

**THE HIGH COURT****[1995 No. 227 Sp.]****BETWEEN****NATIONAL IRISH BANK****PLAINTIFFS****AND****KATHLEEN O'CONNOR AND (BY ORDER) PATRICK ARNOLD****DEFENDANTS****Judgment of Ms. Justice Finlay Geoghegan delivered on the 12th day of November, 2007.**

1. By order of the High Court, 8th October, 1996 (Costello P.), the Court declared the principal monies secured by an equitable mortgage created by deposit of title deeds of the lands and premises known as No. 43 Great William O'Brien Street, Cork made on 31st May, 1989, with the plaintiff, and interest and costs, to be well charged on the defendants' interests in the said lands and premises.

2. As is normal, the said order also directed that the following account and inquiry be taken in the Examiner's Office:-

1. An account of all encumbrances subsequent as well as prior to and contemporaneous with the plaintiff's demand
2. An inquiry as to the respective priorities of all such demands as shall be proved.

3. Advertisements for encumbrances were published in November, 1999. The late Mr. Patrick Arnold, the second named defendant, swore an affidavit on 21st December, 1999. In that affidavit, he acknowledged that in April, 1980 he conveyed, assigned and transferred the property at No. 43 Great William O'Brien Street to the first named defendant Mrs. Kathleen O'Connor but, for reasons set out in the affidavit, claimed to be the true and lawful owner of the property and asserted that neither Mrs. Kathleen O'Connor nor the plaintiff had a better or prior title than himself to the property. He asserted that he was entitled to call for a reconveyance of the property to himself. In the same affidavit he referred to two other sets of proceedings between himself as plaintiff and National Irish Bank and Mrs. Kathleen O'Connor, bearing record numbers 1992/2810P and 1995/4494P respectively. In the final paragraph of the affidavit, he asked that the present proceedings be adjourned until such time as the other two proceedings, in which he was plaintiff against National Irish Bank and Kathleen O'Connor, were determined.

4. On 4th March, 2002, the High Court (McCracken J.) made an order for possession of the property in favour of the plaintiff. Counsel for the second named defendant, Mr. Patrick Arnold, is recorded as appearing on that application. The sale of the property proceeded, the property was sold, and the certificate of result of the sale filed on 23rd November, 2005.

5. On 9th March, 2007, a motion was issued on behalf of Mr. Sean Bohane seeking an order pursuant to O. 55, r. 36 of the Rules of the Superior Courts, 1986, extending the time for the receipt of a claim by the Examiner. An order to that effect was made by the High Court (Finlay Geoghegan J.) on 26th March, 2007, and an affidavit of claim of Mr. Sean Bohane was filed in reliance on a judgment mortgage registered on the property on 14th February, 1996, and an order of the Circuit Court declaring that judgment mortgage well charged on 11th December, 1997.

6. The Assistant Examiner's certificate of the result of the account and inquiry, directed by the order of the 8th October, 1996, dated 17th July, 2007, has been completed and filed.

7. By motion dated 26th July, 2007, and returnable for 30th July, 2007, the plaintiff sought an order for the allocation of the funds in accordance with the payment schedule attached thereto. The payment schedule is prepared in accordance with the Assistant Examiner's certificate. This discloses that as of 10th February, 2007, there was €372,390.49 in court which was proposed to be paid out firstly, to the plaintiff in discharge of the principal interest and costs; secondly to Mr. Sean Bohane in respect of the amount found due on the judgment mortgage for principal and interest; and, the balance to Mrs. Kathleen O'Connor.

8. In the meantime unfortunately, Mr. Patrick Arnold died on 3rd March, 2006, having previously been made a ward of court in 2004. His son Mr. William Arnold is the executor of his estate and had previously been his committee whilst in wardship. On 24th July, 2007, Messrs Barry C. Galvin & Sons issued and served a notice indicating an intention on behalf of Mr. William Arnold, as executor, to seek an order varying or discharging the Assistant Examiner's certificate. A notice of change of solicitors was filed by Barry C. Galvin & Sons on behalf of the second named defendant on 26th July, 2007. The proceedings have not been reconstituted but no point was taken in relation to that at the hearing before me.

9. On 30th July, 2007, counsel appearing for Mr William Arnold indicated that he was not objecting to the payment out in favour of the plaintiff, but was seeking a variation of the certificate or an adjournment or a stay on the balance of the proceedings and, in particular, the payments out to Mr. Sean Bohane and Mrs. Kathleen O'Connor. Mr. Sean Bohane was not represented at that hearing. An order was made on 30th July, 2007, that the Accountant of the High Court make the withdrawal and payment to the plaintiff in accordance with the payment schedule and the balance of the application was adjourned.

10. On 30th October, 2007, I heard submissions on behalf of Mr. William Arnold as executor of the estate of the second named defendant and on behalf of Mr. Sean Bohane and Mrs. Kathleen O'Connor. Counsel for Mr. William Arnold and Mrs. Kathleen O'Connor also filed helpful written submissions. At the hearing, the form of relief being sought by counsel for Mr. William Arnold was an order staying the payment out of any monies to Mr. Sean Bohane or Mrs. Kathleen O'Connor pending the determination of the proceedings in which the late Mr. Patrick Arnold is plaintiff and Mrs. Kathleen O'Connor and National Irish Bank are defendants, bearing record numbers 1992/2810 P and 1995/4494 P respectively. The essential submission made is that the late Mr. Patrick Arnold claimed to be entitled to the beneficial interest in the property as against Mrs. Kathleen O'Connor and as the judgment mortgage registered by Mr. Sean Bohane was in respect of a judgment obtained against Mrs. Kathleen O'Connor personally, it would follow that such judgement would not attach to any beneficial interest in the property.

11. Counsel for Mr. William Arnold accepted that the dispute between the late Mr. Patrick Arnold and Mrs. Kathleen O'Connor as to the beneficial ownership of the property had to be resolved in the separate plenary proceedings and did not seek to make any case that it was to be resolved in the present special summons proceedings. The Court's attention had been drawn to a note of the judgment delivered by Costello P. on 8th October, 1996, when making the primary order in these proceedings. It is clear from that judgment that Mr. Patrick Arnold's claim was then before the Court and Costello P., having referred to the claim made on affidavit by Mr. Patrick Arnold, took the view that he would at most have an equitable interest in the property and that the plaintiff's equitable interest would take precedence over Mr. Patrick Arnold's equitable interest and, as such, it was entitled to the reliefs claimed.

12. Counsel for Mrs. Kathleen O'Connor and Mr. Sean Bohane opposed the application in part on the basis that Mr. William Arnold has not raised any issue which would permit the Court to discharge or vary the Assistant Examiner's certificate in accordance with the jurisdiction given it under O. 55, r. 50 of the Rules of the Superior Courts, 1986. It was also submitted that, in effect, the type of relief being sought was in the nature of a "mareva" style injunction in relation to the monies to which their clients were now entitled in accordance with the payment schedule prepared pursuant to the Assistant Examiner's certificate of the account and inquiry herein.

## Conclusion

13. Order 55 of the Rules of the Superior Courts, 1986, insofar as relevant to the Examiner's certificate provides that:-

44. The result of any proceedings before the Examiner shall be stated in the form of a concise certificate to the Court. Unless an order to discharge or vary the same is made, the certificate shall be deemed to be approved and adopted by the Court.

...

48. Any party or other person interested may, before the proceedings before the Examiner are concluded, take the opinion of the Court upon any matter arising in the course of the proceedings upon notice given to all proper persons. Such notice shall be in one of the Forms Nos. 14 and 15 in Appendix G.

...

50. The Court may, in special circumstances, upon an application by motion for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties.

14. It was agreed that the application brought on behalf of Mr. William Arnold could properly be treated by the Court as an application by motion for directions that the Examiner's certificate be discharged or varied.

15. It is not in dispute that the role of the Examiner is limited to adjudicating on the encumbrances in respect of which claims have been lodged and the respective priority of those encumbrances. In the certificate filed herein, the Assistant Examiner has certified as to: the existence of the equitable mortgage in favour of the plaintiff; the judgment mortgage in favour of Mr. Sean Bohane and a third judgment mortgage in favour of TSB Bank, on foot of which no claim was entered or proved. The Assistant Examiner, in the certificate, also refers to the affidavit sworn by the late Mr. Patrick Arnold on 21st December, 1999 (which appears to have been in response to the advertisement for encumbrances) and records that such affidavit "has failed to establish to the satisfaction of the Assistant Examiner the existence of an encumbrance".

16. Counsel for Mrs. Kathleen O'Connor relies by analogy upon the decision in *Re Ryan (deceased) Field v. Ryan* (1916) 50 I.L.T.R. 11. That case concerned a certificate of the Clerk of the Peace on the taking of an account in a mortgage suit. Barton J. dismissed the appeal by the plaintiff from the order of the County Court judge confirming the certificate of the Clerk of the Peace and, in doing so, stated:

"The case is in my opinion governed by *Mackintosh v. Great Western Railway Co.* (1864) 4 Giff. 683, where it was laid down that when on the investigation of a complicated demand the Chief Clerk's certificate after a laborious examination ascertains the amount due, the Court will not allow the amount to be varied unless a clear mistake or manifest abuse can be shown."

17. It is unnecessary on this application to consider whether "clear mistake or manifest abuse", particularly having regard to the use of the adjectives, is a threshold which must be met by an applicant under O. 55, r. 50. Nevertheless, I accept that the basis for such an application must be an error made by the Examiner in the certificate of the account and inquiry, having regard to the claims lodged before him.

18. Counsel for Mr. William Arnold does not submit that any such error has been made on the facts herein. No challenge is made to the determination that the affidavit filed by the late Mr. Patrick Arnold did not disclose the existence of an encumbrance. Similarly, there is no challenge to the adjudication of the encumbrance in favour of Mr. Sean Bohane as attaching to Mrs. Kathleen O'Connor's interest in the property. The challenge being made on behalf of Mr. William Arnold is to Mrs. Kathleen O'Connor's ownership of the property.

19. This claim was brought against Mrs. Kathleen O'Connor as the owner of the property more particularly described in the deed of assignment dated 5th May, 1980, made between the late Mr. Patrick Arnold of the one part and Mrs. Kathleen O'Connor (then Kathleen O'Riordan) of the other part. While the late Mr. Patrick Arnold was joined as a co-defendant prior to the making of the primary order, it formed no part of the function of the Examiner in taking the account and inquiry, to make any finding as to the respective interests of Mrs. Kathleen O'Connor and the late Mr. Patrick Arnold. The Examiner was obliged to conduct the account and inquiry as to encumbrances in relation to the property in accordance with the title documents which disclose Mrs. Kathleen O'Connor as the owner, in the absence of any court order to the contrary.

20. Accordingly, I must dismiss the application to discharge or vary the certificate of the Assistant Examiner of the 17th July, 2007, herein.

21. Considering the application for a stay on the payment out of the funds in court pursuant to the payment schedule as an application pursuant to the inherent jurisdiction of the court it appears, on the facts herein, to be one which must be refused. Counsel for Mr. William Arnold sought to rely upon the decision of the Supreme Court in *Redmond v. Ireland and the Attorney General* [1992] 2 I.R. 362 as to the matters which might be taken into account by the Court in an application for a stay of execution on the whole or part of an award of damages made by the High Court where an appeal to the Supreme Court is brought. I was invited to consider such matters by analogy. It does not appear to me that those criteria are strictly relevant. Rather, the application must be considered on its own facts and having regard to the respective positions of the parties.

22. The application is made on behalf of Mr. William Arnold as executor of the late Mr. Patrick Arnold. Mr. William Arnold is seeking time to pursue proceedings commenced by his late father in 1992 and 1995 respectively against Mrs. Kathleen O'Connor and National Irish Bank. Those proceedings were in being prior to the making of the primary order herein in October, 1996. It is in itself regrettable that an application for a payment out following a sale pursuant to a primary order made in October, 1996 does not come on until July, 2007. It must have been apparent to the late Mr. Patrick Arnold and his advisors in October, 1996 that the primary order commenced a process which would ultimately result in the sale of the property and the payment out of monies to any encumbrances admitted,

with the balance to Mrs. Kathleen O'Connor as the apparent owner of the property in accordance with the title deeds.

23. It is also clear from the judgment of Costello P. of 8th October, 1996, that the late Mr. Patrick Arnold was making precisely the same claim which his son now seeks to advance in October 1996. The late Mr. Patrick Arnold has had ample time to pursue the proceedings commenced in 1992 and 1995, but has not done so. Whilst reliance was sought to be placed upon the fact that it was difficult, in the last years of his life to obtain instructions from Mr. Patrick Arnold, he only appears to have been made a ward of court in 2004 and, even at that stage, Mr. William Arnold, the applicant herein, was appointed his committee. Mr. Patrick Arnold had ample time in the 1990s to pursue the proceedings commenced in 1992 and 1995.

24. On such facts I have concluded that there is no basis for the Court to exercise any inherent jurisdiction it would have to place any stay on the payment out of the funds now in court to Mr. Sean Bohane and Mrs. Kathleen O'Connor in accordance with the payment schedule attached to the plaintiff's motion of 26th July, 2007. There is no injustice to Mr. William Arnold, as executor of Mr. Patrick Arnold, having regard to the time which has elapsed. To do so would be unjust to the position of Mrs. Kathleen O'Connor and Mr. Sean Bohane.

25. There will be an order dismissing the application brought on behalf of Mr. William Arnold and an order that the Accountant of the High Court withdraw and distribute the funds in court in accordance with the balance of the payment schedule attached to the plaintiff's application of 26th July, 2007.