

THE HIGH COURT

[RECORD NO. 2012/375SP]

BETWEEN

ADM LONDIS LIMITED COMPANY

PLAINTIFF

AND

AIDAN FLYNN

DEFENDANT

JUDGMENT of Ms. Justice Quinn delivered on the 6th day of December, 2018

1. This is an application by Allied Irish Banks Plc ("the Claimant") for an order pursuant to Order 55 Rule 50 of the Rules of the Superior Courts to vary or discharge the Certificate of the Examiner issued in these proceedings dated 3rd of October, 2018. The relevant provisions of Order 55 are as follows:-

Rule 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."

Rule 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."

Rule 49: -

"Every certificate, with the accounts (if any) to be filed therewith, shall be transmitted by the Examiner to the Central Office and there filed, and shall thenceforth be binding on all parties to the proceedings unless discharged or varied upon application by motion of which notice shall have been served within eight days of such filing; provided that in case of an application to discharge or vary any certificate to be acted upon by the Accountant without further order, or any certificate on passing receivers' or liquidators' accounts, the notice shall be served within three days after the filing of the certificate."

Rule 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."

2. On 18th of January, 2007, the defendant granted a mortgage to the Claimant and AIB Mortgage Bank. The mortgage was registered in the Land Registry on 21st of October, 2009 and attached to part of the property of the defendant comprised in Folio 684 Co. Waterford.

3. On 20th of April, 2011, the Claimant obtained judgment against the defendant for the sum of €550,000.

4. On 28th of June, 2011, the plaintiff obtained judgment against the defendant for the sum of €157,000.

5. On 25th of August, 2011, the plaintiff registered a judgment mortgage against the defendant's interest in Folio 684.

6. On 15th of February, 2013, the Claimant registered a judgment mortgage against the same Folio.

7. In 2012, the Plaintiff commenced these proceedings. On 3rd of December, 2012, a well charging order and order for sale was made by the Court which inter alia directed the Examiner to conduct an enquiry as to encumbrances. Ultimately the property comprised in Folio 684 was sold for €110,000.

8. Following the publication of an advertisement for incumbrancers, the sitting to prove claims was first listed before the Assistant Examiner of the High Court on 13th of September, 2013.

9. At the first sitting, the Examiner was not satisfied with the proofs submitted on behalf of the Claimant. The Claimant's solicitor, Mr Donnachadha Murphy of Messrs. Barry C. Galvin, avers that the Examiner directed that a supplemental affidavit be filed addressing three distinct matters, namely to exhibit the mortgage deed, to produce a copy of the judgment obtained and to clarify the description of the entry on the Folio. The sitting was adjourned to 8th of October, 2013.

10. The Claimant filed a supplemental affidavit on 13th of September, 2013, and further sitting took place before the Examiner on 8th of October, 2013.

11. At the adjourned sitting the Examiner did not admit the claim of the Claimant. Mr Murphy, states in his affidavit sworn on 14 of November, 2018 that at this sitting

"...further issues were raised by the Assistant Examiner regarding the documentation regarding (sic) his understanding of the correct party to whom the Claimant's debt was owed."

12. No further proofs were submitted by the Claimant and no further sitting to prove the claims was held. The plaintiff advanced these proceedings before the Court securing on 19th of May, 2014, the order for possession, and ultimately, the sale of the property

for €110,000.

13. The sale of the property having completed, on 25th of September, 2018, notice was issued of a sitting before the Examiner on 3rd of October, 2018 to settle the Certificate of Encumbrances. The Plaintiff and the Claimant were represented at that sitting. Following that sitting, the Certificate of the Examiner was issued on 3rd of October, 2018, stating that the Claimant's claim had "not been admitted pursuant to the ruling of the Assistant Examiner dated 8 October, 2013."

14. On 9th October, 2018 an application was filed by the Claimant pursuant to Order 55 Rule 49 to discharge or vary the certificate. When that application came before the Examiner on 22nd of October, 2018, the Examiner ruled that the application was incorrectly before him and that an application should be brought before the Court itself under Order 55 Rule 50. This is the hearing of that application.

15. This application is grounded on affidavits of Mr Murphy sworn on 25th of October, 2018 and 14th November, 2018. The Court has also been referred to an affidavit sworn by Mr Murphy on 9th of October, 2018.

16. The claimant submits that there can be no circumstances in which its mortgage granted 18th of January, 2007, and registered on 21st of October, 2009, can cede priority to the Plaintiff's judgment mortgage registered later in time.

17. The Claimant submits that when the plaintiff was progressing these proceedings it did so at all times on notice that the Claimant was relying on its mortgage. It refers also to its appearances before the Examiner, and before the Court when the well-charging possession and sale proceedings were listed.

18. The Claimant refers to certain correspondence and communications between it and its solicitors on the one hand, and the Plaintiff (directly) and its solicitor on the other hand. There was some debate as to whether these communications were on a "without prejudice" basis, but for the reasons which follow it is unnecessary to determine that question.

19. While those communications did not result in any concluded agreement, they were a bona fide effort on the part of the plaintiff to secure agreement with the Claimant to share the costs associated with the proceedings which have been necessary to secure the sale of the subject property. The plaintiff opened these communications for fear that the claim of the Claimant would, if admitted, take such priority over the plaintiff's claim that the proportion of the net proceeds of the sale available to the plaintiff would be lower than the costs it had incurred. If the Claimant's claim were admitted it would indeed enjoy priority and the plaintiff's concerns were therefore valid.

20. Of central importance in this correspondence, and upon which the Claimant relies, is a letter written on the 29th of June, 2017, from a Ms. Sarah Brophy, solicitor for the plaintiff, to Barry C. Galvin & Co., solicitor for the Claimant. In that letter Ms. Brophy proposed an agreement whereby the cost of the proceedings would be apportioned in proportion to the amount the respective parties could expect from the proceeds of the sale i.e. twenty percent to the plaintiff and eighty percent to the Claimant. This arose because part of the property sold was outside the scope of the Mortgage. The attraction of the proposal was that since a buyer had then been found, the plaintiff could bring the court sale which it had initiated to a conclusion and apportion the proceeds on this basis. If the plaintiff were to discontinue because it could receive so little or nothing, the Claimant would have needed to pursue its own proceedings to secure the sale. The agreement was never concluded. However, in the letter of 29 June 2017, Ms Brophy states:

"The predicament for ADM Londis is that it would appear that we may only be entitled to circa. 20% of the sale of proceeds with AIB perhaps being entitled to the balance (*subject to the various claims being admitted*)."

(emphasis added)

21. This letter is relied on by the Claimant as acceptance and acknowledgement that the Claimant had a first legal charge which ranked in priority to the plaintiff's judgement mortgage. In fact the letter notes that such a position was "subject to the various claims being admitted."

22. Further exchanges took place between the parties in which the plaintiff pressed the claimant for a response to the proposal.

23. On 25th of October, 2017, Messrs. Galvin said, "The bank has finally reverted and asked for a marketing report from the plaintiff's auctioneer together with the proposed costs and outlays."

24. This correspondence ended without any concluded agreement.

25. Nowhere in the Claimant's communications did it release or waive its claim. On the other hand, whilst on notice that the plaintiff was progressing the proceedings and the sale of the property it did not submit any further proofs to the Examiner, thereby leaving stand the ruling made on 8th October, 2013 which is now recorded in the Certificate.

26. Having referred in his affidavit of the 14th of November, 2018, to the sittings before the Examiner on the 13th of September and 8th of October 2013. Mr Murphy does not state what answer the Claimant made to the issue raised by the Examiner, and the record shows that no further proofs were submitted by the Claimant. This could have been done by filing a further affidavit and attending before the Examiner. Alternatively, if the Claimant was aggrieved at the ruling of the Examiner in those sittings it could have moved pursuant to Order 55 Rule 48 to take the opinion of the Court on the matter.

27. In the affidavit of Mr. Murphy sworn on 9th of October, 2018 Mr Murphy refers to the Certificate dated 3rd of October, 2018. He says that the Examiner

"erred in failing or refusing to admit the Claimant's claim pursuant to [the Mortgage] ... in circumstances where the said charge was registered on behalf of both AIB Mortgage Bank and Allied Irish Banks Plc at numbers 2a and 2b of Part 3 of Folio 684 in the Land Registry on 21st of October, 2009."

28. The fact of registration of the mortgage with the Property Registration Authority is not in dispute. However, this does not of itself relieve the Claimant from the obligation to prove its debt and security before the Examiner in these proceedings. The Claimant cannot simply assert that it was relying at all times on its security when it knew that for the purpose of these proceedings, the function of which is to determine the ultimate distribution of the sale proceeds, the Examiner, charged with the authority of adjudicating claims of encumbrancers, had not admitted the claim.

29. Order 55 Rule 50 of the Rules of the Superior Courts requires the applicant to establish that after a certificate has become binding on the parties, there exists "special circumstances" warranting the Court to discharge or vary the certificate. Neither the affidavits or the submissions of the Claimant refer the Court to circumstances the Claimant characterises as special. Firstly, as regards the ruling of the Examiner, the claimant refers the Court only to the fact of registration of the Mortgage relied on. That fact is not in dispute and was known to all parties, including the Examiner, when making his ruling on 8th October 2013. Secondly, as regards other events referred to in the affidavit, I have already summarised the Court's conclusion that nothing in the communications between the parties relieves the Claimant from the requirement to prove the claim to the Examiner which the Claimant failed for five years to do whilst on notice of the ruling of the Examiner and the progression of the proceedings. The Claimant would also have known or been advised that the distribution of the sale proceeds following completion of the sale would be governed by the result of the adjudication of claims and encumbrances.

30. The Court has been referred to substantive case law regarding priorities as between a judgement mortgage and a prior charge, notably *Tempany v Hynes* [1976] IR 101 and *Larianov Foundation v Leo Prendergast and Sons (Engineering) Limited* [2017] IEHC 192. That a later judgement mortgage cedes priority to a prior charge is clear. However, in mortgage suits the regime whereby the proceeds of a court ordered sale are distributed in accordance with a Certificate which results from an examination of the claims and encumbrances by the Examiner of the High Court, requires that a claimant submit his proofs to the satisfaction of the Examiner, and cannot simply assert that, while failing to advance the proofs before the Examiner, he relies on his security. The facts and events in this case do not amount to special circumstances which warrant the discharge or variation of the Certificate and accordingly the application is dismissed.