

THE HIGH COURT

[2012 No. 8 S.P.]

BETWEEN

ACC LOAN MANAGEMENT LIMITED

PLAINTIFF

AND

WILLIAM FRYDAY AND VANDA FRYDAY

DEFENDANTS

AND

LAVINIA FRYDAY AND RICHARD FRYDAY

NOTICE PARTIES

JUDGMENT of Mr. Justice Quinn delivered on the 26th day of February, 2019.

1. The plaintiff is a judgment creditor of the defendants for the sum of €1,301,344.44 and the holder of a judgment mortgage over lands comprised, *inter alia*, in five folios ("the folios") registered in the names of the defendants. On 14th July, 2014 the court granted to the plaintiff an order declaring the judgment debt well charged on the folios and made an order for sale of the property and for the taking of the appropriate Account and Enquiry by the Examiner of the High Court.

2. On 9th April, 2014 and 17th December, 2014 the notice parties respectively lodged inhibitions at the Property Registration Authority ("the Authority") against the folios which were duly registered by the Authority. The plaintiff claims that the inhibitions were lodged for the purpose of frustrating its ability to enforce the judgment mortgage and to delay the execution of the order of 14th July, 2014. It has applied for orders cancelling the inhibitions. The notice parties object to this application, but the second notice party has since withdrawn his objection.

3. The defendants are a married couple. The first notice party is the mother of the first defendant and the second notice party is the brother of the first defendant.

4. The detailed chronology of events, including procedural occurrences, is important for the determination of the application.

5. On 20th August, 2009 the plaintiff obtained judgment against the defendants in the total sum of €1,301,334.44.

6. On 10th February, 2011 the plaintiff registered a judgment mortgage against the first defendant's interests as the registered full owner of five folios namely folio OY 6959, OY 5662, OY 1716F, OY 2696, OY 13463F. On the same day it registered the judgment as a mortgage against the second defendant's interest as registered full owner of Folio 2696.

Special Summons

7. On 11th January, 2012 the plaintiff issued a special summons seeking orders declaring the judgment debt to be well charged on the Folios and orders for sale and ancillary accounts and enquiries.

8. The special summons proceedings were opposed by the defendants. In those proceedings the first defendant swore affidavits on 9th October, 2012 and 20th January, 2014. The grounds of his opposition related firstly to the manner in which the plaintiff had conducted itself in the proceedings before the court. Secondly, he made substantive arguments to the effect that when the original loans were being advanced it had been agreed that the plaintiff's recourse would be limited to lands comprised in certain legal charges then being granted. Nowhere in those affidavits is any point made suggesting that the defendant was not, as the Land Registry describes him, "full owner" of the lands the subject of the folios, or that any other interests in the lands were extant.

9. The special summons was first returnable before the Master on 10th February, 2012. It was adjourned from time to time and ultimately transferred by the Master to the chancery special summons list on 22nd January, 2014. The matter came before this court on 10th March, 2014. It was adjourned to 19th May, 2014 and then on a pre-emptory basis as against the defendants to 14th July, 2014. The adjournments were sought from time to time on the basis that the defendants needed time to try to resolve the matter with the plaintiff.

10. On 14th July, 2014 orders were made by McGovern J. declaring the judgment debt to be well charged on the properties, and that in default of payment of the judgment debt within 6 months, the properties comprised in the folios be sold and that the Examiner of the High Court take an account of all incumbrances and conduct an enquiry as to priorities.

Inhibitions

11. On 9th April, 2014 the first named notice party Lavinia Fryday applied to the Authority to register an inhibition. The application was accompanied by a letter of that date from the first named defendant consenting to the registration of the inhibition. I shall return later to the contents of the affidavit lodged by the notice party.

12. On 23rd April, 2014 the Authority replied to the first notice party indicating that the application did not disclose a right enforceable against the registered owner.

13. On 18th June, 2014 the first notice party lodged a second affidavit supporting the application for inhibitions. On 9th July, 2014 the Authority replied to the first notice party pointing out that the second affidavit related to only three of the folios in respect of which the original application had been made and referring to the absence of a letter of consent to the inhibition by the second defendant.

14. On 14th July, 2014 the second named defendant issued a letter consenting to the registration of the inhibition against Folio 2696.

15. On 15th July, 2014 the first notice party lodged a third affidavit with the Authority. I shall return later to the contents of that affidavit.

16. On 17th July, 2014 the Authority confirmed to the first notice party that the application for registration of the inhibition against the five folios had been completed.

17. The inhibitions appear on the Folios registered as of 9th April, 2014 in the

following terms:

"No registration under any Disposition for Value by William Fryday is to be registered without the consent of Lavinia Fryday".

18. In December 2014 the second named notice party lodged a request for an inhibition against the same folios grounded on an affidavit sworn by him on 3rd December, 2014.

19. On 17th December, 2014 the Authority confirmed that the inhibition of the second notice party had been completed. It is in the same terms as the first notice party's inhibition.

Proceedings before Examiner

20. On 13th January, 2015 the six month stay on the order of McGovern J. expired, no payment having been made in respect of the judgment debt. On 28th May, 2015 the plaintiff issued a notice to proceed in the examiner's office. The matter was first listed before the examiner on 9th June, 2015 and adjourned.

21. On 17th June, 2015 the examiner directed the plaintiff to advertise for incumbrancers, claims to be submitted by 17th July, 2015, and adjourned the proceedings before him to 21st July, 2015. The following separate developments then occurred.

22. On 12th June, 2015 the first defendant lodged a motion in the Court of Appeal seeking an extension of time to appeal the order of McGovern J. The plaintiff filed a replying affidavit objecting to the application for an extension. When the matter was listed before the Court of Appeal on 16th July, 2015 there was no appearance by or on behalf of the defendants and the application was struck out by Kelly J.

23. On 16th July, 2015, in response to the advertisement of the examiner for incumbrancers, affidavits were filed by the notice parties asserting beneficial interests in the folios. An affidavit was also filed by the first defendant.

24. On 21st July, 2015 the examiner directed that court-appointed conveyancing counsel be instructed to advise and to prepare conditions of sale of the Folios.

25. On the same date, the examiner also informed the plaintiff that "at some point in the well charging proceedings an application will have to be made to seek to remove the inhibitions registered by the various Fryday family members ...an inhibition will not alone stop any potential sale it may also dissuade purchasers from expressing an interest never mind submitting a bid at auction."

26. On 3rd December, 2015 the plaintiff applied to the Authority for cancellation of the inhibitions. The Authority replied that it was not in a position to remove the inhibitions on foot of the plaintiff's applications. Among its requirements was the Certificate of the Examiner as to the Incumbrancers claimed, which would "deal with the inhibitions and the relevant priority". The plaintiff replied to the Authority indicating, correctly, that the Examiner's Certificate of Incumbrancers will not be available until a later stage in the proceedings and after completion of a sale of the property. The Examiner also indicated his certificate would not have the effect of removing the inhibitions and therefore an application to this court should be brought.

Registration of Title Act 1964

27. Section 98 of the Registration of Title Act, 1964, as amended provides as follows:

"(1) The court or, subject to an appeal to the court, the Authority, on the application of any person interested in any registered land or charge, may, after directing such inquiries (if any) to be made and notices to be given and hearing such persons as the court or the Authority thinks expedient, make an order or, in the case of an application to the Authority, an entry, inhibiting for a time, or until the occurrence of an event to be named in the order or entry, or except with the consent of or after notice to some specified person, or generally until further order or entry, any dealing with any registered land or registered charge.

...

(3) The court or the Authority may annex to any such order or entry any terms or conditions they think fit, and may discharge any such order or cancel any such entry, and generally may exercise such powers as the justice of the case requires; but nothing herein contained shall empower the Registrar to discharge an order made by the court."

28. The Land Registration Rules, 2012 (S.I. No. 483/2012) contain the following provisions.

Form of inhibition

29. "128. (1) An inhibition for the protection of an unregistered right or interest may be in the terms of one of the clauses in Form 77, which may be modified or adapted as required to restrict the registration of dealings that would defeat, postpone or prejudice the right or interest claimed."

"128. (2) The Authority may refuse to enter in a register an inhibition that does not state clearly and explicitly the restriction to be imposed."

Entry of inhibition on consent

30. "129. (1) An inhibition for the protection of an unregistered right or interest affecting the property of a registered owner may be entered in the register of the property with his/her consent in writing, which shall be lodged in the Registry together with a statement of the facts showing the nature of the unregistered right or interest in the property that is enforceable against the registered owner."

"129. (2) An inhibition for the protection of an unregistered right or interest affecting an estate or interest created by a

settlement under which a limited owner is registered may be entered in the register with the consent of the owner of such estate or interest or of the trustees of the settlement. The consent shall be in writing and shall be lodged in the Registry together with a statement of the facts showing the nature of the unregistered right or interest in the property that is enforceable against the owner of such estate or interest."

"129. (3) An inhibition for the protection of the registered owner may be entered in the register, with the consent in writing of the registered owner, where in the opinion of the Authority it is necessary."

Procedure on application for inhibition

31. *"131. (1) The Authority may refuse to enter an inhibition applied for unless modified in such manner as it shall direct."*

"131. (2) Where the Authority is satisfied on the facts disclosed in an application or in any document produced in support of it that the applicant is prima facie entitled to the right or interest claimed, it shall send notice of the application and of the proposed inhibition -

(a) to the registered owner of the property, if the right or interest is enforceable against him/her;

(b) to the person or persons appearing to be entitled to dispose of the estate or interest in the property against which the right exists, where the registered owner is known to be dead or is a minor or mentally incapacitated or where his/her whereabouts are unknown or the estate or interest affected by the right is in a settlement under which a limited owner is registered."

"131. (3) The Authority may also give notice to any person appearing from the register to be affected by the right or interest."

No notice of the application for the inhibition was sent in this case to the plaintiff, notwithstanding that it had a judgment mortgage registered against each folio.

Procedure on objection to inhibition

32. *"132. (1) Any person to whom notice of an application for an inhibition is sent may apply to the Authority, within the time stated, objecting to the entry of the proposed inhibition or requesting that its terms be modified or that it be limited in duration. He/she shall state the grounds for the objection or request."*

"132. (2) The Authority may, if it thinks fit, appoint a day and time for the parties to attend before it for the determination of any question relative to the terms or duration of the inhibition to be entered."

"132. (3) The Authority may make any modification of the proposed inhibition that it thinks expedient, having regard to any additional facts disclosed by the parties, and may enter the inhibition so modified in the register."

Commentary on inhibitions

33. Although there is reported case law regarding the vacating of *lis pendens* (see *Hurley Property ICA v. Charleen Ltd* [2018] 1 IEHC 611), and the removal of a caution (see *Ulster Bank Ireland Ltd v. Rockrohan* [2017] IEHC 574), there are no reported judgments on a contested application to cancel an inhibition.

34. The purpose and effect of an inhibition is described by Deeney (*Registration of Deeds and Title in Ireland*, Bloomsbury, 2014) as follows:

"the purpose of an inhibition is to enable persons entitled to unregistered and un-registrable rights over registered land or a registered charge to protect such interest against dispositions that would otherwise defeat them. An inhibition prevents the registration of any disposition that would defeat or postpone the right or prejudice it in anyway. It provides more permanent protection to unregistered rights that may not mature for some time, either for specified time, or until the occurrence of a specified event or except with the consent of, or after notice to some specified person. In the usual course, registration of an inhibition inhibits all dealing for valuable consideration with the land or charge by the registered owner except with the consent of specified person or persons".

35. In Fitzgerald on Land Registry Practice (Round Hall Press – 2nd Ed.) at p. 163 the author says:-

"Because an inhibition is in the main a specific restriction it is the proper machinery to protect rights that may not mature for years.

The entry may inhibit any dealing with the lands or charge for a time, or until the occurrence of an event specified, or except with the consent or notice to some specified person, or onto point of order. Care is taken in the entry of an inhibition that dealings with a property are not unduly restricted."

36. As to what is meant by "not unduly restricted", none of the commentators discuss the potential effect of inhibitions on the rights of an existing mortgagee, chargee or of a judgment mortgagee.

37. McAlister in *Registration of Titles* (1973) says:

"it is clear, however that it was not intended that the Registrar is to have jurisdiction to try the rights of the parties or to determine whether or not the rights claimed are enforceable against the person or persons against whom registration of an inhibition is sought. The sole duty of the Registrar appears to be to determine whether a person claiming as cautioner or inhibitor has prima facie a right or interest which enables protection to be given by the entry of the caution or inhibition on the register. If there is any conflict as to the existence of a right or interest claimed; or if two or more applicants, make conflicting claims; the duty of the Registrar appears to be confined to staying registration pending the determination by the court of the matters in dispute."

The Plaintiff's Application

38. This application is grounded on an affidavit sworn on 23rd October, 2017 by Paul Shaw, Credit and Commercial Manager of the plaintiff. The first named notice party swore affidavits on 30th April, 2018 and 9th July, 2018, and Mr. Shaw swore a supplemental affidavit on 17th May, 2018.

39. Affidavits have also been sworn in the matter by the second notice party Richard Fryday on 30th April, 2018 and 3rd August, 2018 and by a Michael Cuddy, Chartered Accountant and Financial Advisor to the Fryday family on 2nd August, 2018.

40. In addition to the affidavits before the court on this application it is necessary to consider the contents of the affidavits which were sworn by the notice parties to accompany the application for registration of the inhibitions in 2014.

41. I shall consider the available evidence in relation to each of the folios the subject of the inhibition, although there is extensive duplication.

Folio OY6959

42. The first registered owner of this folio, on 19th October, 1999 was James Fryday, father of the first defendant. On 6th June, 2006 William Fryday was registered as full owner. Also on 6th June, 2006 there was registered a "collateral charge for present and future advances repayment with interest – original charge stamped to cover €540,000". The registered owner of the charge is ACC Bank Plc.

43. In her affidavit sworn 9th April, 2014 supporting the application for registration of the inhibition the first notice party provided a family history, referring to the fact that she and her late husband James Fryday (deceased August 2010) originally set up family home in Harvest Lodge, Kilcormack, Co. Offaly and worked on that farm together milking cows and sending milk to Nenagh Co-Op for a long number of years.

44. Their son William Fryday (the 1st defendant) was born on 18th June, 1959. She continued as follows in relation to this folio:

"I say that on or about the 31st January, 1977 we purchased the lands contained in folio OY 6959 in Freagh, Kilcormack, Co. Offaly and that my husband and I agreed to transfer these lands to our son William Fryday on or about 6th June 2006".

She continued:

"I and my husband farmed all of these lands together alongside our son William Fryday until my husband's death on 21st August, 2010. I say that I continued to farm all of these lands with my son William Fryday.

"... my only source of income is derived from farming all of these lands and a big part of that income is derived solely from the single farm payment in relation to all of these lands reference no. 100342403".

45. She then swore that her son, the first defendant has signed a letter of consent allowing her to place an inhibition in her favour on all the Folios.

46. On 23rd April, 2014 the Authority wrote to the first notice party in the following terms:

"I wish to advise that you have not disclosed an unregistered right or interest in the property that is enforceable against the registered owner and accordingly have not shown any grounds that entitle you to the entry of the inhibition sought".

47. In response to this letter the first notice party filed a second affidavit sworn on 18th June, 2014. This affidavit appears to relate only to folios 1716F, 5662 and 2696, and therefore not to folio OY 6959. In this affidavit she swore as follows:

"I say that I have an equitable entitlement to the lands on the basis that in and about the years 1977-1981 myself and my late husband James Fryday advanced monies to our son William Fryday for the express purpose of purchasing lands to enable us and the said William Fryday to farm the said lands in partnership together and for convenience purposes the lands were vested solely in the name of William Fryday but same was to be held by him in trust for myself and James Fryday and the said William Fryday".

"We commenced to farm the lands and have continued to farm the lands in partnership on a joint basis since that date on an annual basis and any profits gained from the farming activities on the land are divided between us on foot of the said Partnership Agreement".

"I confirm that the farm entitlement payments paid from the Department of Agriculture, Food and Fisheries are paid to me jointly with the said William Fryday in respect of the lands contained in these folios".

"I apply for the registration of the inhibition as set out in the application lodged so as that the said inhibition would be a protection of my unregistered right or interest in the said lands and in order to restrict the registration of dealings that would defeat, postpone or prejudice my right or interest and the said William Fryday has consented to the registration of this inhibition".

48. On 9th July, 2014 the Authority wrote again to Ms. Fryday pointing out that although the initial application related to five folios her second affidavit only listed three of the folios and requesting confirmation as to which folio she required registration of the inhibition. The Authority also pointed out that in relation to one of the folios, OY 2696, the consent of the second defendant Vanda Fryday being the joint registered owner of that folio had not been provided.

49. On 11th July, 2014 the second defendant Vanda Fryday issued a letter consenting to the registration of an inhibition in favour of Lavinia Fryday on folio OY 2696.

50. On 15th July, 2014 the first notice party filed a third affidavit with the Authority. This affidavit was in terms identical to the second affidavit but on this occasion referred to all five of the folios.

51. On 17th July, 2014 the Authority confirmed to the first notice party that the application for registration of the inhibition had been

completed in respect of each of the five folios. The registration is dated as of 9th April, 2014.

52. On 8th December, 2014 the 2nd notice party Richard Fryday swore an affidavit supporting his application to register an inhibition on the folios:

"To protect my unregistered right in respect of the said property".

He swore as follows:

"I say that I have an equitable entitlement to the lands on the basis that these lands have been farmed as a family farm by myself, my late father James Fryday my mother Lavinia Fryday and my brother William Fryday who is the registered owner".

"I say that the lands the subject of matter of the application were lands that were purchased or given to my brother William on the basis of profits earned as a family partnership involving lands which are registered in my name as well as these lands registered in the name of my brother William Fryday. All of the lands have been farmed as one unit by our family and all profits earned by the partnership have been reinvested in the lands including the lands the subject matter of this application".

"I apply for the registration of the inhibition as set out in the application lodged so as that the inhibition would be a protection for my unregistered right or interest in the said lands and in order to restrict the registration of dealings that would defect, postpone or prejudice my right or interest and the said William Fryday has consented to the registration of this inhibition".

53. Letters of consent were also lodged, signed by each of William Fryday and Vanda Fryday consenting to the registration of an inhibition in favour of Richard Fryday. On 17th December, 2014 the authority confirmed to Richard Fryday that his application for an inhibition had been completed.

54. In response to the advertisement for incumbrancers in the proceedings before the examiner the first defendant William Fryday and each of the notice parties filed affidavits sworn 16th July, 2015. It is said that in the affidavit of the first notice party she asserts an equitable interest in folios 1716F, 5662 and 2696 on the grounds that she and her late husband James Fryday

"advanced monies to their son to purchase the lands to be held in trust for herself, her late husband James Fryday and the first named defendant William Fryday".

This affidavit related to only three of the folios. In the same proceedings the affidavit of Richard Fryday asserted an equitable interest to the lands contained in the folios on the basis that it had been "farmed" as a family farm by himself his mother his late father and the defendant William Fryday. He also asserted the existence of a "family registered partnership".

55. On 16th July, 2015 the first defendant filed an affidavit in response to the advertisement for incumbrancers asserting a "lawful legal and equitable entitlement to the lands and lawful legal and beneficial interest in the lands". As this was a process of verifying incumbrancers on his interest in the lands there was no purpose to the filing of that affidavit.

Affidavit of Mr. Shaw

56. In his affidavit grounding this application Mr. Shaw refers to the sequence of events and the timing of the registration of the inhibitions and the issuing by the defendants of letters consenting to the registration of the inhibitions.

57. Mr. Shaw refers to the fact that the first notice party's applications to register the inhibitions were made while the special summons proceedings were pending before the court, when adjournments had been sought to enable the defendants to "try and resolve the matter with the plaintiff" and that at no stage during those proceedings did the defendants make it known to this court that applications were being made to register inhibitions in respect of the same lands, or that the first defendant had consented to such registration. He avers that this constituted a "clear attempt on the part of the defendants to prevent the plaintiff from recovering any monies in respect of the judgment debt".

58. Mr. Shaw says that insofar as the first notice party's affidavit asserts that monies were advanced to the first defendant to purchase the lands to be held on trust for herself, her late husband James Fryday and the first defendant himself, no details of such advances have been provided.

59. Mr. Shaw refers to the fact that despite the plaintiff's registered interest on the Folios, namely the judgment mortgage, the plaintiff was not put on notice of the application to register the inhibitions or notified of the decision of the Authority to register the inhibitions. He says that in those circumstances the plaintiff was denied an opportunity to advance its position in relation to the inhibitions.

60. As regards the substance of the inhibitions, Mr. Shaw makes the following observations:

(1) That the first affidavit of the first notice party (9/4/2014) refers to certain of the lands being transferred to the first defendant, whereas the second and third affidavits (18/6/2014 & 15/7/2014) claim an equitable interest on the basis that monies were advanced to the first defendant to purchase the lands and that the folios were registered in his name for convenience only.

(2) That none of the affidavits of the first notice party refer to the second notice party having any interest in the properties, contrary to affidavits sworn by him.

(3) He refers to the absence of any particulars of the monies advanced.

(4) He refers to the absence of supporting documentation for an alleged family partnership or for any agreement made where lands were first acquired and transferred into the name of the first named defendant.

Further affidavits of Lavinia Fryday

61. In her affidavit sworn 30th April, 2018 in response to the application now before the court the first notice party advanced extensive evidence of events and in effect submissions, many of which were not referenced in any manner in earlier affidavits. She swore as follows:

"As appears from the copy folio James and I transferred the land and dwelling comprised in folio 6959 to us and William and he was registered as full owner on 6th June, 2006. I say and believe that William did not pay anything to James or to me for the transfer and he took the property subject to the terms of an agreement which he made with my husband James, my son Richard and with me. I am advised that William holds the property in folio OY6959 on a resulting trust for me."

62. The first notice party also refers to what was described originally as a "family arrangement" which operated prior to 1993 and refers to the establishment in 1993 of a "family registered partnership". No partnership agreement is exhibited. It is said that the partnership was registered with Revenue on 6th April, 1993 and the notice party exhibits certain Revenue returns and other material in support of the existence of the partnership, and refers also to correspondence from Michael Cuddy and Co. Chartered Accountants issued on 25th March, 2018. In that letter Mr. Cuddy writes "to whom it may concern" and refers to the fact of a partnership having been registered for income tax purposes with Revenue on 5th April, 1993 and to the effect that accounts were prepared for the partnership from 1993 to 2011. Mr. Cuddy refers to having already provided evidence of the partnership with examples of accounts, tax computations and forms reflecting the partnership in action. He refers also to "other evidence of partnership in the form of bank borrowings taken out in the joint names of James, William and Richard Fryday for farming purposes with lands in the names of the partners taken as security." Mr. Cuddy says that since 2012 Richard and William have completed separate accounts and "they have been honouring their obligations in the land to Lavinia and she has received a gross payment from the farms as follows." Payments are then detailed from 2011 through to 2016.

63. In her affidavit sworn 9th July, 2018, the first notice party avers that in or about December, 2009 the terms of the partnership were varied, discussions regarding the variation having been prompted by the fact that the first defendant wished to cease dairy farming and each of the defendants and Richard Fryday wished to gain greater control over their own affairs. A meeting was held in December, 2009 at which the family agreed that the partnership would be terminated, the assets in the partnership would be divided between William and Richard on a 50/50 basis and it was agreed also that the "partnership will continue until 31st December, 2013 in respect of Single Farm Payments only and will be shared by all three partners on a 33.33% basis (JL, RR, WV)". Lavinia Fryday continues in her description of those arrangements as follows:

"Ultimately the partnership agreement was reduced essentially to an agreement to pool and share the Single Farm Payments generated by the lands which James and I had transferred to William and Richard. I say and believe that James and I were to receive one third of all of the Single Farm Payments generated by the "Harvest Lodge" lands and by the lands transferred to and purchased in William's name."

She continues further:

"I say and believe that both William and Richard acknowledged and understood that all land which James and I had paid for and transferred to them was held in trust for us. I believe that it was in those circumstances wholly appropriate for me to have referred to Harvest Lodge in my previous affidavit" as I believe that without Harvest Lodge none of the lands comprised in [the five folios] would have been acquired by James and by me. Harvest Lodge played a fundamental role in the creation of resulting trust, the establishment of the partnership and ultimately my interest in the respective land folios."

64. Finally, the first notice party states:-

"I reiterate that William did not contribute any monies to the acquisition the lands which were registered in his name. James and I borrowed the money to acquire the lands against which I registered the inhibitions and subject to this application. Mr. Shaw is critical of the fact that I averred in my affidavit sworn on 15th July, 2014 that James and I advanced monies to William for the purpose of purchasing the lands. I did not have the benefit of legal advice when I swore that affidavit and I was not alive to the distinction between firstly buying land and transferring it to William and secondly advancing money to William to enable him to buy the land. All I knew was James and I borrowed the money to buy the land and we transferred the land to William subject to the proviso that the land would be farmed together with the Harvest Lodge as a unit and that the income from the combined lands would be divided between James, William and Richard. The agreement concluded in December, 2009 varied the original agreement to the extent that it was agreed that James and I would receive one third of the Single Farm Payment rather than one third of the total income generated from the lands".

Evidence of Richard Fryday

65. In his affidavit sworn 30th April, 2018 Richard Fryday refers to a similar history concerning the family arrangement and then the partnership agreement, but does not refer to the termination of the partnership in 2009. He says as follows:

"I say and believe that the partnership continues to farm the lands which I own and the lands which my brother William owns. It is clear that the lands continue to be farmed as a unit and both my mother and I have an equitable interest in the land over which we registered our inhibition."

66. In a second affidavit sworn in relation to this application on 3rd August, 2018 Richard Fryday states his consent to the cancelling of the inhibitions lodged by him and states as follows:

"I was acting in good faith but without the benefit of legal advice when I caused the inhibition to be registered. My primary concern when registering the inhibitions was to avoid a situation where I became solely responsible for the support and maintenance of my mother Lavinia Fryday. I believe that I was at risk of becoming solely responsible despite the fact that there was agreement that my mother was to be supported and maintained both from the lands in my name and from the lands in my brother's name."

67. Richard Fryday then refers to the fact that on 8th December, 1999 his parents transferred to him the lands contained in certain folios which are not the subject of this application namely Folios 180181 and 4994F Co. Offaly and he exhibits the transfer deed. In that transfer deed it is recited that the properties comprised in those folios are transferred to Richard Fryday "in consideration of natural love and affection ... in fee simple subject to the following right therein and there over."

68. The conditions include provision for the payment of £13,400 per annum to Lavinia Fryday and James Fryday and the right of the said Lavinia and James Fryday to the exclusive use of the dwelling house on the lands for the remainder of their lives and the life of the survivor of them.

69. By contrast, no copies of the deeds of transfer of any of the folios to the first defendant are exhibited by any of the notice parties. However, Richard Fryday states that he believes that his parents had placed the lands comprised in the five folios in William's name "on the same basis i.e. my parents had a right to a share of the income generated from the said lands". He then says "the income sharing arrangement continued into the farming element of the partnership was dissolved following a meeting of the partners and their spouses which was held early in December, 2009".

Folio No. 5662

70. The narrative in relation to this folio and most of the folios is largely similar, with some differences. The first distinction between this and folio 6959 is that it reveals that on 1st February, 1996 the first defendant became the first registered owner of the property. There is no registered legal charge in favour of the plaintiff or any other institution, but the judgment mortgage obtained by the plaintiff is duly registered on 10th February, 2011.

71. This folio is one of those referred to in the affidavit of Lavinia Fryday sworn on 18th June, 2014 where she states that she advanced monies to William Fryday for the express purpose of purchasing the lands.

72. In her affidavit of 30th April, 2018 Lavinia Fryday states that the property was first acquired by her and James Fryday in 1977 and that on 1st February, 1996 the property was transferred to the first defendant. She states:

"I say and believe that William did not pay anything to James or to me for the transfer and he took the property subject to the terms of an agreement which he made with my husband James my son Richard and with me. I say and believe that the agreement was that the lands comprised in folio 5662 would remain part of the Fryday family partnership which had been established in the 1980's and had been registered for income tax purposes with Revenue as and from 5th April 1993."

She continued later to say:

"I am advised that William holds the property in folio 5662 on a resulting trust for me".

Folio 01716F

73. In respect of this folio it is said that the property was first acquired in 1978 and that the property was first registered in William's name. The folio records that on 6th September, 1979 William Fryday the first defendant was registered as the first registered owner of the property.

74. This is one of the folios in respect of which it was sworn by the first notice party on 18th June 2014, and again on 15th July, 2014 that she and her late husband James Fryday had "advanced monies" to William Fryday. In her affidavit of 30th April, 2018 in response to this application Lavinia Fryday states that:

It was always agreed and clearly understood that whilst William was the registered owner of the Cadamstown land the land was not William's and further that James and I would be entitled to the income from the land during our lifetimes.

She also refers to the fact the title deeds to this property were lodged with Ulster Bank as security for a loan and that in 1993

"all of the lands were transferred into the Fryday Family Partnership: I am advised that Cadamstown is partnership land and that William holds the property in Folio 1716F on a resulting trust for me".

Folio 2696

75. William Fryday was registered as first registered owner on 22nd June, 1992. On 26th May, 1993 that entry was cancelled and William Fryday and Vanda Fryday were registered as full owners.

76. Again this is one of the three folios which is referred to in Lavinia Fryday's affidavit of 18th June, 2014, where she states (and restates in the affidavit of 15th July, 2014) that she and her husband "advanced monies" to the defendant for the express purpose of purchasing the lands.

Folio OY. 13463F

77. The first registered owner on 19th October, 1999 was James Fryday and on 6th June, 2006 William Fryday was registered as full owner. Also on 6th June, 2006 a charge was registered in favour of the plaintiff as a collateral charge, the original charge having been "stamped to cover €540,000".

78. Again, in the affidavit of 15th July, 2014, Lavinia Fryday states that she and her husband advanced monies to William Fryday for the purpose of purchasing lands. In her affidavit in response to this application sworn on 30th April, 2018 she states that the property was transferred to William in 2006, and

"that William did not contribute anything towards the acquisition of the land comprised in this folio".

She continues:

"I say and believe that the property comprised in folio 13463 was not gifted to William and I am advised that William holds the property in folio 13463F on a resulting trust for me".

Submissions of the Notice Parties

79. The notice parties submit that between 1979 and 1993 all of the lands the subject of the folios were farmed as part of a "family arrangement". It is said that the family arrangement involved an agreement that income from the folios would go firstly to Lavinia and James Fryday who applied the income firstly to service the repayment of loans and secondly to support themselves and all of their sons and daughters.

80. It is then said that in 1993 there was established a partnership, registered with Revenue, comprising the three couples being James and Lavinia Fryday, William and Vanda Fryday and Richard and Rosemary Fryday and that the income therefrom was applied firstly in repayment of loans and any profits thereafter distributed among the three couples pro rata.

81. It is said that in December, 2009 the partnership was dissolved and the assets were divided equally, together with the benefit of the single farm payments associated with the relevant folios and thereafter all income and profits were distributed equally as between the three couples.

82. On 21st August, 2010 James Fryday died and it is said that it was then agreed between Mrs. Fryday and her sons William and Richard to alter the ownership of the herd numbers to reflect the interests in and rights of maintenance and support which Mrs. Fryday enjoyed and that thereafter she would receive an income in the sum of €14,594 per annum from the single farm payments relating to the five folios the subject of these proceedings.

83. Much reliance has been placed by the notice parties on the proposition that in the absence of contrary evidence a presumption of a resulting trust should apply and that insofar as any of the folios were purchased in the name of the first defendant or transferred to the first defendant they are thereafter held on a resulting trust in favour of James and Lavinia Fryday and after the death of James Fryday on a resulting trust for the first notice party. It was submitted that Irish law should no longer recognise a presumption of advancement as between a parent and child, particularly having regard to the fact that at the time of the relevant transfers the first defendant was no longer a minor.

84. Finally, it has been submitted that the court on this application must determine whether Lavinia Fryday's entitlement, now framed as a claim pursuant to the terms of an agreement made in 2009 for the dissolution of the family partnership to be for a share of the single farm payments, "is a charge on the lands". A "charge" is a different legal concept to a claim for an otherwise unquantified beneficial interest.

85. The notice party submits that if this court orders the cancellation of the inhibitions, she will be unable to pursue any other remedy and therefore be irrevocably deprived of any interest in the folios.

The Plaintiff's Submissions

86. The plaintiff submits that the inhibitions have been registered in a concerted effort by the defendants and the notice parties to frustrate the plaintiff's ability to enforce its judgment. They refer to the timing of the registration of the inhibition and of the letters of consent given by the defendants, occurring in the face of proceedings before this Court for an order for sale, and allege a lack of candour in defending those proceedings without disclosing the claims of the notice parties or the fact of the inhibitions.

87. Reference is made to the fact that the Land Registry Rules provide in r.131 (3) that the Authority may give notice to any person appearing from the register to be affected by the right or interest claimed before registering the inhibition. They point to the fact that no such notice was given and accordingly the plaintiff had no opportunity to make representations before the inhibitions were registered.

88. In referring to what the plaintiff describes as inconsistencies of fact as between the sequential affidavits filed by the first notice party, the plaintiff highlights that in the first affidavit sworn by Mrs. Fryday on 9th April, 2014 reference is made only to the transfer of relevant lands to the first defendant, whereas in the affidavits sworn on 18th June, 2014 and 15th July, 2014 reference is made to James and Lavinia Fryday having "advanced monies" to the first defendant.

89. The plaintiff refers also to the extensive evidence concerning firstly, family arrangements, secondly, a registered partnership, and thirdly, a partnership arrangement conferring entitlements only to a share of the Single Farm Payment, all of which it is said has been proffered by the notice parties for the first time in response to this application and most of which it says was not before the Authority when it registered the inhibitions.

90. The plaintiff submits that there are inconsistencies among the submissions made in support of a resulting trust, an express agreement to provide an income, the existence of "family arrangements", and later by the existence of a "registered partnership".

91. It is also submitted that no particulars whatsoever have been given of any of the monies originally claimed to have been advanced to the first defendant or of the terms of the various agreements in place from time to time. Nor has the defendant exhibited any of the deeds of transfer to the first defendant and the only deed of transfer actually exhibited is a deed of transfer to the second notice party, of folios not the subject of these proceedings.

92. It is submitted that insofar as there may be extant an agreement that the first notice party is entitled to a share of the single farm payment now associated with the five folios, this is a personal agreement as between family members, which even if proved would not constitute a basis for an equitable interest in the land itself.

Conclusion

93. As summarised by the authors Deeney, Fitzgerald and McAllister (op cit), the purpose of an inhibition is to afford certain protection to the owner of an unregistered right or interest against dealings in the property without notice to the party registering the inhibition. Deeney describes its purpose as to protect rights "that may not mature for some time, either for a specified time or until the occurrence of a specified event or except with the consent of a specified person".

94. In this case the real effect of the inhibition is not to restrict dealings by the registered owner, which consented to its registration, but to restrict or constrain the holder of a registered judgment mortgage, the validity of which has been upheld by the order of McGovern J. on 14th July, 2014, in pursuing due enforcement of that order in these proceedings.

95. Section 98 of the Registration of Title Act 1964 envisages the registration of an inhibition "for a time, or until the occurrence of an event to be named in the order or entry, or except with the consent of or after notice to some specified person, or generally until further order or entry, any dealing with any registered land or registered charge".

96. It is clear that it was not intended by the Act or by the Rules that an inhibition would serve as an indefinite restriction on a disposition of the property comprised in the folio, whether by the registered owner or by another party having registered an interest in or against the lands. This would be the effect if a claimant in the position of the notice parties in this case, being closely connected family members, was required to do no more than lodge an inhibition, grounded on the most limited of evidence of a prima facie interest, and rest on the basis that this served to establish his claim or interest, without having taken any further or other action to establish or perfect that interest.

97. The notice parties assert that they enjoy beneficial interests, of varying descriptions, in the properties. These rights are said to have accrued as early as 1979 in certain folios and on a range of dates thereafter and are said to have varied as family arrangements changed, the last variation being in 2010 following the death of James Fryday. Whilst the claims are made between immediate family members, no steps were taken to record those interests as regards the folios themselves and the notice parties now rely on a variety of versions and different evidence regarding family arrangements, partnership agreements and other claims, the grounds for which are revealed only in stages in response to this application.

98. Of particular significance is the chronology and sequence of events which occurred. These have been recited in detail at the outset of this judgment and I do not propose to repeat them. Of central importance however is that, having suffered a judgment on 20th August, 2009 and the registration of judgment mortgages on 10th February, 2011 it was only when the special summons proceedings for an order declaring the judgment to be well charged and an order for sale, which commenced in 2012, were listed before this court in 2014 that any steps were taken by the notice parties to protect the interests now claimed. In particular, when the first defendant consented to the registration of the inhibitions, on 9th April, 2014, the matter had already been adjourned once before this court and the defendant had been seeking time from this court apparently to resolve the matter with the plaintiff but without disclosing that he had consented to the inhibitions.

99. The timing of these actions and omissions can lead only to the conclusion that the inhibitions were lodged for the sole purpose of defeating the due enforcement process in these proceedings.

100. The conclusion above is sufficient to determine the matter and order the cancelling of the inhibitions. However, for completeness I shall consider briefly other submissions which were made at the hearing of this application.

Other considerations

101. The plaintiff has referred to certain inconsistencies between the basic form of the application for the inhibitions, including the claim originally made by the second notice party and now withdrawn by him, and the more expansive and elaborate evidence proffered in the replying affidavits on this application. It is submitted that if the notice parties' affidavits in this application were to be credited, the consequence must be that the Authority registered the inhibition on a basis which now proves to be flawed. I accept that submission.

102. The notice parties argue that insofar that there are inconsistencies between the positions adopted by them in response to this application and earlier averments made in the application for the registration of the inhibition allowance should be made for the fact that they did not have the benefit of legal advice at that time. I agree with the plaintiff's submission that this would not explain the difference in the factual descriptions which have been proffered on affidavit.

103. Extensive submissions have been made by both parties concerning the substantive law regarding equitable interests, resulting trusts and presumptions of advancement. Evidence has also been proffered regarding the history of the different folios, the original family arrangement, the partnership and ultimately the treatment of the single farm payments since the death of Mr. James Fryday. The determination of all these issues of law and fact cannot be made on the affidavits before this court and would require a plenary hearing. In this regard, it is true that Rule 131(2) of the Land Registry Rules requires only that the Authority be satisfied on the facts disclosed that the applicant is "prima facie" entitled to the right or interest claimed. However, this reinforces the principle that the inhibition can serve only to protect an interest which has yet to mature or be perfected, and not as an indefinite restriction on the enforcement of rights established against the property.

104. Counsel for the notice parties argued that if the inhibition is cancelled Mrs. Fryday will forever be defeated in her claims to an equitable interest in the lands. If she had moved earlier to protect the putative interest there may be some merit in that submission. However, she has done nothing more to advance the protection of this claim than lodging an inhibition as part of a concerted effort to delay the plaintiff in the recovery of its judgment debt and then oppose this application. To permit such a course to serve as an indefinite obstacle to the recovery of monies declared by this court to be well charged on the property would be wholly inequitable.

105. It has also been submitted that as the notice party is advancing a claim in equity, such a claim is defeated by a combination of the delay, of which the notice party is clearly guilty in terms of advancing the claim and secondly the absence of bona fides, having regard to the timing of the lodgement of the inhibition and giving of consent thereto in circumstances where these proceedings were before the court on the special summons. I accept this submission and refer to my finding earlier that the purpose and effect of this conduct was to delay or hinder the due enforcement of the rights of the plaintiff pursuant to its validly registered judgment mortgage.

106. The power of the Court under s.98(3) of the Registration of Title Act 1964 to cancel the entry of an inhibition is discretionary. The timing of the lodgement of the application for registration of an inhibition and of the writing of the defendant's consent to same, taken together with the failure to disclose those facts when defending the special summons proceedings, informs this Court in the exercise of its discretion. Accordingly, I shall make an order directing the Authority to cancel the inhibitions lodged by both notice parties on the Folios.