onus of showing that he has exercised them before he can seek an order for sale. Carrying out such an exercise would, for the reasons explained by the trial judge, be impractical and inappropriate. As counsel for the Bank correctly submitted, a creditor is entitled to pursue all, any or none of the avenues of recovery available to it – see *China and South Sea Bank Ltd. v Tan Soon Gin* [1990] 1 AC 536 and *ADM Londis Plc v Arman Retail Ltd* [2006] IEHC 309. As with the valuation question, if the so-called non-disclosure of the PPA is not a matter relevant to the court's determination, then it cannot be properly the subject matter of cross-examination.

59. Accordingly, even if by some stretch of the imagination it were possible to conclude that the defendants had in fact applied for an extension of time, it is clear from the findings of the trial judge that it would not have been granted because the defendants had failed to establish that any of the matters about which they sought cross-examination were either relevant or necessary to the court's determination. Even were that not so, it seems to me that the arguments about valuation and non-disclosure are ones that were already available to the defendants, even in the absence of cross-examination.

60. The fact of non-disclosure, if fact it be, was already known and the defendants have themselves been in possession of the PPA since at least November 2022, yet they did not put it in evidence. Similarly, the defendants have at all times been aware that the Bank was putting no valuations before the court and they remained free to make whatever arguments they wished to make about that failure, if it was a failure.

61. Even if a notice of cross-examination had been served in a timely manner by the defendants, it would not provide some form of *carte blanche* to ask any question they wanted to ask. Cross-examination on foot of a notice is subject to the same rules as any other cross-

examination, namely that it is permissible only to ask questions that are relevant to the issue that the court must decide. Thus, even had a notice been served in time, the defendants ought not in my view have been permitted to ask the questions they appear to want to ask. It follows from this that there could be no injustice in refusing an extension of time, even had one been sought, which it was not.

62. It must be said that there is an obvious logic to the necessity for the imposition of a time limit on a notice of cross-examination. Were the parties free to serve such a notice at any time, as the defendants appear to have initially thought, it would be a recipe for procedural chaos. Case management, particularly in the Commercial Court, would be rendered largely meaningless in trials on affidavit if parties could call for cross examination at the drop of a hat.

63. Trial dates and hearing times would largely have to be abandoned as evidenced by the instant case. Had the judge directed cross examination as sought by the defendants, this would have led to a potentially lengthy adjournment to the prejudice of the Bank. Costs sanctions would provide little comfort against defendants who have to date paid nothing on foot of the judgment given against them or indeed made any payment of any description on foot of a loan they took out now some sixteen years ago.

64. In the present case, the defendants had seven months to consider whether they wanted to cross-examine Mr. Mahon and could have elected to do so without leave up until mid November. Rather than intimate that they intended to do so, they agreed with the Bank's estimate of a two day trial on affidavit, which was duly fixed, and despite further interactions with the court up to the 20th December, 2012, in effect one term day before the trial, gave not the slightest hint that they wished to cross examine Mr. Mahon. At no time either before the High Court or this Court, and despite repeated questions from this Court, have the

defendants ever explained this state of affairs. In the light of that, it is difficult to see how any complaint of unfairness to the defendants can legitimately be made, even had they disclosed a basis for the cross examination sought.

65. For these reasons, I am satisfied that the defendants have demonstrated no error in the judgment of the High Court and I would therefore dismiss these appeals.

66. As the Bank has been entirely successful, it would appear to follow that it should be entitled to its costs in each case. If the defendants or any of them wish to contend for an alternative form of order, they will have liberty to deliver a written submission not exceeding 1,000 words within 14 days of the date of this judgment. In that event, the Bank will have liberty to respond likewise within 14 days. In default of such submission being received, an order in the terms proposed will be made.

67. As this judgment is delivered electronically, Whelan and Meenan JJ. have authorised me to record their agreement with it.

06/11/2023