

THE HIGH COURT

[2017 No. 188 Sp]

BETWEEN

GOODBODY PENSIONER TRUSTEES LIMITED

AND

CAROLINE MCBRIDE

PLAINTIFFS

AND

HEVAC LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 1st day of March, 2019

1. This is an application by the plaintiffs for a declaration that a judgment mortgage registered against Folio 6053L, Co. Louth, is null and void and of no legal effect.
2. The procedure used was a special summons, invoking the jurisdiction created by s. 22(2) of the Land and Conveyancing Law Reform Act, 2009 which allows the summary disposal of disputes between trustees and other persons interested, which includes judgment mortgagees, as to the nature or extent of any beneficial or other interest in land.
3. The property in Folio 6053L, Co. Louth is an apartment in a block at Hoey's Lane, Dundalk which was purchased in 2006. The lease shows that the purchasers were acting as trustees of the scheme. The plaintiffs, Goodbody Pensioner Trustees Limited and Caroline McBride, were registered as full owners of the property on 21st January, 2008. The folio shows the same address for both: Ballsbridge Park, Ballsbridge, Dublin 4, which is the registered office of the first plaintiff and the place of business of Goodbody Stockbrokers.
4. On 16th January, 2014 in proceedings bearing Record No. 2011 No. 3029S, the defendant, Hevac Limited, obtained judgment against Ms. McBride for €350,000 plus costs. That judgment was obtained against Ms. McBride in her personal capacity. On 19th March, 2015 the defendant registered that judgment as a judgment mortgage against the second defendant's interest in the property in folio 6053L, Co. Louth.
5. The property is held by the plaintiffs on trust. The trust upon which the property is held is the Larry Fay Heating Limited Caroline McBride Pension Scheme, which was established by definitive deed dated 9th March, 2005. Ms. McBride was party to that deed as a trustee and is a member of the scheme which it established but, for the reasons which I shall give, it seems to me that Ms. McBride's membership of the pension scheme is not material to the legal issue which arises in this case.
6. The scheme is a retirement benefit scheme as defined by s. 771 of the Taxes Consolidation Act, 1997 and was approved by the Revenue Commissioners pursuant to s. 772 as being an exempt approved scheme pursuant to section 774.
7. The plaintiffs' case is that Ms. McBride had, and has, no interest in the property to which a judgment mortgage can attach. Prior to issuing these proceedings, the solicitors for the plaintiffs wrote to the defendant, and to the solicitors who had acted for the defendant in the action in which the judgment was recovered, setting out that she had no beneficial interest in the property but held it in her capacity as trustee.
8. The application is grounded on a short affidavit of Mr. James Connolly setting out the facts and exhibiting the various documents.
9. In a replying affidavit, Mr. Colm Somers, the defendant's credit manager, suggested that at that date of registration the defendant had no notice of any trust and relied on the Folio. The register, of course, cannot show notice of any trust.
10. Mr. Somers then also suggested that it was reasonable to infer that the scheme was a bare trust and was merely a device to shield property in which Ms. McBride had an interest. There was nothing in the replying affidavit that might have justified any such inference and that suggestion was abandoned in the course of the hearing.
11. Much of the argument in the case was directed to the benefits which Ms. McBride is, or may become, entitled to under the scheme.
12. The definitive deed is a standard form which has been approved by the Revenue Commissioners. It contemplates successive employers, multiple members of the scheme, and employed, deferred and retired members, but all the appearances are that it is a fund to provide benefits to Ms. McBride, who is 57 years of age.
13. The scheme provides for a "*normal pension date*" which is the member's 65th birthday or such other date as the employer may specify, which, without the approval of the Revenue Commissioners, is not to be prior to the member's 60th birthday or subsequent to the member's 70th birthday.
14. On retirement, an employed member is entitled to an annuity on his or her life; or on the life or lives of one or more of his or her children; or a cash sum payable immediately. The deed provides for determination of the scheme in certain events, in any of which the Fund must be realised and the proceeds applied in the specified order of priority. The deed does not contemplate the transfer of any assets in the Fund in specie to a member.
15. Extensive submissions were made on behalf of the defendant as to whether a judgment creditor is entitled to have a receiver by way of equitable execution appointed over a contingent benefit in a pension scheme, or whether a member of a scheme can be ordered to delegate a power of election to accelerate benefits or to draw down a cash sum rather than an annuity.
16. The argument was interesting but, in my view, irrelevant to the only issue in this action, which is whether a judgment obtained

against a person in their personal capacity can be registered as a judgment mortgage against a property in which the judgment debtor has no beneficial interest but which is held upon trust.

17. On the authority of *In re: Rae's Estate* (1877) L.R.I. 174 the future contingent interest on a beneficiary of a trust of land is not an interest in land upon which a statutory mortgage could operate. Ms. McBride *qua* member of the scheme, does not have even a future contingent interest in the land.

18. What is left is the argument that the defendant was entitled to register, and is entitled to maintain, the judgment mortgage as a charge against Ms. McBride's bare legal interest in the property as trustee.

19. Mr. Gary McCarthy S.C., for the defendant, quite candidly accepts that Ms. McBride's interest is entirely worthless and that the defendant has no prospect of securing any court order on foot of it. He unashamedly says that the judgment mortgage maybe an impediment to any sale of the property which his client may exploit to impede any dealing with the property: before, I suppose, the defendant moves for equitable execution against Ms. McBride's benefits, or seeks to compel her to exercise a power of election, or perhaps to circumvent the need for any such application.

20. As was observed by Byrne J. in *Re: Strong* [1940] I.R. 382, the effect of the Judgment Mortgage Act, 1850 on unregistered land was definitely settled in 1861 by the decision of the House of Lords in *Eyre v. McDowell* 9 H. L. Cas. 619 and many subsequent cases applying the principle. Recalling that in *Eyre v. McDowell* the House of Lords had held that the judgment mortgage was a process of execution and so could affect only such beneficial interest as the judgment debtor had at the time of registration, O'Byrne J. said, at p. 402 of the report:-

"... the registration of the necessary affidavit in the Registry of Deeds, only affects such property as the judgment debtor, at the time of registration, lawfully possesses as of his own right, and ... the judgment creditor takes subject to all equities by which the judgment debtor is bound.

It is also, in my opinion, well established that a judgment mortgage is a process of execution and does not constitute a purchase for valuable consideration." [Emphasis added.]

21. In *In Re: Strong* the court was divided as to whether the Local Registration of Title (Ireland) Act, 1891 meant that registered land was to be treated differently to unregistered land but the court was unanimous as to the law governing unregistered land. The court decided by a majority (Sullivan C.J., Geoghegan and O'Byrne JJ.) that a purchaser for value of registered land was entitled to have cancelled from the register a judgment mortgage which had been registered against the vendor's interest in the land before the registration of the purchaser's deed of transfer but after payment of the purchase money due under the contract.

22. In *Tempany v. Hynes* [1976] I.R. 101 the Supreme Court held that by the express terms of s. 71, sub-s. 4 of the Registration of Title Act, 1964 the registration of a judgment mortgage could only charge an interest in the lands subject to the unregistered rights of a debenture holder, and subject to the derivative rights of a purchaser to whom a receiver appointed by the debenture holder had contracted to sell the lands.

23. Henchy J. said, at pages 109 and 110:-

24. *"[When] a judgment mortgage is registered as a burden affecting the interest of the registered owner after an enforceable contract has been made to sell the land, what becomes affected thereby is the transient beneficial interest of the registered owner. Section 71, sub-s. 4 of the Registration of Title Act, 1964 stipulates that on registration of the judgment mortgage affidavit, the charge created on the interest of the judgment debtor shall be subject to the registered burdens, the burdens taking effect under s. 72 without registration, and 'all unregistered rights subject to which the judgment debtor held that interest at the time of registration of the affidavit.' The latter category applies here, for a 'right' is defined in s. 3, sub-s. 1, of the Act of 1964 as including 'estate, interest, equity and power' – thus covering the estate or interest of the purchaser. Since the judgment creditor (by registering his judgment as a judgment mortgage) could not acquire any greater estate or interest in the land than the registered owner had at the time of such registration, all that could pass to the judgment creditor here was the interest in the land which the registered owner had after the making of the contract to sell, namely, an interest which would pass out of existence once the sale had been completed, the purchase money paid and the purchaser registered as full owner. It follows, therefore, that if the defendant completes the purchase and becomes registered as full owner, the post-contract judgment mortgages will no longer affect the lands and he will be entitled to have them cancelled from the folio."*

25. *Coffey v. Brunel Construction* [1983] 1 I.R. 36 was a case where a *lis pendens* was registered as a burden on the folio after the purchaser had paid over the entire purchase money but before the transfer to him was registered. The Supreme Court held that upon payment of the purchase monies the purchaser acquired an equitable estate in fee simple in the land.

26. In *Coffey v. Brunel Construction* O'Higgins C.J. applied to the issue in that case the reasoning of O'Byrne J. in *In re: Strong*. He said, at pages 42 and 43:-

"The plaintiffs herein seek the rectification of the register by the vacation of the lis pendens. They do so on the grounds that [the vendor] had no interest in the lands at the date of its registration. On that date, which is the critical date, [the vendor] had already created in favour of the plaintiffs, a right which vested in them the entire beneficial estate in the lands. ...

Therefore, I am of the view that [the vendor] had no estate or interest in the lands at the date of the registration of the lis pendens. Accordingly, in my view, the registration of the lis pendens should be vacated."

27. The Land and Conveyancing Law Reform Act, 2009 modified the law in relation to judgment mortgages, but not, for present purposes, in any material way. By s. 116 of the Act of 2009 a creditor who has obtained a judgment against a person may apply to the Property Registration Authority to register a judgment mortgage against that person's estate or interest in land. By s. 117, registration of a judgment mortgage under s. 116 operates to charge the judgment debtor's estate or interest in the land with the judgment debt and entitles the judgment creditor to apply to the court for an order for the sale of the land, or such other order for the enforcement of the judgment mortgage as the court thinks appropriate. In the case of land which is co-owned, the judgment creditor may apply for partition, or for the sale of the land and distribution of the proceeds.

28. It is long established that a vendor of registered land who has been paid the purchase monies, although he remains on the folio as the registered owner, has no estate, interest or right in the land which is capable of being affected by a judgment mortgage. I cannot

see how the position of a trustee could possibly be any different. Although Ms. McBride appears on the folio as a joint registered owner, she has no estate, interest, or right in the land which is capable of being affected by the judgment mortgage.

29. It is long established that a judgment mortgage is a process of execution. The judgment creditor in this case is plainly not entitled to execute a judgment recovered against Ms. McBride personally, against property which she holds in trust.

30. At the time the judgment mortgage was registered, the defendant probably had grounds to suspect, but could not have known for sure, that Ms. McBride was a trustee. The position, however, was clearly spelled out in correspondence before these proceedings were instituted. The replying affidavit did not disclose any basis for the assertions that the trust was a bare trust, or that it was voidable.

31. Subject to any submission that counsel may make, it seems to me that the appropriate orders are that:-

- (1) the second plaintiff had no estate or interest in the property comprised in Folio 6053L, Co. Louth, capable of being affected by the registration of judgment mortgage;
- (2) the notice of the judgment mortgage in the register does not create a valid burden on the lands;
- (3) the plaintiffs are entitled to have the entry cancelled.