

THE HIGH COURT

[2010 No. 39 SP]

BETWEEN

CROHAN O'SHEA

PLAINTIFF

AND

MICHAEL BUTLER AND WILLIAM BUTLER

DEFENDANTS

AND

WILLIAM KELLY

NOTICE PARTY

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 28th day of July, 2014

1. This judgment is given on two separate motions brought by the plaintiff in the Examiner's Court Motion List. The first is a motion issued on 27th September, 2013, seeking an order approving the sale of the lands in Folio 3855 and Folio 3856, County Tipperary, in an amount of €337,000 to Calco Farms limited or a director thereof, namely Mr. Con Callanan.

2. The second notice of motion is one issued on 2nd May, 2014, seeking orders pursuant to O. 51, r. 1 of the Rules of the Superior Courts that Mr. William Butler, the second named defendant, and Mr. William Kelly, a notice party to the motion, their servants and agents deliver up to the plaintiff vacant possession of the lands contained in Folio 3855 and Folio 3856, County Tipperary.

Background

3. On 12th May, 2009, the High Court (McGovern J.) granted judgment in favour of Mr. Crohan O'Shea, the plaintiff herein against Mr. Michael Butler and Mr. William Butler, the defendants herein, in proceedings [2006 No. 4849 P] in the sum of €653,832. The said judgment was registered as a judgment mortgage and, *inter alia*, registered against the interests of Mr. Michael Butler and Mr. William Butler in the properties comprised in Folio 3855 and Folio 3856, County Tipperary, on 19th June, 2009.

4. In these special summons proceedings, an order was made by the High Court (Dunne J.) on 20th December, 2010, declaring the principal monies secured by the judgment mortgaged well-charged, *inter alia*, on the defendants' interests in the lands contained in Folio 3855 and Folio 3856, County Tipperary. The order also provided that in default of payment of the principal sum of €653,382 and interest and costs within three months from the date of service, that the lands and premises be sold at such time and place subject to such conditions of sale as would be settled by the Court. It also provided that an account of encumbrances and enquiries as to respective priorities be taken by the Examiner. The order of 20th December, 2010, also applied to lands comprised in Folio 34763F, County Tipperary.

5. Mr. William Butler, alone, is the registered owner of the properties comprised in Folio 3855 and Folio 3856, County Tipperary. He is registered as full owner of each.

6. On 16th August, 2011, the Examiner issued a ruling on the account and enquiry directed to be taken by the order of 20th December, 2010, following advertisements for encumbrances. Of relevance to these applications is the fact that both Mr. William Butler and Mr. William Kelly were represented at the hearing before the Examiner by Mr. Mark Walsh Solicitor of Kenny Stephenson Chapman. A submission was made that Mr. William Kelly and four other members of the Butler family claimed to have an equitable/beneficial interest in the lands comprised in Folio 3855 and Folio 3856, County Tipperary; that separate proceedings were to be issued pursuant to s. 22 of the Land and Conveyancing Law Reform Act 2009, seeking to determine the nature of the beneficial interest owned by them and an adjournment of the enquiry was sought. The adjournment was refused by the Examiner. They did not claim to be encumbrancers, which was the subject of the Examiner's inquiry.

7. The Examiner, in his ruling, also noted that Ulster Bank Ireland Ltd. had a charge registered on the property in Folio 3855 and Folio 3856, County Tipperary, but had not submitted a claim, notwithstanding that they had been notified of their entitlement to apply for an extension of time to submit a claim.

8. A notice of motion was issued by the plaintiff in late 2012, seeking orders in relation to the sale of the lands the subject matter of the Well Charging Order of 20th December, 2010, and in respect of certain of the properties, vacant possession. I will return to this motion. In response, it appears that a motion was issued on behalf of five named individuals, including Mr. William Kelly, by Mr. Herbert Kilcline Solicitor, seeking leave to appear and defend the action. That application was grounded, in part, upon an affidavit of Mr. William Kelly in which, in relation to the properties comprised in Folio 3855 and Folio 3856, County Tipperary, he stated:

"These folios comprise a farm which I have been in possession of and worked for over twenty years. The registered owner of these lands is one William Butler of Ballytrasna, Cashel, Co Tipperary, but the aforesaid Mr Butler has no beneficial interest in these lands.

I have become aware that the plaintiff has issued a motion on 28th November 2012 seeking a sale of these lands. I am not a party to these proceedings and I have not been put on notice of the motion seeking an order for the sale of these lands of which I am possession and which I own beneficially."

He asked that the Court refuse the plaintiff's notice of motion insofar as it related to an order for the sale of "my lands comprised in Folio 3855 and Folio 3856, Co Tipperary".

9. The application of Mr. William Kelly and others for leave to defend the action was refused by order of the High Court (Dunne J.) on 4th February, 2013.

10. On the same day, 4th February, 2013, the High Court (Dunne J.) heard the plaintiff's motion, and insofar as the lands in Folio 3855 and Folio 3856, County Tipperary, were concerned, made orders:

"1. That part sale of lands which stand well-charged by an order of this Court on 20th December, 2010, namely:

(i) being Folio 3855, County Tipperary, in the Barony of Eliogarty;

(ii) being Folio 3856, County Tipperary, in the Barony of Eliogarty;

. . .

IS APPROVED

. . .

3. the sale of the said properties be made by private treaty

. . .

6. execution on foot of this Order in respect of the lands at 1(i) and 1(ii) above [Folios 3855 and 3856] be stayed for a period of two months from the date hereof subject to right of inspection by the plaintiff, his servants or agents . . .

Liberty to apply."

11. It appears that a subsequent application was made for a further stay on the order for the sale of the properties in Folio 3855 and Folio 3856 grounded upon an affidavit of Ms. Angela Farrell Solicitor then acting for the defendants. The application related, in part, to the lands in Folio 3855 and Folio 3856, and insofar as relevant to this application, Ms. Farrell deposed at para. 16 of her affidavit:

" . . . The Butlers also own a farm of 52 acres near Thurles, a property called Lewagh More, contained in Folios 3855 and 3856. As things stand, the farm lands are also part of the Order for Sale of 4th February 2013. The property at Lewagh More is ancestral land that has long been in the family, and my client has a nephew who farms that land and has an expectation of inheriting it. As there has been no Order for possession of the farm land I assumed that there was no imminent danger of its being sold, but when I spoke to Mr. Glennon, the Examiner, he told me that this was not so, and that I needed to get a court order to vary the order of 4th February 2013."

12. The Court has been informed that Mr. William Kelly is a nephew of Mr. William Butler. No other nephew has been referred to as being in possession. Hence, it appears Ms. Farrell was referring to Mr. Kelly as the person farming the lands with "an expectation of inheriting it".

13. The Court did not extend the earlier stay of two months placed on the sale by private treaty of the lands comprised in Folio 3855 and Folio 3856 pursuant to the order of 4th February, 2013.

14. The plaintiff, in accordance with normal practice, appointed, with the approval of the Examiner, Pádraig Hyde & Sons Auctioneers as the auctioneers for the sale of the land. Also, counsel appointed by the Court advised and settled conditions for sale. She made it a condition of the contract that once a purchaser had been secured, that the Court should approve the sale. This condition is an appropriate protection where the order giving liberty for sale by private treaty does not include a minimum price at which the lands may be sold without further Court approval.

15. In September 2013, the plaintiff issued the motion seeking Court approval for the sale which is the subject of this judgment. That was grounded *inter alia*, on an affidavit of Adrian Hyde Auctioneer, of the firm Pádraig Hyde & Sons, in which he set out the process followed to seek a purchaser for the lands, the bids received and deposed that the price then achieved of €337,000 "represents the open market value of the lands and is a fair price".

16. That application was opposed on behalf of the defendants on a number of grounds, some of which are not relevant to the application and some of which related to an alleged value of the property well in excess of the purchase price achieved. This contention was, in part, was based upon a potential development value for the property but without any evidence of relevant planning approval or zoning.

17. In addition, Mr. William Butler, in an affidavit sworn on 22nd November, 2013, drew the Court's attention to the registration in Folio 3855 and Folio 3856 of a lien in favour of Ulster Bank. He deposed that the lien was in substitution for an equitable mortgage and exhibited an undertaking from Hickey-Dwyer Solicitors and correspondence between them and Ulster Bank. He also deposed that the Ulster Bank lien registered as a burden ranked in priority to the plaintiff's judgment mortgage and referred to the opinion of Court counsel to that effect.

18. The solicitor's undertaking exhibited by Mr. William Butler is dated 21st July, 2006. It refers to "our client" as William Butler and Michael Butler; relates to the lands in Folio 3855 and Folio 3856; and is addressed to the Ulster Bank in the following terms:

"In consideration of your providing or continuing to provide banking facilities to my/our above Client, I/We undertake to proceed with the registration of my/our client as full owner of the Property, to bespeak the Land Certificate in his name and to hold the Land Certificate and supporting documents of title to the Property in trust for you and to your order and to deliver same to you showing my/our Client registered with a good marketable title."

The undertaking was furnished by Ms. Clodagh Hickey-Dwyer Solicitor to Ulster Bank. Mr. William Butler also exhibited to the same affidavit a letter dated 13th October, 2009, from Ulster Bank to Ms. Hickey-Dwyer calling upon her pursuant to the undertaking to furnish the original Land Certificate to them and her letter of 16th October, 2009, addressed to Messrs. Michael and William Butler informing them that pursuant to the undertaking, she would be furnishing the original Land Certificates to Ulster Bank.

19. Mr. William Butler, in his same affidavit of 22nd November, 2013, deposed at para. 7 that the loans secured on the lands in Folio

3855 and Folio 3856 then amounted to €582,727 and exhibited an Ulster Bank statement of 7th December, 2012, which relates to an account in the names of Mr. Michael Butler and Mr. William Butler. These documents exhibited by Mr. William Butler and the matters deposed to in his affidavit indicate that in 2006, Mr. William Butler, as registered owner of the lands in Folio 3855 and Folio 3856, was in a position to use the lands as security for borrowings from Ulster Bank to himself and Mr. Michael Butler.

20. The plaintiff's application for approval of the proposed sale was adjourned from time to time in the latter part of 2013, and the earlier part of 2014. Very considerable latitude was given to the defendants, in part by reason of complications relating to their legal representation by Ms. Farrell Solicitor, and, ultimately, a change in legal representation to Mr. Kilcline Solicitor.

21. A further complication arose by reason of a notice of motion issued on behalf of Ulster Bank Ireland Ltd. on 10th February, 2014, seeking an order for the extension of time pursuant to O. 55, r. 36 of the Rules of the Superior Courts for the admission of its claim to security over the lands comprised in Folio 3855 and Folio 3856, County Tipperary, by virtue of the equitable deposit of Title Deeds evidenced by the undertaking given by Hickey-Dwyer Solicitors on 21st July, 2006.

22. The plaintiff's motion to approve the sale was heard on 17th February, 2014, and judgment was reserved. The Court indicated that it wished to obtain the views of Ulster Bank Ireland Ltd. on the proposed contract for sale, given its then pending application for late admission of its security claim which it was accepted ranked in priority to the plaintiff's judgment mortgage and the dispute by the defendants relating to the purchase price achieved.

23. The Ulster Bank motion was before the Court on 11th April, 2014. On that date, even though the Court had heard and reserved its decision on the plaintiff's motion to approve the sale, an application was made on behalf of the defendants that the Court would hear from a Mr. Larry Monaghan of Thurles Truffles Ltd. who was in Court, and the Court was furnished with an affidavit from Mr. Monaghan indicating that Thurles Truffles Ltd. was prepared to offer €400,000 to purchase the lands. In view of the difference between the proposed purchase price of €337,000 and the €400,000 now apparently offered, the Court, having heard counsel for the plaintiff, counsel for the defendants and Mr. Monaghan in person, indicated that it would be prepared to give one last opportunity for the admission of further evidence on the plaintiff's application for the approval of the sale subject to the following directions:

1. An affidavit of Mr. Monaghan (or some other person on behalf of Thurles Truffles Ltd.) to be filed in the Examiner's Office no later than 4.00pm on Thursday 24th April averring to proof of funds, meaning either:

- (a) confirmation from a firm of solicitors that they hold the funds in their client bank account with instructions that the funds be used to purchase the property or

- (b) to produce a bank draft in Court on 28th April which can be lodged pending completion of a sale; and an averment that Thurles Truffles Ltd. is prepared by 2nd May to enter into a contract for sale in the terms of the contract settled by Court conveyancing counsel and pay the requisite deposit.

2. Confirmation on affidavit from both defendants that they will cooperate in every way, including arranging for the delivery of a vacant possession of the lands, with the proposed sale to Thurles Truffles (the Court noting that it had been indicated that their nephew may be in possession of the lands).

3. The solicitor for Thurles Truffles Ltd./Larry Monaghan should attend in Court on 28th April.

The plaintiff's motion for approval of the sale was adjourned for mention to 28th April, with the foregoing directions.

24. Also, on 11th April, 2014, the Court, having been informed that the plaintiff and Ulster Bank Ltd. had reached agreement in relation to the late admission of the claim of Ulster Bank Ireland Ltd. to be secured on the lands in Folio 3855 and Folio 3856, the Court, on the Bank's motion made an order pursuant to O. 55, r. 36 of the Rules of the Superior Courts giving liberty to the Bank to enter its claim within fourteen days from the date thereof, and gave further directions in relation to the continued carriage of the sale of the property by the Solicitors for the plaintiff and discharge of certain costs in priority to the claim of Ulster Bank Ltd. At no point in time did the defendants object to the admission of the claim of Ulster Bank Ireland Ltd. to be secured over the lands in Folio 3855 and Folio 3856. Mr. William Butler had deposed that they were so secured.

25. No affidavit was lodged on behalf of Thurles Truffles Ltd. pursuant to the directions given on 11th April. An affidavit was sworn jointly by the defendants on 24th April, 2014, in which they deposed that they were unwilling to cooperate with the sale of the farm to Thurles Truffles Ltd. or deliver up vacant possession of the farm for reasons which may be summarised as follows:

1. The farm in question in Folio 3855 and Folio 3856 has been in the Butler family for over 400 years. Their father, in the interests of his family, set about making provision for his children who were not secured in permanent positions by placing the farm in trust for those children.

2. William Butler was declared to be the registered owner of the farm. His responsibility is to see that the farm is kept in trust for the following family members:

- (a) Josephine Butler

- (b) Ann Butler

- (c) Mary Butler Kelly

- (d) Thomas Butler

- (e) Willie Kelly

3. Michael Butler, the first named defendant, is one of the family not included in the trust and has no right to the farm in Folio 3855 and Folio 3856.

4. Hence, Michael Butler is not in a position to give any undertaking regarding issues with the farm and William Butler, the second named defendant, has no authority to give any undertakings regarding any issues with the farm without the

consent of the individuals whose names are in the trust.

5. Willie Kelly had sworn an affidavit in February 2013, stating his claim to the farm that he has been on all his life.

6. Michael Butler should not be in these Court proceedings.

26. When the matter came before the Court on 28th April, counsel appeared for Thurles Truffles Ltd. He indicated that whilst he had to accept they were in default of the Court's directions and had not yet filed an affidavit, they were putting funds together and were still interested in purchasing the lands for €400,000.

27. A further complication arose as Mr. Kilcline Solicitor informed the Court on that day that the defendants had now discharged him as their solicitor and wished to act for themselves. On further enquiry by the Court, it appeared that he had only been discharged by Mr. Michael Butler who was present in Court, but that Mr. William Butler had not discharged him. In such circumstances, Mr. Kilcline was given liberty to come off record from Mr. Michael Butler, and by reason of Mr. Michael Butler's averments on affidavit as to the absence of any interest in the lands in Folio 3855 and Folio 3856, the Court directed that he need not be served with any further application in relation to those lands. Liberty was given to Mr. Kilcline to issue and serve a motion returnable for 26th May, 2014, seeking to come off record from Mr. William Butler.

28. Mr. Michael Butler informed the Court that the lands were being farmed by his nephew, Mr. William Kelly. By reason of the averments from Mr. Michael Butler and Mr. William Butler that they would not deliver up possession, the Court gave liberty to the plaintiff to issue a motion for possession returnable for 26th May, 2014. The plaintiff had intended awaiting approval of the sale to seek possession.

29. The Court adjourned the plaintiff's motion to approve the sale to 26th May, 2014, and indicated that if Thurles Truffles Ltd. continued to be interested in purchasing the lands for €400,000, it must bring an application seeking approval of a contract for sale returnable for 26th May, 2014, grounded on an affidavit with proof of funds to be filed by 19th May, 2014. Thurles Truffles Ltd. did not issue any motion seeking approval of the sale to it, returnable for 26th May, 2014.

30. The plaintiff issued the motion for possession on 2nd May, 2014, returnable for 26th May, 2014. Mr. William Kelly was included as a notice party by reason of the information provided that he was the person in possession of and farming the lands. The plaintiff had to make an *ex parte* application for substituted service on Mr. Kelly on 19th May, 2014. On 26th May, 2014, the return date, Mr. William Kelly did not attend. Mr. Michael Butler and Ms. Josephine Butler, his sister, attended Court. Also Mr. Kilcline attended and informed the Court that he was not now seeking to come off record for Mr. William Butler and was continuing to represent him in these proceedings. The Court was not satisfied that there had been proper service of the motion for possession on Mr. William Kelly. Mr. Michael Butler and Ms. Josephine Butler informed the Court that they believed that Mr. William Kelly was currently outside of the jurisdiction. The Court was informed by them that Mr. William Kelly's wife, Mrs. Margaret Kelly, resided at Ballytarsna, Cashel, County Tipperary. Ms. Josephine Butler indicated to the Court that she was willing to identify for a summons server the location of the house at which Mrs. Margaret Kelly resided and to identify Mrs. Margaret Kelly.

31. The Court adjourned the motion for possession peremptorily to Thursday 19th June, 2014, for hearing and made a further order for substituted service on Mr. William Kelly by service on his wife with directions in relation to identification information to be provided by Ms. Josephine Butler. The order for substituted service also indicated that if Mr. William Kelly intended to oppose the motion for possession, that he should file an affidavit by 13th June, 2014, and appear in Court or be legally represented on 19th June, 2014. Mr. William Kelly delivered and filed an affidavit on 17th June, 2014, sworn on 16th June, 2014. The affidavit was filed by Mr. Kilcline's Solicitor on his behalf, and at the hearing on 19th June, 2014, Mr. Kilcline informed the Court that he was representing Mr. William Kelly in addition to Mr. William Butler. Counsel was instructed on their behalf and present in Court.

32. Mr. Kelly, in his affidavit, deposes at para. 2:

"Firstly, I will refer to my previous affidavit of 28th January 2013, exhibited as DOR6 in Mr. O'Riordan's present affidavit. I repeat my averments contained therein that I am in possession of the Lewagh farm which I own beneficially, and that the registered owner, Mr. William Butler, has no beneficial interest in these lands. . ."

33. He then refers to earlier information given as to his intention to apply for a possessory title and exhibits a printout from the Property Registration Authority of a pending application, in which he is named as applicant, in relation to Folio 3855 and Folio 3856, County Tipperary, in relation to an application under s. 49 (of the Registration of Title Acts 1964).

34. In relation to his claim to a possessory title, Mr. Kelly states at paras. 5 and 6 of his affidavit:

"5. The merits of my claim to a possessory title of the Lewagh Farm is currently under consideration by the Land Registry and will be dealt with thoroughly and impartially. It is always open to the Plaintiff to issue fresh plenary proceedings if he desires to have my adverse possession claim dealt with by the High Court instead of the Land Registry. However, any such proceedings must be by Plenary hearing as oral evidence from witnesses will be necessary to establish the facts and to properly and fairly try and determine the issue of my claim to adverse possession of the Lewagh Farm.

6. I have dispossessed the legal paper owner, Mr William Butler, over 20 years ago and I have been in exclusive possession of and in receipt of rents and profits from the Lewagh Farm for the past 20 years. The land is currently rented out for tillage to one Mr Michael Moloney for this year. At the minute, Mr Moloney is physically occupying the Lewagh farm and he has no knowledge of or notice whatsoever of these proceedings. I am in sole receipt of rents from Mr Moloney and this is consistent with my claim to exclusive possession and control of the Lewagh farm."

35. The motion for possession was heard on 19th June, 2014. Counsel for the plaintiff submitted that the application now lodged by Mr. Kelly with the Property Registration Authority pursuant to s. 49 of the Registration of Title Act 1964, on the basis of adverse possession, was entirely inconsistent with all prior submissions and averments made, both by Mr. Kelly and by the Butler family in relation to an alleged beneficial interest of Mr. Kelly in the lands by reason of an alleged trust under which Mr. William Butler is stated to hold the lands. He referred, in particular, to submissions made in July/August 2011, when the defendants, other members of the Butler family and Mr. Kelly were represented by Messrs. Kenny Stephenson & Chapman in relation to the alleged trust and the intention to issue proceedings pursuant to s. 22 of the Conveyancing Act 2009, and their failure to take any subsequent step to that effect. Further, he referred to the other affidavits sworn which have been set out previously in this judgment, all of which referred to either a trust, a beneficial ownership or an intention to bequeath the lands to Mr. Kelly. He also relied upon the very considerable delay, in part caused by changes of legal representation, and the time given by the Court to the defendants in relation to the

potential sale to Thurles Truffles Ltd. He submitted that the Court should now approve the sale of the lands in Folio 3855 and Folio 3856, County Tipperary, in consideration of €337,000 and make an order for vacant possession of the properties to facilitate such sale. He submitted that on the facts herein, it was not necessary that Mr. Michael Moloney be served with the application for vacant possession. Mr. Kelly, in his affidavit, deposes that the lands are let to Mr. Moloney this year for tillage. Counsel for the plaintiff submitted that as Mr. Kelly had been in Court on 4th February, 2013, when the order for the sale of the lands by private treaty had been made by Dunne J., with a stay of only two months, Mr. Kelly was aware, at the time of making any letting arrangement with Mr. Moloney, of the pending sale of the property. The Court, at all material times, had been told that Mr. Kelly was the person in possession of the property. Mr. Kelly's recent affidavit was the first mention of Mr. Moloney.

36. Counsel for Mr. William Butler and Mr. William Kelly submitted that the Court should not now either approve the sale of the property or make an order for vacant possession. He submitted that Mr. Kelly was entitled to have his application for a possessory title pursuant to s. 49 of the Registration of Title Act 1964, determined in advance of any such sale.

37. Counsel for Ulster Bank Ireland Ltd. supports the plaintiff's applications. He had previously informed the Court that the Bank having had the property valued was supporting the application for approval of the sale for €337,000.

Conclusion

38. My conclusion is that the Court should now make orders:

1. Approving the sale of the lands in Folio 3855 and Folio 3856, County Tipperary in the Barony of Eliogarty to Calco Farms limited (or Mr. Con Callanan) for the sum of €337,000; and

2. An order pursuant to O. 51, r. 1 of the Rules of the Superior Courts directing that Mr. William Butler, the second named defendant, and Mr. William Kelly, their servants or agents and any person with notice of the making of this order deliver up vacant possession of the lands contained in Folio 3855 and Folio 3856, County Tipperary, to the said purchaser.

39. My reasons for reaching these conclusions are as follows.

40. The only applications currently before the Court are the plaintiff's two motions set out at paras. 1 and 2 of this judgment. The first motion seeks an order approving the sale of the lands in the amount of €337,000, and the second an order for possession of the lands. The order for possession is sought in aid of the proposed sale of the lands.

41. The lands in Folios 3855 and 3856, County Tipperary, are already the subject of orders of the High Court of 20th December, 2010, declaring the plaintiff's judgment mortgage well-charged on the defendants' in the said lands and directing a sale upon the defendants' failure to pay the judgment amount, and, more specifically, the order of 4th February, 2013, ordering the part-sale of the lands by private treaty. There is now no stay on either order. The evidence before the Court on the application for approval of the sale is that the auctioneer, appointed with the approval of the Court, has taken steps (albeit that they are disputed as being adequate) to advertise the sale, received certain specified bids, conducted negotiations and has deposed that the price achieved of €337,000 "represents the open market value of the lands and is a fair price".

42. In addition, Ulster Bank, which holds security over the lands which the defendants have deposed rank in priority to the plaintiff's judgment mortgage, have had the lands separately valued and support the sale of the lands in consideration of €337,000.

43. Whilst the defendants have put evidence before the Court of a higher valuation of the lands, that is based upon a potential development value which is not supported by planning permission or relevant zoning. In addition, the defendants appear to have also sought a purchaser, and when they put evidence before the Court of the potential purchase by Thurles Truffles Ltd. in consideration of €400,000, they were given considerable latitude (which has delayed the approval for the sale sought by the plaintiff) to see if a purchaser with available funds was forthcoming. That has not proved to be the position.

44. On the evidence before the Court, it therefore appears that the only firm offer available for the purchase of the property from a person who has been prepared to enter into the written contract for sale is for a sum of €337,000, which the auctioneer is of the view represents the open market value of the lands, and is a fair price. Hence it appears the Court should now approve that sale.

45. I am satisfied, that given the history of these proceedings, the plaintiff needs an order for possession of the lands in order to be able to ensure that vacant possession is delivered to the potential purchaser, as is required under the contract for sale. The overwhelming evidence before the Court has been that Mr. William Kelly is the person in possession of the lands. I am satisfied that (after some difficulty) he has been served with the application for possession, he was represented at the hearing of the motion for possession and has sworn an affidavit in that application. As set out above, Mr. Kelly deposed, in the affidavit sworn by him on 16th June, at para. 2 that he is in possession of the farm. Whilst he has also deposed at para. 6 that the land is currently rented out for tillage to a Mr. Michael Moloney, it appears to me that it is not necessary for the plaintiff to separately serve Mr. Moloney with notice of this application. Insofar as he has a letting he holds from Mr. Kelly and can have no better entitlement than Mr. Kelly to remain in possession of the lands. I am proposing to place a short stay on the order for possession so as to permit Mr. Moloney reap the benefit of any crops sown this year or grass that he may have fertilised etc. in the course of this year. I will hear counsel about the appropriate date.

46. I am refusing the submission made on behalf of Mr. Kelly that his application to the Property Registration Authority for a possessory title be determined in advance of the decision on these motions. It is not a matter for the Court, on this application, to determine what rights, if any, Mr. Kelly has to the lands in Folios 3855 and 3856, County Tipperary. I am not satisfied that he has put before the Court evidence which would justify the Court adjourning the present application until such time as his claim to a possessory title had been determined. Until the most recent affidavits, all the evidence put before the Court by Mr. Kelly and other members of the Butler family, asserted either a beneficial interest in the lands or an expectation of inheritance. Further, the Court has made an order well-charging the defendants' interests in the lands with the judgment mortgages and it does not appear to have been contended that Mr. William Butler had no interest capable of being so charged. Also, on the undisputed evidence before the Court, as noted at para. 19 of this judgment, the evidence adduced by the defendants is that Mr. William Butler, in 2006, as registered owner of the lands in Folios 3855 and 3856, County Tipperary, was in a position to use the lands as security for borrowings from Ulster Bank to himself and his brother, Mr. Michael Butler, and again, in October 2009, did not object to his solicitor furnishing the original Land Certificate to the Ulster Bank in accordance with an earlier undertaking given. As previously stated, the defendants do not dispute the validity of the security held by Ulster Bank which, by reason of its priority to the plaintiff's claim, will, except in respect of those costs of the plaintiff, which they have agreed should rank in priority, as a matter of probability be paid the greater part of the proceeds of sale.

