THE COURT OF APPEAL

2015, 290

Peart J.
Irvine J.
Hogan J.

BETWEEN/

MUINTIR SKIBBEREEN CREDIT UNION

PLAINTIFF/

APPELLANT

- AND –

CORNELIUS CROWLEY

DEFENDANT/

RESPONDENT

- AND –

BREDA CROWLEY

NOTICE PARTY

2015, 291

BETWEEN/

MUINTIR SKIBBEREEN CREDIT UNION

PLAINTIFF/

APPELLANT

- AND –

BRENDAN HAMILTON

DEFENDANT/

RESPONDENT

- AND –

BREDA HAMILTON

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 13th day of July 2016

1. These two appeals, which were heard together, raise essentially the same issue, namely, whether it would be appropriate to grant an order directing the sale of jointly owned family homes to enable the discharge of a judgment debt obtained by a credit union against one of the spouses? In a judgment delivered in the High Court on 23rd January 2015, White J. refused to grant the plaintiff, Muintir Skibbereen Credit Union ("the Credit Union"), the orders in these two cases which it had sought pursuant to s. 31 of the Land Law and Conveyancing Act 2009 ("the 2009 Act"): see *Munitir Skibberreen Credit Union v. Crowley* [2015] IEHC 107. The Credit Union has now appealed to this Court against this decision.

2. At the hearing of this appeal the Court was informed that this appeal represents the first occasion in which the principles governing the possible partition and sale of a family home have fallen to be considered by either this Court or the Supreme Court following the enactment of s.31 of the 2009 Act and its coming into force on 1st December 2009. This appeal accordingly raises issues of some considerable practical importance.

The factual background to these two appeals

3. The decision of the High Court concerned two separate special summonses issued by the Credit Union against the defendants. In both cases the Credit Union sought a well charging order and the sale of two separate properties which in both instances comprised family homes. In the first appeal (2015, No. 290), the first defendant, Mr. Cornelius Crowley, jointly owns the property comprised in Folio 77272F Co. Cork, with his wife, Ms. Breda Crowley. In the second appeal (2015, No. 291), the first defendant, Mr. Brendan Hamilton, jointly owns the property comprised in Folio 5079F Co. Cork, with his wife, Ms. Breda Hamilton.

4. Both Mr. Crowley and Mr. Hamilton engaged in relatively small scale property development in the general West Cork region. Both defendants obtained loans from the Credit Union for this purpose, but following the property collapse in 2008 ultimately they proved unable to repay these loans. It may be convenient to consider first the particular circumstances of each defendant before proceeding to examine the legal issues which arise.

5. In the case of Mr. Crowley, judgment was obtained by the Credit Union on the 5th October, 2011 for the sum of €562,500 and costs of €355.98. On the 9th December, 2011 judgment was registered in the Land Registry on Folio 77272F Co. Cork. Similarly on the 9th December, 2011, judgment was registered in the Land Registry on Folio 5079F Co. Cork.

6. Mr. Crowley and Ms. Crowley were married on the 9th October, 1993 and they have three children aged 14, 9 and 7 respectively. Ms. Crowley never signed any documentation providing the family home as any security for the commercial loan and nor was she involved in any way in respect of her husband's application for a loan.

7. In the case of Mr. Hamilton, judgment was obtained by the Credit Union on for the sum of €562,500 and €345.98 for costs. Mr. and Ms. Hamilton were married on 2nd May, 1978. They have three children who are no longer dependant. As it happens, both Mr. Hamilton and Ms. Hamilton suffer from ill health. Just as with the case of Ms. Crowley, Ms. Hamilton never signed any documentation providing the family home as security and nor was she involved in any way in respect of her husband's application for a loan.

8. All other property assets which Mr. Crowley and Mr. Hamilton previously owned have subsequently been sold, so that the only properties which remain available to satisfy the judgment debts are the respective family homes.

The judgment of the High Court
9. In the High Court White J. refused to make the orders sought, saying:

"It is within the Court's discretion to decide if it is appropriate to grant the well charging order, and to order partition and sale. The Court in its discretion refuses the application of the plaintiff in respect of both defendants, for the following reasons:

> "(1) Both the properties are the family homes of the respective defendants.
>
> (2) Breda Crowley and Breda Hamilton, the spouses of the respective defendants, were never consulted about the commercial loan drawn down by the defendants from the plaintiff.
>
> (3) The spouses, Breda Crowley and Breda Hamilton, never signed any documentation providing the family home as security.
>
> (4) The personal circumstances of Breda Crowley with responsibility for three dependant children of ages 13, 8 and 6 and those of Mrs. Hamilton who is suffering from ill health are taken into account by the Court.
>
> (5) Both defendants are in serious debt, and 50% of the net proceeds of any sale of the family homes due to the spouses, would not provide either family with sufficient resources to purchase another family home.
>
> (6) The orders sought by the plaintiff are refused."

The jurisdiction of the High Court to order partition or sale under s.31 of the 2009 Act
10. The jurisdiction of the High Court to order partition or sale is now set out in s. 31 of the 2009 Act. This section provides:

> "(1) Any person having an estate or interest in land which is co-owned whether at law or in equity may apply to the court for an order under this section.
>
> (2) An order under this section includes:-
>
> (a) an order for partition of the land amongst the co-owners,
>
> (b) an order for the taking of an account of incumbrances affecting the land, if any, and the making of inquiries as to the respective priorities of any such incumbrances,
>
> (c) an order for sale of the land and distribution of the proceeds of sale as the court directs,
>
> (d) an order directing that accounting adjustments be made as between the co-owners,
>
> (e) an order dispensing with consent to severance of a joint tenancy as required by section 30 where such consent is being unreasonably withheld,
>
> (f) such other order relating to the land as appears to the court to be just and equitable in the circumstances of the case.
>
> (3) In dealing with an application for an order under subsection (1) the court may:-
>
> (a) make an order with or without conditions or other requirements attached to it, or
>
> (b) dismiss the application without making any order, or
>
> (c) combine more than one order under this section.
>
> (4) In this section:-
>
> (a) 'person having an estate or interest in land' includes a mortgagee or other secured creditor, a judgment mortgagee or a trustee,
>
> (b) 'accounting adjustments' include:-

(i) payment of an occupation rent by a co-owner who has enjoyed, or is continuing to enjoy, occupation of the land to the exclusion of any other co-owner,

(ii) compensation to be paid by a co-owner to any other co-owner who has incurred disproportionate expenditure in respect of the land (including its repair or improvement),

(iii) contributions by a co-owner to disproportionate payments made by any other co-owner in respect of the land (including payments in respect of charges, rates, rents, taxes and other outgoings payable in respect of it),

(iv) redistribution of rents and profits received by a co-owner disproportionate to his or her interest in the land,

(v) any other adjustment necessary to achieve fairness between the co-owners.

(5) Nothing in this section affects the jurisdiction of the court under the Act of 1976, the Act of 1995 and the Act of 1996.

(6) The equitable jurisdiction of the court to make an order for partition of land which is co-owned whether at law or in equity is abolished."

11. It has been stated that s. 31 gives the court "a free hand in deciding what the appropriate order is" and that the use of the permissive "may" in s. 31(3) "reiterates the court's discretion": see Wylie, *The Land and Conveyancing Law Reform Act 2009: Annotation and Commentary* (Dublin, 2009) at p. 128. But before considering the extent to which s. 31 of the 2009 Act changed the law, it is necessary first to examine the pre-2009 Act legislation and case-law.

The jurisdiction of the Court to order partition and sale prior to the 2009 Act

12. The power of the Court to order partition and sale was previously set out in ss. 3 and 4 of the Partition Act 1868 ("the 1868 Act"): see generally, Mee, "Partition and Sale of the Family Home" (1993) 15 D.U.L.J. 78 and Conway, *Co-Ownership of Land: Partition Actions and Remedies* (Dublin, 2012) at p. 167 *et seq.* As Finnegan J. observed in *Irwin v. Deasy* (No.2) [2011] IESC 15, [2011] 2 I.R. 752, ss. 3 and 4 of the 1868 were the first statutory provisions to confer a judicial power of sale in lieu of partition.

13. Section 3 of the 1868 Act provided:

"3. In a suit for partition, where, if this Act had not been passed a decree for partition might have been made, then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct sale of the property accordingly, and may give all the necessary or proper consequential directions."

14. As Finnegan J. noted in *Irwin (No.2)*, s. 3 of the 1868 Act only applied to those cases "where prior to the passing of the Act a decree for partition might have been made." Furthermore, the power to order sale in lieu of partition was discretionary and would be exercised only where the court was satisfied "that a sale would be more beneficial for the parties interested than a division."

15. Section 4 of the 1868 Act provided as follows:-

"In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

16. Just as in the case of s. 3, s. 4 only applied in those cases where a decree of partition might have been granted prior to the enactment of the 1868 Act. The section further required the court to order a sale on the application of an "interested party" unless the court saw "good reason" to the contrary. As Finnegan J. observed in *Irwin (No.2)* [2011] 2 I.R. 752, 780):

"A mortgagee is a party interested and will be reckoned in the proportion of his interest under the section: *Davenport v King* 29 L.T. 92. The onus rests on the person opposing sale to establish a good reason why it should not be ordered otherwise the court is bound to order it: *Penderton v Barnes* 6 Ch. 693. There are many authorities as to what will or will not amount to a good reason: where partition was as easy as a sale and would cause no loss to the plaintiff, while a sale would cause great loss to the defendant and the action was vindictive, this was held to be a good reason: *Saxton v Bartley* 48 L.J.Ch. 519, *Re Langdale* I.R. 5 Eq. 572."

17. In *Irwin (No.2)* the Supreme Court held that a judgment mortgagee was not a person interested for the purposes of s. 4 of the 1868 Act. In arriving at this conclusion Finnegan J. noted that in *Mahon v. Lawlor* [2010] IESC 58, [2011] 1 I.R. 311 the Supreme Court had held that by virtue of the provisions of s. 71 of Registration of Title Act 1964, a judgment mortgage of registered land operated only as a charge and not as a mortgage. It followed, therefore, that a judgment mortgagee of registered land had no entitlement to apply for partition and sale under the 1868 Act, precisely because it was not an actual mortgage.

18. In *Mahon v. Lawlor* the Supreme Court ruled that a judgment mortgage in respect of registered land did not survive the death of the joint tenant. This was because the right of survivorship was an incident of the original grant and because the survivor, as Finnegan J. put it ([2011] 1 I.R. 311, 321):

"takes not by way of descent from the deceased joint tenant, but by virtue of the original grant. It follows accordingly that any burden created on the interest of a joint tenant cannot continue to affect the lands after his death."

19. The decision in Mahon was governed by the pre-2009 Act law and it should be noted that the 1868 Act was repealed in its entirety by the 2009 Act: see s. 8(3) of the 2009 Act and Schedule 2, Part 4. In *Mahon* Finnegan J. observed that the position of judgment mortgagees was nonetheless not altered by the 2009 Act: s. 30(3) of the 2009 Act expressly provided that the registration

of a judgment mortgage did not sever the joint tenancy and that the judgment mortgage was extinguished upon the death of the judgment debtor.

20. Finnegan J. also pointed out one important change which had been effected by s. 31 of the 2009 Act, in that a judgment mortgagee was expressly included in the definition of a person "having an estate or interest in land": see s. 31(4)(a) of the 2009 Act. Section 117(1) of the 2009 Act further states that the registration of a judgment mortgage under s. 116 operates to charge the judgment debtor's estate or interest in land and entitles "the judgment mortgage to apply to court for an order under…s. 31." It follows, therefore, that unlike the position in *Irwin (No.2)*, the Credit Union is entitled to apply *qua* judgment mortgagee for the s. 31 relief sought in the present case.

21. In *Mahon* Finnegan J. also took the opportunity to remark on the breadth of the jurisdiction conferred by s. 31 of the 2009 Act ([2011] 1 I.R. 311, 323):

> "Thus the Act confers upon a judgment creditor the right to apply for any of the orders mentioned in s. 31(2). It would be of assistance to those called upon to advise judgment creditors and judgment debtors and indeed to the courts if the Act gave guidance as to the basis upon and circumstances in which the courts will exercise the discretion conferred by s. 31(3). In the absence of such guidance the circumstances in which, for example, a judgment creditor will be granted or refused an order for sale must wait the development of jurisprudence on a case by case basis."

22. Finnegan J. then described the effect of s. 117 of the 2009 Act which gives the court a general power to take inquiries regarding other incumbrancers and to grant an order for sale. He then commented ([2011] 1 I.R. 311, 324):

> "Section 117 does not make any clearer the provisions of s. 31 as to the basis upon and circumstances in which the courts should exercise the discretion conferred. For this reason it is to be regretted that the opportunity presented by the Act of clarifying fully the reliefs and remedies available to a judgment creditor for the benefit of both the judgment creditor and the judgment debtor was not availed of by the Legislature."

23. While these comments – which are admittedly *obiter* - cannot be gainsaid, the task nonetheless falls on this Court to endeavour to apply s. 31 of the 2009 Act to the circumstances of the present cases under appeal. Some guidance can also nonetheless be gleaned from earlier pre-2009 Act case-law, even if some of that case-law proceeded on the assumption – which was later found to be erroneous by the Supreme Court with its decision in *Irwin (No.2)* – that a judgment mortgagee was entitled to apply for an order for sale under s. 4 of the 1868 Act and even again if the discretion conferred by s. 31 of the 2009 Act is, at first blush, at least, more extensive than that which had been conferred by ss. 3 and 4 of the 1868 Act.

24. The starting point is that the discretion conferred by s. 31 of the 2009 Act must be exercised in a constitutional fashion in accordance with standard *East Donegal* principles (*East Donegal Co-Operative Livestock Marts Ltd. v. Attorney General* [1970] I.R. 317). This means that, where appropriate, the Court must endeavour to balance and respect competing constitutional rights, including the property rights of the judgment mortgagees and those of the spouses.

25. The second factor is that the lending by the Credit Union in both instances was unsecured and personal to each judgment debtor. This had the consequence that neither Ms. Crowley nor Ms. Hamilton were consulted regarding the taking out of these loans by their respective spouses and neither were they required to sign or execute any documentation. It is true that, strictly speaking, the Family Home Protection Act 1976 ("the 1976 Act") has no application to the present case, because as Carroll J. ruled in *Containercare Ltd. v. Wycherley* [1982] I.R. 143, the consent of the non-borrowing spouse is not required under s. 3 of that Act in the case of the registration of a judgment mortgage. As Carroll J. stated ([1982] I.R. 143, 149-150):

> "A judgment mortgage is a process of execution…A judgment mortgage, if registered against a family home is not a disposition by a spouse purporting to convey an interest in the family home. It is a unilateral act by a judgment creditor."

26. While I do not suggest in any way that *Containercare* was wrongly decided, this Court must nonetheless be faithful to the underlying statutory objectives of the 1976 Act. In this regard it may be noted that s. 31(5) of the 2009 Act expressly stated that nothing in that section "affects the jurisdiction of the court" under the 1976 Act. This in itself is a clear signal from the Oireachtas that the s. 31 jurisdiction should be exercised in a manner which was consistent with the objectives of the 1976 Act.

27. The 1976 Act itself reflected a fundamental policy choice made by the Oireachtas which – reflecting constitutional values embraced in both Article 40.5 (inviolability of the dwelling) and Article 41 (protection of family life) - sought to prevent the sale or disposal of the family home by the *unilateral act* of one spouse at the expense of the other. That objective would be seriously compromised if a family home which the couple co-owned could be effectively sold by court order over the heads of the wives in the present cases given that they had no involvement in the business affairs of their respective husbands and, critically, where they had never been given a prior opportunity to consent to such loan transactions. The situation would, of course, have been very different had the wives in question been parties to such transactions or if they had otherwise consented to the loan agreements which had given rise to the judgment mortgages in the first place. This never occurred in either of the present cases.

28. This approach is consistent with the reasoning found in a number of pre-2009 Act cases. Thus, for example, in *First National Building Society v. Ring* [1991] IEHC 2, [1992] 1 I.R. 375 – where the underlying facts were quite similar – Denham J. refused to direct an order for sale of a family home under s. 4 of the 1868 Act, saying ([1992] 1 I.R. 375, 379:

> "She is the joint owner of the family home to the purchase of which she contributed a great deal. The premises are the family home and are central to family life and its location is central to the family activities and education. If the family home were sold the disruption to family life would be enormous and very detrimental. She would be unable to purchase another dwelling house with her share of the net proceeds of the sale of the home and her family would be homeless and destitute. She is an innocent party. No judgment has been obtained against her. She shares no guilt or blame for any actions of [her husband."

29. Denham J. then later added ([1992] 1 I.R. 375, 380):-

> "There is no valuation of the premises now or at other relevant times. There is no determination of the various proportions and shares of any other interests in the property. Clearly it is in the second defendant's interest to try to retain this property, if at all feasible. This matter has not been enquired into at all. There is no information on the real likelihood of sale of this house. The court would not ordinarily make an order which would be futile.

> The second defendant who is a co-owner and who is an innocent party and has no judgment registered against her would undoubtedly suffer a significant sacrifice if her property, part of the family home, were sold now. In these circumstances it does not appear appropriate now to order partition or sale in lieu of partition."

30. This is precisely the position here. It is true that the rights of the judgment mortgagee are liable to be defeated if the two family homes in question are not sold. But the Credit Union's entitlements cannot prevail as against the rights of the two innocent parties, namely, Ms. Crowley and Ms. Hamilton, who had nothing to do with these transactions and who did not give formal consent to them. In any event, as, moreover, Denham J. indicated in *Ring*, partition of a family home in these circumstances is not a realistic possibility and the sale of a divided moiety of a family home would not represent a marketable title, even if such a thing were possible.

31. Counsel for the Credit Union, Mr. Dwyer S.C., drew attention to a line of case-law where the High Court examined the possibility of a sale of a family home in circumstances where the net equity remaining from the proceeds of sale would be sufficient to enable the innocent spouse to purchase another property: see *First National Building Society v. Ring, Drillfix Ltd. v. Savage* [2009] IEHC 540 and *Trinity College, Dublin v. Kenny* [2010] IEHC 20.

32. It is true that the decision of Laffoy J. in *Kenny* certainly stuck a different emphasis to that of Denham J. in *Ring*. In *Kenny* the family home in question was a valuable one. The judgment debtor and his wife were both in their late 70s and their children were no longer living at home. The evidence was that the sale of the property would leave Ms. Kenny with sufficient resources to purchase another property:

> "Counsel for the plaintiff acknowledged that there will be a degree of disruption to the lives of Mr. Kenny and Mrs. Kenny if they are required to vacate the Dartry property which has been their home for fifteen years in consequence of a Court sale. However, the position of the plaintiff is that Mrs. Kenny will have sufficient resources to provide alternative accommodation for herself and Mr. Kenny in the event of the Court ordering a sale of the Dartry property. That, it seems to me, is the correct inference to draw from the evidence. It is the crucial factor in determining whether the Court's discretion should be exercised in favour of ordering a sale at this juncture."

33. It is again unnecessary for the purposes of the present case to consider the extent to which (if at all) the potential availability of a sufficient net equity after the sale of a family home might be a relevant consideration in respect of an application of this kind. It may well be – as Laffoy J. seemed to suggest in Kenny – that in an appropriate case the provisions of s. 4 of the 1976 Act might be applied by analogy in order to guide any court called upon to exercise the jurisdiction which is now conferred by s. 31 of the 2009 Act.

34. While s. 4(1) of the 1976 Act allows the courts to dispense with the consent of a spouse to a particular sale, s. 4(2) provides that the court:

> "….shall not dispense with the consent of a spouse unless the court considers that it is unreasonable for the spouse to withhold consent, taking into account all the circumstances, including:
>
> (a) the respective needs and resources of the spouses and of the dependent children (if any) of the family, and
>
> (b) in a case where the spouse whose consent is required is offered alternative accommodation, the suitability of that accommodation having regard to the respective degrees of security of tenure in the family home and in the alternative accommodation."

35. But whatever *might* possibly be the situation where the sale of a particular family home would leave the innocent spouse with a net equity sufficient to purchase another property – as was the case in *Kenny* - this possibility simply does not arise in either of the two cases under appeal. In this respect, it is sufficient to say that in the judgment under appeal White J. found that, as both defendants were in serious debt, "50% of the net proceeds any sale of the family home due to the spouses would not provide either family with sufficient resources to purchase another family home." This is a finding which White J. was clearly entitled to make on evidence available to him and therefore, applying standard Hay v. O'Grady principles (*Hay v. O'Grady* [1992] 1 I.R. 210), this Court cannot interfere.

Conclusions

36. In these circumstances it follows that, for the reasons just given in this judgment, this Court should not make an order for sale of the family homes in question pursuant to s. 31(2)(c) of the 2009 Act. I reach this conclusion principally because the effect of any such order would be to direct the sale of the family home over the wishes of the innocent spouse who was not a party to the loan transaction which gave rise to the judgment mortgage in the first instance and who had never formally consented to same.

37. It is unnecessary to express any concluded view as to whether the fact that the innocent spouse might be in a financial position to purchase another family home were the existing family home to be sold at the behest of the judgment creditor is a relevant factor in an application of this kind. The resolution of that issue will have to await another and more appropriate case. It is sufficient to say that even if this were a relevant consideration, it would not assist the Credit Union in the present case, given the findings of White J. to the effect that the net equity which would be available to Ms. Hamilton and Ms. Crowley for this purpose followed a sale of the respective family homes would not be sufficient to enable either of them to purchase alternative accommodation.

38. The Credit Union are, of course, perfectly entitled to the appropriate well-charging orders in respect of both properties. But since I consider that White J. was correct in the conclusions he reached in declining to make an order for sale under s. 31(2)(c) of the 2009 Act, I would otherwise dismiss the appeal.