

THE HIGH COURT

2008 864 SP

BETWEEN/

THE CRIMINAL ASSETS BUREAU

PLAINTIFF

AND

A.C.

DEFENDANT

AND

A.C. (SENIOR)

NOTICE PARTY

THE HIGH COURT

2007 297 SP

BETWEEN/

A.C. (SENIOR)

PLAINTIFF

AND

THE CRIMINAL ASSETS BUREAU

DEFENDANT

JUDGMENT of Mr Justice Roderick Murphy delivered the 18th day of June, 2009.

1. Cause of Action

The two above mentioned actions were agreed to be consolidated and heard together in relation to the application of the Criminal Assets Bureau to have a well charging order over the property of the notice party at Ballybough Road in the City of Dublin ("the property") and if necessary an order directing the taking of accounts and inquiries in relation to the property.

The grounding affidavit of Frances Cassidy, an officer of the Revenue Commissioners, referred to the judgment debt, the judgment mortgage and the registration thereof.

The plaintiff in the second proceedings applied for a discharge of the registration on the basis that the legal and equitable interest in the property is his and not that of A.C., his son, the defendant in the first proceedings.

It is not controverted that A.C., Jnr. had been found guilty of certain drug charges and was, at the time of the hearing, in lawful custody. Indeed he has agreed to orders made in a related case, 2008/1030SP *CAB v. A.C. and L.D.*, in respect of premises at Clonee.

2. Submissions of the Criminal Assets Bureau

The Criminal Assets Bureau submitted that the proceedings brought by the notice party in the first matter were improperly brought by way of special summons. The Bureau asked that the affidavits filed in respect of that motion be read as evidence in respect of the notice parties' contentions.

A.C., Jnr. received a recommendation under the ad hoc Legal Aid Scheme for the preparation of such affidavit of rebuttal. No such affidavit was filed. Accordingly, the averments made are uncontroverted.

Mr. C., Senior's affidavit asserts his ownership over the property. It is to be noted that the following facts are not in controversy between the applicant and the notice party:-

- Judgment obtained in the Court against the plaintiff's son in the sum of €725,715.54 and €600,114.55 in respect of taxes, penalties and interest arising on monies from an unknown or legal source which has not been brought to tax;
- The judgments were registered as a mortgage against the estate and interest of the plaintiff's son in Ballybough Road, Dublin;
- The property was purchased in the name of A.C., Albert College Crescent, in March 1994;

- The plaintiff and his son have the same name;
- The plaintiff's son's address prior to 1999 was Albert College Crescent;
- The contract for sale was signed "A.C. (In trust)";
- There was considerable intermingling of the financial affairs of the plaintiff and the plaintiff's son. The plaintiff, Mr. C., Snr. contended in his affidavit that this arose "for (his) convenience...and would simply save (him)...trouble of an extra journey to the bank". The Bureau suggests that it was for the purpose of confusing the ownership of assets; and
- The sums allegedly used to purchase the property do not correspond exactly to any particular lodgement or withdrawal by the plaintiff.

The Bureau submits that the legal background to the matter is the Judgment (Ireland) Act 1850, section 6 which provides:-

"Where any judgment shall be entered up after the passing of this Act... and the creditor under such judgment... shall know or believe that the person against whom such judgment... is entered up... is seized or possessed at law or in equity of any lands, tenements or hereditaments of any nature or tenure...it should be lawful for such creditor...to make and file in the Superior Court in ...which such judgment... is entered up...an affidavit... and it shall be lawful for the creditor making such affidavit to register the same..."

It is submitted that the effect of this registration is mandatory, pursuant to s. 7 of the same Act which provides:-

"The registration of such affidavit shall operate to transfer and divest in the creditor registering such affidavit all the lands, tenements and hereditaments mentioned therein, for all the estate and interest to which the debtor mentioned in such affidavit shall at the time of such registration be seized or possessed at law or in equity or might at such time create by virtue of any disposing power..."

It is submitted that the section suggests that the nature of the interest may differ enormously and it is only the interest vested in the judgment letter which is affected by the judgment mortgage as is provided in *Tempany v. Hynes* [1976] I.R. 101.

While co-ownership may raise issues in relation to an application for an order for sale on foot of a judgment mortgage, the fact that property is co-owned is no bar to the registration of a judgment mortgage: *Container Care (Ireland) Ltd. v. Wycherly* [1982] I.R. 143.

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

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

In conclusion the Bureau submits that as a public body charged with, inter alia, the taking appropriate action under the law to deprive or to deny persons of assets or the benefit of such assets derived, in whole or part, directly or indirectly, from the proceeds of crime. Significantly, the notice party does not put in issue that his son was engaged in a significant level of serious crime which generated substantial amounts of money.

Taking the notice party's evidence at its highest, there was (it was submitted) a considerable overlap between the dealings of father and son. This, together with the other facts outlined above and on the affidavits, makes it appropriate to grant the declaration for the orders for accounts and enquiries which the applicant seeks.

3. Submissions of A.C. (Senior)

The judgment mortgage affidavit seeks to enforce two judgment mortgages against the interests of A.C., Jnr. in the premises Ballybough Road in the City of Dublin. A.C., Snr. denies that his son has any interest, legal or equitable in the said property. The proceedings instituted by special summons are not proceedings under the Proceeds of Crime Act 1996 and thus as outlined below the provisions of that Act do not apply to the proofs and evidence relevant thereto.

The Judgment Mortgage (Ireland) Acts 1850 and 1858 provide a procedure whereby a creditor who obtains judgment may register that judgment against the debtor's land. Section 6, already referred to in the submissions of the Bureau had the effect that where a creditor obtains judgment against a debtor he may swear an affidavit of debt and thereafter register the affidavit in the Registry of Deeds.

Section 7 of the Judgment Mortgage (Ireland) Act 1850 provides that registration as aforesaid of such affidavit shall operate to transfer to and vest in the creditor registering such affidavit all the lands, tenements and hereditaments mentioned therein, for all the estate and interest of which the debtor mentioned in such affidavit shall at the time of such registration be seized or possessed at law or in equity, or might at such time create by virtue of any disposing power which he might then, without any assent of any other person, exercise for his own benefit....

The section sets out the effective registration to capture the interest of the judgment letter at the time of registration.

The effect of a judgment mortgage is stated in Wylie *Irish Land Law* (3rd Ed.) at 13.179:

"In other words, registration creates a mortgage of the estate or interest in land held by the judgment that are in

favour of the judgment creditors. Such a mortgage is subject to most of the principles governing mortgages in general. The usual method of enforcement is to bring an action for a declaration that the sum is well charged, and for a sale if the amount is not paid within a specified period of three months. Discharge does not require execution of a reconveyance of the land and can be effected simply by entering up a memorandum of satisfaction."

In *Irwin v. D.C.*, (Unreported, High Court, 31st January, 2006) Laffoy J. set forth a procedure in relation to the enforcement of Judgment Mortgages as follows:-

"Under the long established jurisprudence of the courts in this jurisdiction, the judgment creditor, whether a judgment mortgage is registered against unregistered or registered land, may only enforce the security afforded by the registration of his judgment mortgage by applying to the court for a "well charging" order, an order for payment the amount found due to him and what of the judgment mortgage within a specified time, and an order for sale in the event of default payment. One of the four proofs required by the court to grant a well charging order in respect of a judgment over registered land is that the debtor seized or possessed at law or in equity of the estate and interest of the lands mentioned in the judgment mortgage affidavit. Accordingly it is only lands and the ownership (legal or equitable) of the judgment debtor and the extent of that ownership that are affected as provided under section 7."

In *McAuley v. Charadin* 81 CHR 567 states that:-

"...it is quite clear and uncontroverted that under neither of these Acts was the creditor to be entitled to more than what the debtor had for himself; it was not intended to have the property of one man applied to pay the debts of another..."

Now what lands are "by virtue of this Act" exempted from being taken? Why, the same which were liable under the Sheriff's Act and under 3 and 4 Vic., (see 105). Then the nature of the interest which could be so made available is the measure by which to ascertain the extent of the right to be conferred by this new Statute. But the lands capable of being made available under the former Acts were clearly those only in which the judgment debtor had a beneficial interest, and to the extent only of that interest. Then, upon the words of this section, to such lands only can the creditor obtain a right under the new law."

In *Naughton v. Naughton* (Unreported, Supreme Court, 9th November, 1993) the defendant/appellant claimed that another party, a company, owned the land and claimed that a judgment mortgage was a well charged on certain land. The case is the converse of the present case in that the affidavit was registered against the interest of the legal owner but he claimed the beneficial ownership lay elsewhere. In the present case the legal owner is a stranger to the judgment and a claim of equitable interest. *Naughton* is instructive on a procedural level. Blayney J. for the court stated:-

"On the basis of this evidence the appellant contended that the company owned the plot by reason of having built the house upon it and having received the rent when the house was let. For the plaintiff/respondent it was submitted that the company clearly did not own the land in the plot since the appellant was registered as owner of it, and if the company had a beneficial interest in the plot that was a matter which could be determined by the examiner when taking the accounts and enquiries directed by the primary order.

In my opinion it is clear on the facts and on the submissions that there is a plain issue to be determined, namely, whether the company is entitled in equity to the plot, or to an interest in the plot, but I consider that this is not an issue which could be determined by the examiner. Insofar as the title to the plot is concerned, the examiner should not look beyond the folio which shows the appellant as full owner and so she could not entertain any claim by the company to the ownership of the plot or any interest in it, nor could she deal with any claim by the company on the enquiry as to encumbrances as such interest (if any) as the company might have would not come within any of the classes of encumbrances covered by such enquiry.

In these circumstances the question arises as to how the issue can be determined and also as to whether it can be determined without the company being made a party to the proceedings. It seems to me that in this matter consideration is an important one. It would not seem proper that the court should decide the issue without hearing the company since the effect of this decision could be to find that a company is not entitled to an interest in which it clearly may have a claim."

It is submitted that that decision shows that the determination of the ownership of land is a matter for the court and not for the examiner. (*National Irish Bank v. Kathleen O'Connor and, by order, Patrick Arnold* (Unreported, High Court, 12th November, 2007) per Finlay Geoghegan J.

The Bureau has claimed that A.C., Jnr. is the owner of the property subject to the proceedings. The grounding affidavit at para. 11 in respect of the two judgment mortgages, sworn on 19th January, 2005 states:-

"is that to the best of my knowledge and belief the defendant in the said judgment is at the time of swearing this affidavit seized and possessed at law or in equity or has disposing power which he may without the assent of any other person, body or corporation exercise for his own benefit of or over certain lands, tenements, hereditaments and premises, hereinafter mentioned, that is to say the property described as No. 6, Ballybough Road, situate in Ballybough Road at the southern side of the junction of Sackville Avenue, etc."

Although the Bureau accepts that the property was purchased by Mr. A.C., Snr. it claims that Mr. A.C., Snr. holds the property in trust for the benefit of his son, Mr. A.C., Jnr.

No claim has previously been made that the property was held in trust for Mr. C., Jnr. The Bureau infers that because it has a judgment for a substantial sum against Mr. C., Jnr. he has a beneficial interest in the property. The only evidence to that effect is the opinion of two officers of the Bureau.

Mr. A.C., Snr. has stated that he is the sole owner of the property, the subject matter of proceedings and that he provided the purchase money. Moreover he says that the title in the property vests in him that he did not purchase the property in trust for the benefit of his son.

No probative evidence has been given that Mr. A.C., Snr. purchased the property in trust for the benefit of his son. The creation of a trust of property is by statute required to be in writing. Keane: *Equity in the Law of Trusts in the Republic of Ireland*, Ch. 7 refers to three certainties in the creation of a trust which are not present in the memorandum of agreement whereby Mr. C., Snr. purchased the property (in trust). It is submitted that such a phrase is commonly used in the purchase of property where the purchaser contemplates using some other vehicle as the ultimate purchaser or indeed seeks to sell on the contract. General condition 30 applies to make a purchaser personally liable to complete the sale unless and until he has disclosed to the vendor the name of his principal or any other such party.

Counsel submits that the general principle applied in civil cases is that he who asserts must prove and refers to *Ulster Bank Ltd. v. Joseph Whittaker*, (Unreported, High Court, 21st January, 2009) where Clarke J. said that where there were issues between the parties on affidavit evidence it would be impossible without a full plenary hearing to come to a definitive conclusion as to whether the bank's case was properly made out.

It is further submitted that the evidence of Garda Andrew O'Keeffe and Frances Cassidy are inadmissible as they constitute opinion evidence which is not relevant. In para. 3 of Garda O'Keeffe's affidavit sworn on 20th June, 2007, he states:

"I also believe that he has invested the proceeds of such activity in a number of properties, including the property at issue here."

In para. 6 of the same affidavit reference is made to intelligence available to him which he did not wish to disclose for operational reasons and which confirmed the impression that the property purchased by the plaintiff for and on behalf of his son, A.C., Jnr. was from proceeds from his son's illegal activity.

Mr. Cassidy's affidavit sworn on the same date in para. 10 states that he believed that the plaintiff at all times intended to hold the property in trust for the benefit of his son.

The proceedings taken by the Bureau were to enforce the judgment mortgage and were not taken under the proceeds of Crime Act, 1996. Therefore s. 8 of that Act, as amended which relates to evidence of belief does not apply.

4. Reply of Bureau

Counsel on behalf of the Bureau agrees that the proceedings were not under the Proceeds of Crime Act and that the provisions of s. 8, accordingly, do not apply.

The matter should not be left to the examiner as the court can determine the existence of an interest that sums are well charged.

Counsel submitted that a letter from the defendant which asserted that the property was not his was not on affidavit and even if treated as such was not evidence that puts in issue the facts that the Bureau have deposed to the court. The facts are not controverted by that letter.

Counsel submitted that it was incorrect to say that the Bureau had not adduced a single piece of evidence.

Three propositions put forward by the Bureau are supported by relevant facts which have not been controverted.

Firstly, there was a commonality or pool of money and cash available to both Mr. C., Snr. and Mr. C., Jnr.

Reference was made to para. 27 of Mr. C., Snr.'s affidavit sworn the 12th day of March, 2008 where it was averred that it had occasionally been his practice to give his wage cheques to his son to cash for him.

There are discrepancies between the cheques paid to Mr. C., Snr. and the lodgments made to his bank account both in terms of amount and in terms of dates and, indeed, in terms of the reference to "it appears".

The drugs trade of Mr. C., Jnr. is a cash business which was categorised as of a substantial nature in Mr. Cassidy's affidavit.

The second proposition was that out of the pool of funds, property was bought and it was proposed that that be developed.

Underlying this proposition is that the contract was "in trust" which suggested another interest.

The undertaking as to the development was, on the evidence of Mr. C., Snr., limited to the sum of £10,000 being the difference of the funds which he said were available to him and the cost of the premises.

Mr. C., Jnr. worked on the property as was evidenced by the affidavit of the architect. No details were given of payments due to him or the interest that he had. This evidence points to a joint project.

The third proposition is that Mr. C., Snr. had not shown that the property was acquired by means of legitimate funds alone. He had not carved out of the joint undertaking what legitimate funds were invested by him.

5. Decision of the Court

It is common understanding that this is not a proceeds of crime case. It is an application for a well charging order. The ordinary rules of evidence apply.

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

The onus of proof is on the Bureau to substantiate, under s. 7 of the 1850 Act that Mr. C., Jnr. has an interest in the subject property.

The fact that funds are intermingled does not necessarily imply that funds came from Mr. C., Jnr.

Nor does the evidence that Mr. C., Jnr. did work in the house, though the nature and extent of this work is unclear, prove that he had an interest or that that constituted a joint undertaking. Whatever the suspicions of the Bureau may be and indeed the confidential information received by them does not of itself prove that he had financed or part financed the purchase of the property.

It is clear that s. 6 of the 1850 Act refers to a creditor under a judgment who "shall know or believe" that the person against whom such judgment is entered up is seized or possessed of any lands, etc. which would make it lawful for the creditor making such affidavit to register the same. However there is, in strict terms, no evidence of knowledge or source of belief on the deponent's own part to substantiate that Mr. C., Jnr. has an interest in the subject property.

I am not satisfied that the purchase by Mr. C., Snr. in trust necessarily proves that anyone other than Mr. C., Snr. paid the deposit or would be liable for the balance on completion.

It may point to an intention to develop under the name of a company or a partnership. In any event condition 30 of the Incorporated Law Society standard conditions of sale would apply.

Neither am I satisfied that the remainder of the funds available to Mr. C., Snr. out of the redundancy payments of €43,000 and the discharge of the balance and deposit for the house of €32,500 was the only sums which would be available for the development. Clearly a development of that nature and size would require outside financing. As the development did not proceed the issue of who might have financed the development is not relevant.

The court is concerned that Mr. C., Snr. has not demonstrated to the court the precise source of payment for the premises, the subject matter of the application. A saving account and a current account were exhibited in his affidavit. There may be some doubt that what is averred to as appearing to be correlative lodgments does indeed relate to the payments.

It is unclear whether the lodgement of £24,000 to the savings account on 9th February, 1994 is indeed the source of the draft of £24,226.92 on 11th May, 1994 which was paid, together with part of the £8,000 borrowed to his solicitor.

Notwithstanding such concern, the evidence adduced by the Bureau does not substantiate that Mr. C. Jnr. has an interest in the property.

There is no evidence that Mr. C., Jnr. has any disposing power which he may exercise for his own benefit.

The court will, accordingly, decline to make a well charging order.