Neutral Citation Number: [2010] IEHC 20

THE HIGH COURT

2008 478 SP

BETWEEN

THE PROVOST, FELLOWS AND SCHOLARS OF THE UNIVERSITY OF DUBLIN, TRINITY COLLEGE

PLAINTIFF

AND

JAMES KENNY AND PATRICIA KENNY

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 22nd day of January, 2010.

The proceedings

In these proceedings, which were initiated by special summons which issued on 12th June, 2008, the plaintiff seeks to realise its security created by three judgment mortgages which have been registered against two properties jointly owned by the first defendant (Mr. Kenny) and the second defendant (Mrs. Kenny). The judgment mortgages affect only the interest of Mr. Kenny in those properties. The sums secured by the judgment mortgages represent the cost of proceedings instituted by Mr. Kenny in 2000, 2002 and 2003 against the plaintiff, which were awarded by the Court to the plaintiff against Mr. Kenny and which have been taxed.

There are three judgment mortgages involved, which secure the following sums:

(1) €123,238.18 together with interest thereon from 2nd March, 2001;

(2) €289,666.39 together with interest thereon from 19th October, 2004; and

(3) €69,009.20 together with interest thereon from 26th March, 2004.

As of 28th October, 2008 the aggregate sum due on foot of the three judgment mortgages for principal and interest was €663,239.34. Interest has continued to accrue at the rate of €105.63 per day from 29th October, 2009.

The properties against which the judgment mortgages are registered are the following:

> (a) The dwelling house and premises known as 4, Temple Road, Dartry in Dublin City (the Dartry property), which it is common case is the "family home" within the meaning of the Family Home Protection Act 1976 (the Act of 1976) of Mr. Kenny and Mrs. Kenny. The title to the Dartry property is unregistered title. It was purchased by Mr. Kenny and Mrs. Kenny in 1995 and their interest is subject to a mortgage dated 3rd May, 2001 in favour of Bank of Ireland (the Bank of Ireland mortgage). The Bank of Ireland mortgage clearly has priority over the three judgment mortgages registered against the Dartry property, which were registered on 4th February, 2003, 7th November, 2007 and 24th April, 2007 respectively.
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> (b) A bungalow, which is used as a holiday home by Mr. Kenny and Mrs. Kenny and is situate at Portnoo, County Donegal (the Donegal property). The title to the Donegal property is registered title, the relevant folios being Folio 21400 and Folio 43061 of the Register of Freeholders, County Donegal. Mr. Kenny and Mrs. Kenny are registered as full owners with absolute title on each Folio, *prima facie* as joint tenants. There is registered against each folio a charge, which was registered on 20th February, 1997, for present and future advances stamped to cover IR£50, 000 repayable with interest. Allied Irish Finance Co. Ltd. is the registered owner of the charge. It is not clear from the evidence before the Court how much, if anything, is owing to Allied Irish Finance Co. Ltd. on that charge. The judgment mortgages in issue in these proceedings were registered as burdens on both folios on 25th April, 2007 against the interest of Mr. Kenny in the Donegal property. At the same time, other judgment mortgages were registered by the plaintiff against Mr. Kenny's interest, but they are not in issue in these proceedings.

The relief claimed by the plaintiff in the special summons is, first, a declaration that the monies secured by each of the judgment mortgages in issue stands well-charged on both the Dartry property and the Donegal property. This is a point which is not in controversy, but the relief claimed should be that the monies stand well-charged on the interest of Mr. Kenny alone in the Dartry property and the Donegal property. The plaintiff also seeks a declaration as to the sums due and owing to the plaintiff on foot of the judgment mortgages. The specific relief claimed with a view to realising the monies due to the plaintiff is an order that payment of the amount found due be effected through a sale of the Dartry property and/or the Donegal property, or by the appointment of a receiver, or by both such sale and appointment. Significantly, the plaintiff also seeks, if appropriate and necessary, an order for sale in lieu of partition pursuant to the Partition Acts 1868 to 1876. It does not seek a sale of Mr. Kenny's interest alone in either property.

At the hearing, the plaintiff sought an order for sale of both the Dartry property and the Donegal property. Although the

reliefs claimed by the plaintiff included an order for possession, that does not arise at this juncture, although it would arise in the event of a Court ordered sale taking place, if it was necessary to give the purchaser of the sold property vacant possession.

Counsel for Mr. Kenny, whose argument was adopted by counsel for Mrs. Kenny, challenged the jurisdiction of the Court to order the sale of either the Dartry property or the Donegal property. It is convenient to consider the jurisdiction point in relation to the Donegal property first.

Donegal property: jurisdiction point

It was submitted on behalf of Mr. Kenny and Mrs. Kenny that the Court has no jurisdiction to order a sale of the Donegal property, which is registered land co-owned by Mr. Kenny and Mrs. Kenny, at the suit of the plaintiff which has a judgment mortgage against the interest of Mr. Kenny only in that property on the authority of the decision of this Court in *Irwin v. Deasy* [2006] 2 ILRM 226 (*Irwin v. Deasy No. 2*).

In response, counsel for the plaintiff submitted that, in essence, *Irwin v. Deasy (No. 2)* was wrongly decided. Counsel contended that *Irwin v. Deasy (No. 2)* was wrong on two grounds:

> (1) in, following the decision of Finlay Geoghegan J. in *Irwin v. Deasy* [2004] 4 I.R. 1 (*Irwin v. Deasy No. 1*), finding that a judgment creditor with a judgment mortgage over the interest of one of two or more co-owners of registered land is not a person in whose favour a decree of partition could be made and, accordingly, is not a person in whose favour an order for sale in lieu of partition could be made under s. 3 or s. 4 of the Partition Act 1868 (the Act of 1868); and
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> (2) even if that finding is correct, in failing to find that the final words of s. 71(4) of the Registration of Title Act 1964 (the Act of 1964), which provides that the judgment creditor "shall have such rights and remedies for the enforcement of the charge as may be conferred on him by order of the court", confer on the Court sufficient jurisdiction to make an order for sale in lieu of partition in the circumstances.

In regard to the second ground, it was submitted that the decision in *Irwin v. Deasy (No. 1)* was correct and the decision in *Irwin v. Deasy (No. 2)* should not be followed.

I think the first ground may have been based on a misunderstanding of what was decided in both legs of *Irwin v. Deasy* in relation to the jurisdiction of the Court under the Act of 1868. Even though the plaintiff did not invoke any specific provision in the Partition Acts in the special summons, it became clear at the hearing that the plaintiff's claim for an order for sale in lieu of partition was founded on s. 4 of the Act of 1868, when counsel for the plaintiff was pressed on this point by counsel for Mrs. Kenny. That section provided as follows:

> "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct the sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

The issue which arises in relation to the Donegal property, and which arose in *Irwin v. Deasy*, as to whether s. 4 gave jurisdiction to order a sale in lieu of partition on the facts turns on the question whether, if the Act of 1868 had not been passed, a decree for partition might have been made, not on the question which was the basis on which the first ground was argued – whether the plaintiff is "interested" to the extent of one moiety or upwards. Put another way, the issue is whether, aside from the Act of 1868, the Court could have made an order for partition. Having outlined the history of the partition jurisdiction, Finlay Geoghegan J., in *Irwin v. Deasy (No. 1)*, considered the jurisdiction to make an order for partition in the following passage of her judgment (at p. 7):

> "A person may only claim an order for partition if entitled in possession or entitled to call for legal possession: see White and Tudor*, Leading Cases in Equity* (7th ed., London, 1897), vol. 1 p. 199. A mortgagee has been held entitled to claim partition, *op. cit*. p. 201. Also a mortgagee has been held entitled to an order for sale in lieu of partition under the Act of 1868, see *Davenport v. King* (1883) 49 L.T. (N.S.) 92. There does not appear to be any reason to distinguish a judgment mortgagee of unregistered lands from any mortgagee of unregistered lands who has been held so entitled."

Later, Finlay Geoghegan J. went on to deal with the position of a judgment mortgagee seeking an order for sale in lieu of partition of registered land by reference to the facts of the case before her, stating (at p. 8):

> "I have concluded that the registration of a judgment affidavit under s. 71 of the Act of 1964 does not confer on the plaintiff any interest in the lands … such as would entitle him to a decree of partition in accordance with the established principles. He is not entitled in possession or to call for possession of the lands. The absence of any provision in s. 71 analogous to that contained in s. 62(6) of the Act of 1964 in relation to registered owners of charges created by the owner of property in the folio means that one cannot assimilate the position of a judgment creditor in whose favour a charge is created by the registration of the judgment mortgage affidavit pursuant to s. 71 of the Act of 1964 (which is simply a burden on the property), to the position of a judgment creditor who has registered a judgment mortgage affidavit in the Registry of Deeds against unregistered land and is a mortgagee pursuant to the provisions of s. 7 of Judgment Mortgage (Ireland) Act 1850. Support for this view is to be found in Lyall, *Land Law in Ireland*, (2nd Ed., Dublin, 2000) at p. 868 where it is stated:-
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> > 'In registered land a judgment mortgage does not effect a conveyance of the debtor-spouse's interest: it creates a charge on the interest. It would seem to follow that a judgment mortgagee of registered land cannot apply for an order for sale under the Partition Acts because he or she is not a co-owner.'"

On the second leg of *Irwin v. Deasy*, following the joinder by Finlay Geoghegan J. of the co-owner with the judgment debtor of the lands in issue in that case (Mrs. Deasy), and having heard submissions on her behalf, I arrived at a similar

conclusion that, as a person in the position of the plaintiff in that case did not have an interest in the land of the type which would entitle him to maintain a suit for partition, having regard to the terms of s. 3 and s. 4 of the Act of 1868, he could not pursue the statutory remedy of a sale in lieu of partition under that Act (*Irwin v. Deasy (No. 2)* at p. 238).

In their written submissions counsel for the plaintiff were particularly critical of the decision of the High Court of Northern Ireland in *Northern Bank Ltd. v. Haggerty* [1995] N.I. 211, which was referred to in *Irwin v. Deasy (No. 2)* as having been relied on by counsel for Mrs. Deasy on the second leg of that case (p. 232) and was cited as the source of the statement that the common law remedy of partition was rendered obsolete on the enactment of the Real Property Limitation Act 1833 (p. 234), but was not otherwise relied on. The references in the judgment in the *Northern Bank Ltd*. case to the decision in *Evans v. Bagshaw* (1869) L.R. 8 Eq. 469 and to *Seton's Judgments and Orders* (7th Ed., 1912) and *Daniell's Chancery Practice* (8th Ed., 1914), in my view, are "red herrings" as regards the fundamental point as to the application of s. 4 of the Act of 1868, which is whether a decree for partition might have been made if the Act of 1868 had not been passed, in appearing to focus on the requirement that the plaintiff have a "present interest" or an estate "in possession" or be "entitled in possession". Like the plaintiff in this case, Northern Bank Ltd. did have an interest in possession, as opposed to an interest is remainder or reversion, so no issue arose as to the interest being "in possession" as against not "in possession". However, Campbell J. went on to say (at p. 217):

> "Unlike a mortgage, which confers an interest in property, a charge merely gives the chargee certain rights over the property as security for the loan:
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> > 'A charge is the appropriation of real or personal property for the discharge of a debt or other obligation, without giving the creditor either a general or special property in, or possession of, the subject of the security'.
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> (see *Fisher & Lightwood's Law of Mortgage* (10th Ed., 1988) p. 4).
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> Since the owner of a charge did not have an estate or interest in possession, prior to the passing of the Partition Act 1868, he would not have been granted a decree for partition and he would not be entitled to an order under s. 4 of the Act."

I interpret that passage as stating the same principle as was stated in the passages from the judgment of Finlay Geoghegan J. in *Irwin v. Deasy (No. 1)* quoted earlier: that in order to maintain a suit for partition of land, the plaintiff would have had to have an estate or interest in the land which entitled him to possession or to call for possession of the land. The judgment mortgage registered by the plaintiff against the interest of Mr. Kenny in the Donegal property does not give the plaintiff that status, so that a decree for partition could not have been made in its favour, if the Act of 1868 had not been passed, and, accordingly, jurisdiction to order a sale in lieu of partition at its suit was not conferred on the Court either by virtue of s. 3 or s. 4 of the Act of 1868. Therefore, the first ground on which the plaintiff has urged that the decision in *Irwin v. Deasy (No. 2)* should not be followed does not stand up.

Turning to the second ground, counsel for the plaintiff have summarised their arguments that the decision in *Irwin v. Deasy (No. 2)* is based on a wrong interpretation of s. 71(4) as follows:

> (i) By providing that "the creditor shall have such rights and remedies for the enforcement of the charges as may be conferred on him by order of the Court", the Oireachtas may have intended to confer on the Court such jurisdiction as the Court would previously have had in relation to judgment mortgages on registered land by virtue of s. 21(2) of the Local Registration of Title Act 1891 (the Act of 1891). In other words, it is the contention of the plaintiff that the Oireachtas intended the Court to have what is described as an analogous jurisdiction to that which was available under the 1891 Act. That argument is based on the assumption that the order sought by the plaintiff in relation to the Donegal property could have been made when s. 21(2) of the Act of 1891 was in force prior to its repeal by the Act of 1964.
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> (ii) The only real alternative interpretation is that the Oireachtas intended the Court to have such jurisdiction as it has in relation to judgment mortgages on unregistered land, citing the observations of Finlay Geoghegan J. (at p. 5) in *Irwin v. Deasy (No. 1),* which were made before Mrs. Deasy was joined as a party and submissions were made on her behalf.
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> (iii)If neither the interpretation suggested at (i) or (ii) above is adopted, it was suggested that it is difficult to see where the Court could find jurisdiction to order any sales at the instigation of judgment mortgagees on registered land since the relevant words contain no explicit reference to any particular remedy, even though one is plainly intended.

In relation to the first argument, it is anything but clear that a judgment mortgagee in the position of the plaintiff could have obtained an order for sale in lieu of partition by virtue of the provisions of s. 21(2) of the Act of 1891 while that Act was in force, as the commentary in *Registration of Title in Ireland* by McAllister referred to in the judgment in *Irwin v. Deasy (No. 2)* (at p. 236) suggests. In any event, that provision was repealed by the Act of 1964. In my view, it would be absurd to assume that, notwithstanding such repeal, the Oireachtas intended its former effect to be continued by the courts.

The second argument ignores the manner in which the Oireachtas dealt with the distinction between mortgages of unregistered land and charges on registered land in the Act of 1964. The Act put in place a distinct code in relation to registration of title. In relation to charges created by the registered owner on registered land, in s. 62 of the Act of 1964 it is expressly provided that, on the registration of the owner of a charge for repayment of principal with or without interest, the instrument of charge operates as a mortgage by deed (*i.e*. of unregistered land) within the meaning of the Conveyancing Acts, so that the registered owner of the charge has, for the purpose of enforcing the charge, all the rights and powers of a mortgagee under a mortgage by deed, including power to sell the estate or interest which is subject to the charge. Sub-section (7) of s. 62, which re-enacted a provision which was first introduced in the Registration of Title Act 1942, enables the registered owner of a charge to apply to Court in a summary manner for possession when repayment of the principal money secured by the instrument of charge has become due. Those are only two of the provisions included in the Act of 1964 which create a comprehensive scheme for enabling a registered owner of a charge to realise his security.

If the Oireachtas considered it necessary to expressly confer such status and powers on the registered owner of a charge on registered land created by the registered owner of the land, then one would assume that, if it intended to confer similar status on a judgment mortgagee who has registered his judgment mortgage as a burden on registered land, it would have done so expressly. It did not do so. It merely provided that the registration of the affidavit of judgment in compliance with the requirements of s. 71 operates to charge the interest of the judgment creditor (s. 71(4)). Accordingly, one cannot assimilate the position of such a judgment mortgagee of registered land to the position of the registered owner of a charge on registered land or, as Finlay Geoghegan J. concluded in the second passage quoted earlier, to the position of a judgment mortgagee of unregistered land. That being the case, I cannot see how it is possible to construe s. 71(4) as having the effect contended for.

I am still of the view, expressed in *Irwin v. Deasy (No. 2)*, that when the Oireachtas enacted s. 71(4) it intended that the rights and remedies to which the judgment mortgagee should be entitled to enforce his security should be limited to rights and remedies which the Court has jurisdiction to grant having regard to the nature of the security, namely, that it merely operates to charge the interest of the judgment debtor without conferring on the judgment mortgagee the status and rights conferred on the registered owner of a charge by virtue of s. 62.

As regards the third argument, the obvious situation for which the provision in s. 71(4) provides a remedy is where the judgment mortgage is registered as a burden against the entire interest of the registered owner of the land. In that situation, in accordance with the long established equitable jurisdiction of the Court, the judgment creditor can apply to Court in a mortgage suit for a "well-charging" order and an order for sale. The difficulty which the plaintiff faces in relation to the Donegal property is that, because his judgment mortgage is registered only against the interest of one of the co-owners, in order to get the remedy it seeks it has to rely on the separate and distinct, but exclusively statutory, jurisdiction in relation to sale in lieu of partition of land. Because of the express terms of the statute in question, the Act of 1868, it cannot invoke that jurisdiction because it does not comply with the requirement that, had the 1868 Act not been passed, a decree for partition might have been made in the circumstances which prevail.

To put it another way, to construe s. 71(4) in the manner suggested on behalf of the plaintiff would result in the application of s. 4 of the Act of 1868 in circumstances where, on the express terms of the section itself it is not intended to apply, which would involve finding on the part of the Oireachtas an intention to amend s. 4 by implication, to accommodate the judgment mortgagee who merely has a charge and no more by the application of s. 71(4). In my view, when the Oireachtas in s. 62 expressly provided the mechanisms to enable a registered owner of a charge created by the registered owner of registered land to avail of the remedies available to a mortgagee of unregistered land, which include the remedy of a sale in lieu of partition provided by the Act of 1868, but did not extend those mechanisms to a judgment creditor, no such intention may be implied.

I am not persuaded by the arguments advanced on behalf of the plaintiff that

s. 71(4) can be construed in a manner which allows the Court to apply s. 4 of the Act of 1868 so as to order a sale of the Donegal property and deprive Mrs. Kenny of possession thereof. I am still of the view, expressed in *Irwin v. Deasy (No. 2)* that at the time these proceedings were heard there was a *lacuna* in the law.

However, that *lacuna* has been rectified by s. 31 and s. 117 of the Land and Conveyancing Law Reform Act 2009 which commenced on 1st December, 2009. For the record, I should say that at the end of the hearing of this matter on 28th October, 2009, counsel for the parties asked the Court to defer giving judgment *pro tem*. On 23rd November, 2009 the Court was informed that the parties required a judgment. Nothing in this judgment is to be taken as an expression of any view on the application of the Act of 2009 to the facts, because that issue simply did not arise at the hearing.

For the reasons I have outlined, I am of the view that, while the Court has jurisdiction to make a "well-charging" order in relation to the Donegal property for the benefit of the plaintiff on foot of the three judgment mortgages in issue in these proceedings, the Court does not have jurisdiction to order a sale in lieu of partition in reliance on the jurisdiction conferred by the Act of 1868.

The Dartry property: jurisdiction point
Section 4 of the Act of 1868 mandated the Court to direct a sale of co-owned property and a distribution of the proceeds, instead of a division of the property among the co-owners, unless there was "good reason to the contrary", on being requested so to do by "the party or parties interested, individually or collectively, to the extent of one moiety or upwards of the property to which the suit relates". Counsel for Mr. Kenny referred the Court to a decision, which is described by Wylie in *Irish Land Law* (Butterworth, 3rd Ed., at p. 443 ff) as a "somewhat odd interpretation" of that provision. The decision is a Northern Ireland case, *Northern Bank Ltd. v. Adams* (Unreported, Master Ellison of the High Court, 1st February, 1996). In that case the plaintiff was seeking an order under s. 4 of the Act of 1868 as mortgagee of Mr. Adams' half-share in a house. The evidence was that the house was worth £80,000, while the sum owing to the plaintiff by Mr. Adams was approximately £10,000. Master Ellison held that there was no jurisdiction to order a sale under s. 4 of the Act of 1868 "because the realisable value of the plaintiff mortgagee's interest is less than a moiety". As is pointed out by Wylie, a mortgagee's interest attaches to the entirety of the estate or interest mortgaged. Therefore, even if it is a fact that the amount due to the plaintiff on foot of the three judgment mortgages represents less than half the value of the Dartry property, that is immaterial. The plaintiff, as the judgment mortgagee of Mr. Kenny's interest in the Dartry property, is a party interested "to the extent of one moiety or upwards".

Accordingly, I am satisfied that the jurisdiction point in relation to the Dartry property fails. It remains to consider whether the Court should see that there is "good reason to the contrary" which militates against directing the sale of the Dartry property and a distribution of the proceeds of sale.

Dartry property: good reason to contrary?
In the context of the application of s. 4 of the Act of 1868, counsel for Mr. Kenny raised an issue as to the application of the Act of 1976 to the Dartry property, which, as I have recorded, it is agreed is a "family home" within the meaning of that Act, in the event of the Court ordering a sale in lieu of partition. The issue has arisen because, in an affidavit sworn on 4th December, 2008, Mr. Kenny has averred that he does not consent to the sale of Mrs. Kenny's interest in the Dartry property, in the event of a sale being ordered by the Court. That point, in my view, is of some relevance in the overall context of the application of s. 4 of the Act of 1868 to the facts, but it is also to a large extent premature.

What the Court is being asked to do at this juncture is to make an order for sale in lieu of partition of the Dartry property

at the suit of the plaintiff judgment mortgagee. On the facts, this case is on "all fours" with *Containercare Ltd. v. Wycherley* [1982] I.R. 143, in that the plaintiff in that case was a judgment mortgagee which was seeking an order for sale of a family home the title to which was unregistered land, which was vested in the joint names of the judgment debtor husband and his wife and was subject to a mortgage in favour of a building society, which had priority over the judgment mortgage. A "well-charging" order and an order for sale were made at the suit of the judgment mortgagee, Carroll J. holding that the vesting in the judgment mortgagee of the interest of the judgment debtor husband took effect by operation of law and was not a conveyance within the meaning of the Act of 1976. The specific point raised by counsel for Mr. Kenny was, apparently, not raised and was not addressed.

Following the decision in *Containercare v. Wycherley*, the effect of the registration of the plaintiff's first judgment mortgage against Mr. Kenny's interest in the Dartry property on 4th February, 2003 was to sever the joint tenancy of Mr. Kenny and Mrs. Kenny. If the Court orders the sale of the Dartry property and the sale proceeds to contract stage, the question of transmitting the title to the respective undivided moieties of Mr. Kenny and Mrs. Kenny to the purchaser will arise. At that stage, the question of the requirement of the consent under the Act of 1976 of either of them to the conveyance of the other party's moiety could arise, because, as was pointed out by Murphy J. in *O'D. v. O'D.* (High Court, Unreported, 18th November, 1983), a sale under the Act of 1868 does not constitute "a parliamentary conveyance". It is premature to express any view on whether the consent under the Act of 1976 of either Mr. Kenny or Mrs. Kenny to the conveyance of the other's moiety to a purchaser pursuant to a Court sale would be required. However, even if it were held that it would be, s. 4 of the Act of 1976 confers a discretion on the Court to dispense with consent to a conveyance of an interest in a family home. In exercising the discretion the Court is required not to dispense with the consent unless it considers that it is unreasonable for the spouse to withhold consent taking into account all the circumstances including the respective needs and resources of the spouses and of the dependant children (if any) of the family and, in a case where the spouse whose consent is required is offered alternative accommodation, the suitability of that accommodation having regard to the respective degrees of security of tenure in the family home and in the alternative accommodation.

In considering whether to order a sale of the Dartry property, it seems to me that common sense dictates that, on the assumption (but without expressing any view on the point) that it might be held that the prior consent under the Act of 1976 of either Mr. Kenny or Mrs. Kenny to a conveyance to the purchaser of the other's moiety would be required in the event of a Court ordered sale proceeding to completion, the Court should have regard at this juncture, insofar as it is possible to do so, to the factors to which the Court would have to have regard, if it were to become necessary to consider dispensing with the consent of either Mr. Kenny or Mrs. Kenny under the Act of 1976. To that extent, I think the point made by counsel for Mr. Kenny is relevant. However, in addition to the issue of the requirement for consent under the Act of 1976 to completion of the sale being premature, it must be emphasised that prematurity also arises from the fact that it would be the circumstances which would prevail at the time the Court would be considering whether to make an order under s. 4 of the Act of 1976 which would be relevant to a determination under that section.

As I have stated, it is the jurisdiction of the Court under s. 4 of the Act of 1868 which is being invoked by the plaintiff. On its face, s. 4 is mandatory in the sense that it provides that the Court "shall, unless it sees good reason to the contrary" direct a sale. However, counsel for the plaintiff properly acknowledged that the jurisdiction to order a sale is discretionary because, in effect, the jurisdiction "piggy-backs" on the Court's jurisdiction to make an order for partition, which survived as equitable jurisdiction, although it has been abolished since 1st December, 2009 by virtue of s. 31(6) of the Act of 2009.

In the cases in which what constitutes "good reason to the contrary" for the purposes of s. 4 of the Act of 1868 has been considered, the tendency in the recent past has been to interpret the expression more widely than was the case historically (*cf* the observations of Campbell J. in *Northern Bank v. Haggerty* at p. 217). In O'D. v. O'D., on an application by a husband who jointly owned the family home with his wife for the sale thereof in lieu of partition, Murphy J. stated that, in his view, what constitutes good reason at the present time would properly have regard to the rights of the parties under the Act of 1976. A similar approach was adopted by this Court (Denham J.) in *First National Building Society v. Ring* [1992] 1 I.R. 375, where, on an application by a judgment mortgagee of the first defendant husband for an order for sale in lieu of partition of a family home, in a passage relied on by counsel for Mr. Kenny (at p. 381), Denham J. stated:

> "The second defendant who is a co-owner and who is an innocent party and has no judgment registered against her would undoubtedly suffer a significant sacrifice if her property, part of the family home, were sold now. In the circumstances it does not appear appropriate now to order partition or sale in lieu of partition."

In that case, the Court adjourned the proceedings generally with liberty to re-enter. Because of a dearth of evidence in relation to, *inter alia*, the valuation of the property and the circumstances of the persons interested in the property, in particular, the second defendant, the Court directed an inquiry into factual matters which would indicate the impact of a Court ordered sale.

There is no such dearth of evidence in this case. Certain evidence was put before the Court by the plaintiff as to the assets of Mr. Kenny and Mrs. Kenny with a view to demonstrating that the relief sought would not deprive Mr. Kenny and Mrs. Kenny of the ability to provide themselves with an alternative home. The following is a summary of the evidence:

> (a) There is evidence before the Court, on the basis of a "kerbside" valuation obtained by the plaintiff, that the value of the Dartry property is in the region of €1.5m. If it sold for that price, when the mortgage in favour of Bank of Ireland is discharged, the balance of the proceeds of sale would exceed €1m. Mrs. Kenny's share of the proceeds would be in the region of €500,000. The plaintiff's judgment mortgages would absorb the totality of Mr. Kenny's share.
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> (b) There is also evidence before the Court, on the basis of a similar type valuation, that the value of the Donegal property is in the region of €125,250. As I have stated, it is not clear what, if anything, is due to Allied Irish Finance Co. Ltd. on foot of the charge which is registered on the two folios. On the basis of the jurisdictional point in relation to the Donegal property, I have held that that property cannot be the subject of an order for sale in these proceedings, so that it remains the property of Mr. Kenny and Mrs. Kenny subject to whatever, if any, money is due to Allied Irish Finance Co. Ltd. and, as regards Mr. Kenny's interest, to all the judgment mortgages registered by the plaintiff against it.

(c) While the plaintiff explored the probability that Mr. Kenny owns other assets, the only other asset of significance which emerged is his shareholding in Firestone Diamonds plc., which was valued at £170,695.68 as of the end of October 2009. Mr. Kenny averred that the shares are encumbered in favour of his bank as security for a personal loan and that the amount secured is in the region of €95,000.

As to their personal circumstances, Mr. Kenny and Mrs. Kenny are both elderly, being in their late seventies. Their five adult children have all left home. Three of their children reside in Ireland but, as it was put, they have their own families. In this context Mrs. Kenny has averred in her affidavit replying to the plaintiff's claim that it is not at all clear that there will be resources to accommodate either her or Mr. Kenny, if the Court should order a sale of the Dartry property.

Counsel for the plaintiff acknowledged that there will be a degree of disruption to the lives of Mr. Kenny and Mrs. Kenny if they are required to vacate the Dartry property which has been their home for fifteen years in consequence of a Court sale. However, the position of the plaintiff is that Mrs. Kenny will have sufficient resources to provide alternative accommodation for herself and Mr. Kenny in the event of the Court ordering a sale of the Dartry property. That, it seems to me, is the correct inference to draw from the evidence. It is the crucial factor in determining whether the Court's discretion should be exercised in favour of ordering a sale at this juncture.

Taking all of the relevant factors into account, I have come to the conclusion that it would be a proper exercise of the Court's discretion to order a sale of the Dartry property for the purpose of meeting Mr. Kenny's liability to the plaintiff out of his share of the proceeds of the sale thereof.

Order
As I have already indicated, the order in relation to the Donegal property will be limited to a "well-charging" order.

In relation to the Dartry property, there will be the usual primary order in a mortgage suit containing a "well-charging" declaration, a finding as to the sum due to the plaintiff by Mr. Kenny as of 28th October, 2009 (€663,239.34) and of continuing interest due at the rate of €105.63 per day from 29th October, 2009. There will be an order for sale in the event of the monies found due not being paid to the plaintiff within one year from the date of this judgment. That allows a longer period than usual before the order for sale becomes operative.

It would be highly desirable that the parties should reach a settlement in relation to Mr. Kenny's indebtedness to the plaintiff before the order for sale becomes operative, not only because of the disruption to the lives of Mr. Kenny and Mrs. Kenny which will be inevitable if it does become operative, but also because of the fact that the debt is growing at the rate of almost €40,000 per annum and the mortgage suit process is protracted and expensive.