

## THE HIGH COURT

2013 559 SP

BETWEEN

OWEN WHYTE

PLAINTIFF

AND

WALTER COSGRAVE AND PAULINE COSGRAVE

DEFENDANTS

**EX TEMPORE JUDGMENT of Mr. Justice O'Connor delivered on the 11th day of April, 2016.**

1. After the exchange with the Court last Wednesday the 6th of April, 2016, senior counsel for the plaintiff in his reply to submissions of Mr. Power, counsel for the first named defendant, and Mr. Duggan for the second named defendant confined the application in these proceedings (commenced by special summons issued on the 1st of October, 2013 as verified by the plaintiff in his affidavit sworn on the 22nd of August, 2013) to seeking:-

(3) An order for partition of the lands and house comprised in Folio 68629L Co. Dublin pursuant to s.31(2)(a) of the Land and Conveyancing Law Reform Act, 2009 ("the 2009 Act") and

(7) An order directing all necessary consequent accounts and enquiries.

2. The Court gave liberty to counsel for the defendants to file written submissions and to senior counsel for the plaintiff to complete his reply today, Monday the 11th of April. Counsel for the plaintiff explained that all matters had been addressed already which had been covered in the written submissions.

3. Firstly the Court expresses its appreciation of the research and written submissions completed in such a short time frame by counsel for the defendants.

**Facts**

4. The relevant facts might be summarised as follows:-

1) The defendants were registered as joint owners of 66 Plunkett Avenue, Finglas on the 5th of February, 1987, the defendants having paid IR£16,500 for the house.

2) The second named defendant ("Mrs. Cosgrave") contributed significantly to the repayment of the loan used to redeem the mortgage. She has lived there since 1987. It is a family home which is visited and used by her children, grandchildren and great grandchildren including a special grandson with needs for respite.

3) On the 9th of April, 2008 the late Feeney J. awarded, in uncontested proceedings a sum of €450,000 to the plaintiff against the first named defendant ("Mr. Cosgrave"). Some relatively small credit for that judgment was due to Mr. Cosgrave arising from the terms of his sentence following his conviction in criminal proceedings for the same events leading to the prosecution and the judgment of Feeney J.

4) On the 15th of February, 2010 a judgment mortgage was registered against Mr. Cosgrave on Folio 68629L which contained the said family home.

5) Without seeking to engage either of the defendants in the process of realising that judgment mortgage, the plaintiff swore a short verifying affidavit for the special summons on the 22nd of August, 2013. The only fact which was incorrect in that affidavit was the reference to the actual affidavit relied upon for registering the judgment mortgage; nothing really turns on that point. The plaintiff's solicitor corrected the error in a supplemental affidavit and explained how another affidavit was filed as a result of the commencement of the 2009 Act with effect from the 1st of December, 2009.

6) Mr. Cosgrave served a notice to cross examine the plaintiff on his affidavit and the Court has already ruled that cross examination of the plaintiff on that affidavit will not advance matters and will probably not assist the defendants.

7) Only after the defendant had served the replying affidavit to the plaintiff's affidavit and the first affidavit of the plaintiff's solicitor, did Mrs. Cosgrave receive a letter dated the 10th of July, 2014 seeking the consent of Mrs. Cosgrave to the partition of the family home pursuant to s.31(2)(a) of the 2009 Act. This was on the eve of a hearing in these proceedings on the 10th of July, 2014.

8) The plaintiff for reasons which have not been clarified on affidavit has not advanced any material fact for consideration by this Court in relation to the exercise of the Court's jurisdiction and discretion to make the orders now sought.

9) On the other hand Mrs. Cosgrave makes the following points that are not contradicted:-

(i) She did not know of the claim in these proceedings until they were served and explained to her;

(ii) She has maintained the house and has paid significantly to the repayments and upkeep of same;

(iii) Her only income is now a pension and she would not be able to purchase another family home if forced to do so by an

order of this Court during her lifetime.

10) Mr. Cosgrave while not denying his liability to the plaintiff stresses:-

(a) The fact that the property has been his wife's family home for the last 28 years or more now;

(b) the fact that the plaintiff has refused or omitted to explain how it would not be grossly unfair to Mrs. Cosgrave to partition the house.

### **Decision**

5. The 2009 Act modernised the law in relation to this area and it is fair to say that in future there should be a process of engagement between a judgment mortgage creditor and innocent third parties who are joint owners of a property with the judgment mortgage debtor prior to the issue of proceedings. Simply to seek one or more of the orders envisaged in s.31 (2) of the 2009 Act without some prior consultation with each of the relevant parties is counter productive. The onus rests on a judgment mortgage creditor to establish the reasons for severing effectively a joint tenancy when seeking partition, sale or whatever.

6. Section 30(3) of the 2009 Act clarifies for all cases now that registration of a judgment mortgage does not sever the joint tenancy.

7. The partition order now sought by the plaintiff will probably be "futile" which was the word used by Denham J. in *First National Building Society v. Ring* [1992] 1 IR 375.

8. Further such an order will lead to unnecessary costs and stress to Mrs. Cosgrave. The plaintiff has not advanced any reason why partition should be directed other than for his desire for some part payment of the debt owed by Mr. Cosgrave which has nothing to do with Mrs. Cosgrave.

9. It is not the case that the property could be physically divided and one part of the family home sold. Mrs. Cosgrave's assertion about her inability to get alternative accommodation is unchallenged.

10. The Court for the reasons outlined and in exercising its discretion refuses to make the orders sought.

11. Finally by way of obiter the Court notes that following a period of engagement prior to the issue of this type of proceedings in the future, it may be open to a judgment creditor to apply merely for an order severing the joint tenancy and declaring the tenancy to be a tenancy in common with or without conditions, provided the judgment creditor satisfies the Court that the innocent joint tenant has unreasonably withheld consent.

12. Hopefully wisdom will be accumulated in the next few years "to obviate another judgment creditor being impaled on the *chevaux de frise* for the regulation of judgment mortgages" as Laffoy J. said when adopting the wording of the Royal Commission some 130 years ago in *Irwin v Deasy* [2006] 2 ILRM 226; [2011] 2 IR 752, 768 at para. 29. The Court renews this statement and more particularly for applications that will be made under the 2009 Act.