

## THE HIGH COURT

[2005 No. 2 SP]

BETWEEN

ACC BANK PLC

PLAINTIFFS

AND

VINCENT MARKHAM AND MARY CASEY

DEFENDANTS

**Judgment of Mr. Justice Clarke delivered the 12th December, 2005.****1. Introduction**

1.1 On 29th March, 2004 the plaintiff ("ACC") obtained judgment in the sum of €20,166.96 together with costs in the sum of €380 against the first named defendant ("Mr. Markham"). On 6th July, 2004 in accordance with the provisions of the Judgment Mortgage (Ireland) Acts 1850 to 1858, ACC converted that judgment into a judgment mortgage against the interest on Mr. Markham in a property in the townland of Cappateemore East in Co. Clare. The property concerned is registered land in respect of which Mr. Markham and the second named defendant ("Ms. Casey") are the registered owners. On that basis the judgment mortgage registered by ACC is as against the interest of Mr. Markham only.

1.2 Interest has continued to accrue on the above debt so that as of 20th December, 2004 the total sum due was €21,744.88 with interest continuing to accrue to date. In these proceedings ACC seeks a declaration that that sum together with continuing interest from 21st December, 2004 are due and that the judgment mortgage to which I have referred stands well charged over the interest of Mr. Markham in the said lands. Given that, even on ACC's case, the judgment mortgage relates only to the interest of Mr. Markham in the lands, the summons goes further and seeks partition of the lands or a sale in lieu of partition so as to enable the interest of Mr. Markham to be disposed of which in turn would enable ACC to receive payment.

1.3 Mr. Markham and Ms. Casey were married on 29th December, 1990 but have, it would appear, been separated since November 2001. They have four children who range between the ages of six and twelve. It would also appear from the affidavit of Ms. Casey that the property the subject of the judgment mortgage and the subject of these proceedings was the family home of the defendants in which they resided together from approximately 1991 to 2001. It would appear that upon separation both parties left the family home and went to live at separate and different addresses.

1.4 The matter which gives rise to complication in this case stems from the fact that on 10th March, 2003 Ms. Casey instituted family law proceedings in which she sought an order of judicial separation and various ancillary reliefs. Amongst those ancillary reliefs sought is an order under s. 9 of the Family Law Act 1995 which, if granted, would direct Mr. Markham to transfer to Ms. Casey his entire estate and interest in the family home. Pleadings have been closed in those family law proceedings and it would appear that the case is currently awaiting a hearing date.

1.5 Mr. Markham has not defended the proceedings with which I am concerned and it does appear, therefore, that *prima facie* ACC would be entitled to a well charging order over Mr. Markham's interest in the lands. Whether ACC would also be entitled to an order of partition or, more likely, sale in lieu of partition, is a matter which may well need to be argued in due course. However the initial issue which arises is one as and between ACC and Ms. Casey. Ms. Casey contends that any interest in the family home which the court may direct to be transferred to her as a result of the family law proceedings to which I have referred, would rank in priority to the judgment mortgage in favour of ACC. It is accepted by counsel on behalf of ACC that if Ms. Casey is correct in that contention (though he disputes this) then the appropriate course of action would be to adjourn these proceedings until such time as the family law proceedings had been completed and to review the matter in the light of the result of those family law proceedings.

1.6 If, for example, the court were to direct that the entirety of Mr. Markham's interest in the family home were to be transferred to Ms. Casey (and on the assumption that such a direction or order would have priority over the judgment mortgage) then there would remain no interest in the property left to Mr. Markham and in turn ACC could, in practice, therefore, have no entitlement. Furthermore even if the family law proceedings did not result in the entirety of Mr. Markham's interest in the family home being transferred to Ms. Casey but nonetheless resulted in Ms. Casey having transferred to her some part of Mr. Markham's interest so that she would end up, in that eventuality, with more than 50% of the interest in the family home, that fact could have relevance to the exercise of the courts discretion in respect of partition or sale in lieu thereof.

1.7 It is, therefore, clear that it is necessary for the court to determine, at this stage, whether any interest in the property which Ms. Casey may obtain as a result of the family law proceedings but which is currently owned by Mr. Markham would rank in priority to the judgment mortgage of ACC. That is the issue which was argued before me and it is to that issue that this judgment is directed.

1.8 Before passing to the legal issues which arise I should note a number of material facts which are relevant to those legal considerations.

**2. Facts**

2.1 Firstly, as will be seen from the history of events referred to above, the relevant family law proceedings were commenced on 10th March, 2003. The judgment mortgage was not registered until 6th July, 2004. Therefore it is clear that the family law proceedings, in which Ms. Casey seeks orders directing a transfer of Mr. Markham's interest in the property to her, were in being as of the date of the registration of the judgment mortgage.

2.2 Secondly it does not appear that Ms. Casey caused to be registered on the folio in respect of the lands any *lis pendens* indicating that she had a claim in being in respect of the property. Nor is there any evidence to suggest that ACC were, as of the date of the filing of the judgment mortgage affidavit, aware of the existence of the proceedings as and between Mr. Markham and Ms. Casey. Similarly it does not appear that Ms. Casey was aware of the existence of the judgment mortgage until such time as she received correspondence in relation to the intended commencement of these proceedings. Against that background it is necessary to turn to the legal issues involved.

**3. The Law**

3.1 Counsel for Ms. Casey places particular reliance on the decision of this court in *A.S. v. G.S.* [1994] 1 I.R. 407. That case also concerned a *lis* which was pending in the context of a judgment mortgage. It should be noted, and as is clear from the authorities referred to in *A.S.* that the original meaning of the term *lis pendens* related to the fact that there was a case (or *lis*) pending

(pendens). In its more modern usage the term has come to be synonymous with the filing of a document given the same name (*lis pendens*) in the appropriate register so as to put parties on notice of the fact that there is such a case pending. However it is clear that in its original form the term simply related to the fact that there was such a case pending rather than to a document which placed parties on notice of that fact.

3.2 The underlying rationale, behind the doctrine of *lis pendens* is, as noted by Geoghegan J. in A.S., to be found in the authoritative explanation by Lord Cranworth in *Bellamy v. Sabine* (1857) 1 De G. & J. 566. At p. 578 of the report the following passage appears:-

"It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operations. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence ... The language of the court in these cases [Culpepper v. Aston (1682) 2 Cas. In Ch. 115 and *Sorrell v. Carpenter* (1728) 2 P. Wms. 482] as well as in *Worseley v. The Earl of Scarborough* (1746) 3 Atk. 392 certainly is to the effect that *lis pendens* is implied notice to all the world. I confess, I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is, that, pendent lite, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The doctrine is not peculiar to Court of Equity. In the old real actions the judgment bound the lands, notwithstanding any alienation by the defendant pendent lite, and certainly that did not depend on any principle arising from implied notice."

3.3 Geoghegan J. also refers to the decision of Kenny J. in *Giles v. Brady* [1974] I.R. 462 where, having reviewed the history of relevant legislation from the decision in *Bellamy v. Sabine* in 1857 and noting that the doctrine had a considerable potential to work hardship on a purchaser or mortgagee who bought property in ignorance of the existence of the suit in question the learned judge identified that it was to remedy such an ill that the Judgments (Ireland) Act 1844 ("the Act of 1844") was enacted. Section 10 of that Act provided as follows:-

"No *lis pendens* shall bind or affect a purchaser or mortgagee without express notice thereof unless and until a memorandum or minute containing the name and the usual or last known place of abode ..." is registered.

3.4 Therefore the original position was that the existence of a suit already commenced was sufficient to protect the interests claimed in that suit in the event that it should be successful. The Act of 1844 altered this position by providing that the existence of the suit should only operate in priority to a purchaser or mortgagee if that party had notice of the suit or if the appropriate registration of the existence of the *lis* had been registered.

3.5 Having reviewed that historical position Geoghegan J. in A.S. went on to find, in relation to the status of a claim made in family law proceedings as a potentially registerable burden against registered land, that he could "see no reason why a claim for a property adjustment order should not be included even though the claim is contingent on the court deciding to make an order". As noted by Geoghegan J., it therefore, followed that the lending institution concerned in A.S. could not register a judgment mortgage which would take priority over the property adjustment order once it had notice of the claim. However Geoghegan J. went further and noted that the protection given to "purchasers and mortgagees" in the Act of 1844 is intended only for persons acquiring an interest for value. On the basis that a judgment mortgagee has been held to be a volunteer (and in that context the learned judge makes reference to *Re Murphy and McCormack* [1930] I.R. 322 and *Re Strong* [1940] I.R. 382) Geoghegan J. came to the view that a volunteer is bound by a *lis pendens* irrespective of whether he had notice of it and irrespective of whether the *lis* has been registered.

Thus, in substance, Geoghegan J. came to the view that the original position that pertained prior to the enactment of the Act of 1844, continued in place in respect of volunteers (which were those purposes he was satisfied included those who might register a judgment mortgage).

Finally it should be noted that Geoghegan J. was, as I am here, dealing with registered land. In that context he noted that the only purpose for the registration of a *lis pendens* as a burden on registered land is so as bind purchasers and mortgagees for value without actual notice.

In summary, therefore, A.S. would appear to be authority for the following propositions:-

1. A party who makes a claim in appropriate family law proceedings for a transfer of an interest in property owned by the other party to those proceedings is entitled to register a *lis pendens* in respect of such property;
2. If such a *lis pendens* is registered then its registration will bind a party who is a purchaser or mortgagee for value so that any direction to transfer the property which may ultimately be made will rank in priority over the interests of any purchaser or mortgagee for value who acquired their interest subsequent to the registration of the *lis pendens*; and
3. By virtue of the fact that a judgment mortgagee is taken to be a volunteer rather than mortgagee for value such judgment mortgagee (and in principal any other volunteer) will (even in the absence of actual notice or the registration of a *lis pendens*) rank behind the interest of a spouse to whom a transfer order is made provided the relevant family law proceedings had been commenced before the registration of the judgment mortgage.

On that basis it seems clear that if A.S. is to be followed it covers the facts of this case so that the interest of Ms. Casey would rank in priority to the judgment mortgage in favour of ACC. Counsel for ACC invites me to consider whether that can truly be the case in the light of the wording of the Registration of Title Act 1964 itself. I therefore now turn to that Act.

#### **4. The Registration of Title Act 1964**

4.1 With respect to registered land s. 71(4) of the Registration of Title Act, 1964 provides that a charge on the interest of a judgment debtor in favour of a judgment mortgagee is subject to existing registered burdens and burdens affecting the interest without registration and "all unregistered rights subject to which the judgment debtor held that interest at the time of registration of the affidavit". In *Tempany v. Hynes* [1976] I.R. 101 the Supreme Court held that a purchaser from the registered owner of land had

such an "unregistered right" under a contract for sale before execution of the transfer or payment of the purchase money. Therefore such purchaser took free of a post contract judgment mortgage registered against the vendor. Indeed Kenny J., delivering the judgment of the court, reaffirmed, at p. 117 that:-

"A judgment mortgage is a process of execution and the judgment mortgage is not a purchaser for valuable consideration: *Eyre v. McDowell* (1861) 9 H.L. Cas. 619."

4.2 The real question is, therefore, whether Ms. Casey, as a person who has brought a claim which may, if successful, entitle her to a direction that certain lands be transferred to her, may be said to be a person who has an unregistered right subject to which Mr. Markham held his interest at the time of the registration of the affidavit. If she is then it is clear from the provisions of s. 71 that the judgment mortgage is subject to that right and thus that her right has priority over the judgment mortgage.

4.3 It seems to me that the use of the phrase "all unregistered rights subject to which the judgment debtor held that interest at the time of registration of the affidavit" does no more than recognise the historical position as analysed by Kenny J. in *Giles* and Geoghegan J. in *A.S.* It acknowledges the position of a judgment mortgagee as a volunteer. It therefore specifies that, as such, the judgment mortgagee will take subject unregistered rights. In equity such rights included the rights of persons who had, prior to the registration of the judgment mortgage, commenced a suit or lis in respect of the lands. There is nothing, therefore, in the wording of s. 71 of the 1964 Act which would cause me to depart from the view expressed by Geoghegan J. in *A.S.*

4.4 It follows, therefore, that any interest to which Ms. Casey may become entitled as a result of the family law proceedings will rank in priority to the interest of ACC under the judgment mortgage by virtue of the fact that the family law proceedings were commenced and in being as of the time of the registration of the judgment mortgage affidavit. In those circumstances, for the reasons outlined at the beginning of this judgment, it appears to me to be appropriate to postpone any further consideration of this case until the family law proceedings have been concluded and the precise interest of Ms. Casey has been authoritatively determined.