

THE HIGH COURT

[2015 No. 211Sp]

BETWEEN

A.D.M. MERSEY PLC

PLAINTIFF

AND

JAMES (OTHERWISE KNOWN AS JIM) BERGIN AND NICOLA BERGIN

DEFENDANTS

AND

EIMEAR BERGIN AND CIARAN BERGIN

NOTICE PARTIES

**JUDGMENT of Mr. Justice Allen delivered on the 14th day of January, 2020**

**Introduction**

1. This case raises a novel question of law as to the effect, since the enactment of the Land and Conveyancing Law Reform Act, 2009, of the registration of a judgment mortgage against the interest of a joint tenant of land, where one of the joint tenants is a judgment debtor but the other is not.

**Facts**

2. On 16th July, 2010 the plaintiff, by its then name of ADM Londis plc, marked judgment against the defendants, Mr. James Bergin and Mrs. Nicola Bergin, for €604,029.06 and €315.98 for costs.
3. On 9th September, 2010 that judgment was registered as a burden on Folio 7642, County Kilkenny, against the interest of James Bergin in that property. James Bergin was at that time, and since 27th January, 1992 had been, registered as the owner of the folio, jointly with his father Mr. Kieran Bergin.
4. On 8th May, 2013 Kieran Bergin and James Bergin executed a form of transfer which recited their desire to sever their joint tenancy and transferred the lands to themselves as tenants in common in equal shares. On 3rd May, 2017 Kieran Bergin and James Bergin were so registered on the folio.
5. On 29th April, 2013, shortly before the severance or purported severance of the joint tenancy, Kieran Bergin had executed a codicil to his will, by which he bequeathed his interest in the land in Folio 7642, County Kilkenny, to his granddaughter, Eimear Bergin, and his grandson Ciaran Bergin. The inference is irresistible, and the fact was confirmed by an affidavit of Mr. Kieran Bergin's solicitor, that the object of the transfer and the codicil was to protect his interest in the lands from his son's creditors. Mr. Kieran Bergin was then 87 or 88 years of age.
6. By special summons issued on 15th July, 2015 the plaintiff applied for a declaration that the judgment mortgage stood well charged on the interest of the defendants in the property, and for orders under ss. 31 and 117 of the Land and Conveyancing Law Reform Act, 2009 for partition of the lands or for a sale and distribution of the proceeds, and for the usual orders for accounts and enquiries.

7. The summons named James Bergin and Nicola Bergin as defendants. It was slightly surprising that Mrs. Bergin was named as a defendant because she had no apparent interest either in the lands the subject of the present application or in the lands comprised in another folio in the sole name of Mr. James Bergin, on which the judgment mortgage had also been registered. Since the substantive relief claimed was an order for the partition or sale of lands of which Mr. Kieran Bergin was registered as a co-owner, it was, I thought, very surprising that he was not named as a defendant.
8. By order of the High Court made on 20th June, 2016 the judgment mortgage was declared to be well charged on the defendants' (sic.) interest in the lands and the claim for the balance of the reliefs was adjourned.
9. Mr. Kieran Bergin died on 22nd August, 2018.
10. The special summons came back into the list in March 2019, on notice to Mr. James Bergin and Mrs. Nicola Bergin, but not to the legal personal representatives of Mr. Kieran Bergin. By then, the plaintiff's solicitors had established that Mr. Kieran Bergin had died, and they had established by an up-to-date search that the land was registered in the names of James Bergin and Kieran Bergin as tenants in common. The plaintiff's position was that whatever might have been done after the judgment mortgage was registered was irrelevant since, it was said, the effect of survivorship was that Mr. James Bergin was solely entitled to the lands and, it was said, all that was needed was an order for sale.
11. On 1st July, 2019 the probate judge gave liberty to Ms. Eimear Bergin and Mr. Ciaran Bergin to apply for a grant of letters of administration in their grandfather's estate, limited for the purpose of defending these proceedings, and thereafter Eimear Bergin and Ciaran Bergin applied to be joined as defendants. Remarkably, the plaintiff objected and ultimately Eimear Bergin and Ciaran Bergin were joined as notice parties.
12. The argument advanced on behalf of the plaintiff is based on nice questions of law, to which I shall come, but the substantive issue is whether the proceeds of sale of the lands – if they are to be sold – should be paid in their entirety to the plaintiff or should be divided between the plaintiff and the estate of Mr. Kieran Bergin. In a busy Monday morning motion list on 18th October, 2019, long after the summons had been listed for further consideration and very shortly before the hearing date, an order was made joining Ms. Eimear Bergin and Mr. Ciaran Bergin as notice parties. It seems to me that from the outset Mr. Kieran Bergin was a necessary and proper party to an action for the partition and sale of lands of which he was a co-owner, and his legal personal representatives are persons whose presence is necessary in order to allow the court to effectually adjudicate upon the issue raised by the plaintiff and formally ought to be joined as co-defendants. The notice parties' motion may formally be spent but the court is entitled under O. 15, r. 13 at any time of its own motion to join them as defendants and will do so.

### **The issue**

13. The issue identified in the written submission filed on behalf of the plaintiff is whether joint tenants of registered land can sever their joint tenancy after the registration of a judgment mortgage in a manner which is effective against the judgment mortgagee.

### **The arguments**

14. Intriguingly, Mr. Buttanshaw, having so framed the issue, submits that it makes no difference whether they can or cannot sever their joint tenancy. If the severance of a joint tenancy after registration of a judgment mortgage against the interest of one of the joint tenants is not wholly ineffective against the judgment mortgagee, he argues, it is effective to confer on the judgment mortgagee security over the interest of each of the tenants in common after severance.
15. The argument is based on three propositions. The first is that as joint tenants James Bergin and his father each owned the entire of the lands rather than either a defined or identifiable portion, or a defined fraction. Reference is made to the definition of a joint tenancy in Megarry & Wade *The Law of Real Property* (9th Edition) at para. 12-002 and 12-003: -

*"A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights as against everyone else they are in the position of a single owner. The intimate nature of joint tenancy is shown by its two principal features, the right of survivorship and the 'four unities'. ...*

*It is often said therefore that each joint tenant holds nothing and yet holds the whole together with the other."*

16. I accept the short passage relied on as a correct statement of the law. As to the submission on behalf of the plaintiff, I think that it is more correct to say that, as against the world, the two joint tenants both, rather than each, own the entire of the lands.
17. The second proposition is that after an effective severance of a joint tenancy, as between the two joint tenants, each co-owner owns an equal undivided moiety of the property. That is correct. *"In other words"*, it is said, *"following severance each joint tenant no longer owns the whole of the common property but only a defined fraction thereof"*. With respect, I do not believe that the suggested alternative formulation is truly an alternative formulation, or that it is correct. It is certainly correct to say that each of the two tenants in common, are as between themselves, entitled to an undivided moiety but together they both own the whole.
18. As Prof. Wylie explains in the 5th edition of his work on *Irish Land Law* at para. 8.03: -

*"In the case of both a joint tenancy and a tenancy in common, the land held by the persons concerned is held by them concurrently, so that as far as third parties are*

*concerned the co-owners of the land must be treated a single unit for the purpose of certain transactions in respect of the land."*

19. Mr. Buttanshaw's third proposition is that since it is the case that a co-owner owns the whole of the property before severance and only half after, it necessarily follows that the act of severance is an alienation by each to the other of an equal undivided moiety. It is here, in my view, that the argument breaks down: or, perhaps, fails to come together. The first proposition looks at a co-ownership from the point of view of everyone else, but the second from the point of view of the co-owners. As is clear from the short passage cited from Megarry & Wade, joint tenants, between themselves have separate rights so that the effect of severance is to convert the joint tenancy into a tenancy in common, specifically by destroying the right of survivorship.
20. It seems to me that the third proposition on which the plaintiff's argument is based fails to recognise the difference between those two points of view. Moreover, the proposition that severance involves alienation to the other joint tenant fails to take account of the fact that until 2009 a joint tenancy could be severed unilaterally by the acquisition by one of the joint tenants of a further interest in the property or by the alienation by the joint tenant of his interest to a third party, or of the fact that a joint tenancy is severed by the simultaneous death of the joint tenants, or by the bankruptcy of one of the joint tenants. While the effect of severance is that each of the co-owners will have a different interest in the land (as against the world as well as *inter se*), it does not follow that each or either has obtained anything at all, still less his entire interest in the land, from the other. After as well as before the severance, the co-owners will hold their interest from the original grant.
21. It is submitted on behalf of the plaintiff that the registration of a judgment mortgage "*captures the whole of the property which is held on a joint tenancy*". I cannot agree. All that it can capture is the judgment debtor's interest in the property. It is well and long settled that a judgment mortgage is a process of execution. See for example *Re Strong* [1940] IR 382.
22. Prior to the operative date of the Land and Conveyancing Law Reform Act, 2009, a judgment mortgage against unregistered land, because it took effect as a mortgage, severed a joint tenancy but a judgment mortgage against registered land, because it operated as a charge, did not. This had the effect that a judgment mortgage registered against the interest of a joint tenant in registered land was extinguished on the death of the judgment debtor: *Mahon v. Lawlor* [2011] 1 I.R. 311. And that a judgment mortgagee of registered land did not have a sufficient interest in the land to give him *locus standi* to maintain an action for partition: *Irwin v. Deasy* [2011] 2 I.R. 752.
23. It made no sense that the rights of judgment mortgagees and joint tenants, or surviving joint tenants, should depend upon the accident as to whether the title to the property was registered or unregistered, and the two were brought into alignment by the Act of 2009, since when a judgment mortgage will operate as a charge against both unregistered and registered land, and a judgment mortgagee (although he is not) is treated as a "*person*

*having an estate or interest in land*" so as to be amongst those who may apply for an order under section 31.

24. Section 30 of the Act of 2009 substantially restricts the circumstances in which a joint tenancy can be severed. Section 30 provides: -

*"30 – (1) From the commencement of this Part, any –*

*(a) conveyance, or contract for a conveyance, of land held in a joint tenancy, or*

*(b) acquisition of another interest in such land,*

*by a joint tenant without the consent referred to in subsection (2) is void both at law and in equity unless such consent is dispensed with under section 31(2)(e).*

*(2) In subsection (1) 'consent' means the prior consent in writing of the other joint tenant or, where there are more than one other, all the other joint tenants.*

*(3) From the commencement of this Part, registration of a judgment mortgage against the estate or interest in land of a joint tenant does not sever the joint tenancy and if the joint tenancy remains unsevered, the judgment mortgage is extinguished upon the death of the judgment debtor.*

*(4) Nothing in this section affects the jurisdiction of the court to find that all the joint tenants by mutual agreement or by their conduct have severed the joint tenancy in equity."*

25. Prof. Wylie at paras 8.29 and 8.30 traces the legislative history of s. 30 of the Act of 2009 which explains the uneasy concept of unilateral severance by one joint tenant with the prior written consent of all the other joint tenants, save where the joint tenant wishing to sever has applied for and obtained an order dispensing with the consent that has been unreasonably withheld. Significantly, for present purposes, the scheme of the legislation appears to me to be to limit the exercise of what theretofore had been a right, rather than to abrogate the right altogether. The unilateral severance does not strictly speaking require the co-operation of the other joint tenants but merely their consent. The other joint tenants must nowadays agree to it, but the severance is still effected by the act of the one.

26. I pause here to deal with one element of the argument made by Mr. Kennedy on behalf of the estate of Mr. Kieran Bergin, which is that the Oireachtas could not have intended that if the non-debtor dies before the debtor, that the debtor will become entitled to the whole of the property by survivorship and that consequently the judgment mortgage will attach to the whole of the property and not just his undivided share. It is submitted that if the legislation envisaged a creditor receiving what is said to be a windfall of this nature, it would have expressly provided for this. The immediate policy behind s. 30(3) may very well have been to align the position of a surviving non-debtor joint tenant of unregistered land with that of a surviving non-debtor joint tenant of registered land but it seems to me

that that alignment necessarily aligned the position of surviving debtor joint tenants. On the death of the non-debtor joint tenant the debtor takes the entire interest in the land by survivorship, and the judgment mortgage is not extinguished. Logically, the judgment mortgage remains in force against the enlarged interest of the judgment mortgagee. In consequence, as Mr. Buttanshaw submits, if nothing is done after a judgment mortgage has been registered against the interest of one of the joint tenants, the judgment mortgagee may come to have security over the entire of the lands, or no security at all, depending on which of the joint tenants dies first. It was against that eventuality that the plaintiff might come to have security against the whole of the lands that Mr. Kieran Bergin sought to make provision by the deed he executed on 8th May, 2013.

27. Section 30, sub-s. 3, expressly contemplates that a joint tenancy may be severed after the registration of a joint mortgage and before the death of judgment debtor. Clearly this could be the effect of an order under s. 31 or s. 117, including an order under s. 31(2)(e) dispensing with the consent of one or more joint tenants, where such consent has been unreasonably withheld: but the issue raised in this case is whether the joint tenancy may be severed by what has been referred to in argument as the "*innocent*" joint tenant but what the old cases call the "*companion*" joint tenant, with the consent of the judgment debtor.
28. It is acknowledged on behalf of the plaintiff that during the life of the judgment debtor the companion joint tenant as well as the judgment mortgagee may apply to court for an order under section 31. Unless and until such an order is sought and obtained, it is submitted, all are to be taken as rolling the survivorship dice.
29. In this case, the game might have commenced on 16th July, 2010 when the plaintiff recovered an enforceable judgment and its right of action accrued. The potential players were the judgment debtor, who could not win; an octogenarian retired farmer and shopkeeper of limited resources whose son was in serious financial difficulties; and a public limited company which had twelve years to cast the dice which might roll for many years before finally coming to rest. Mr. Kieran Bergin did not want to play. Neither did the plaintiff, for it applied to the court on 15th July, 2015 for an order for sale of the lands. If Mr. Bergin, whose interest in the land was potentially at stake, had been named as a defendant and had been before the court on 20th June, 2016 when the well charging order was made, the plaintiff's claim for an order for sale and division of the proceeds could have been dealt with.
30. In principle, the registration of the judgment mortgage was a process of execution against the interest of Mr. James Bergin in the lands and did not affect the interest of Mr. Kieran Bergin. The effect of s. 30(3) was that Mr. Kieran Bergin's share was on the hazard unless and until the joint tenancy was severed, but if the plaintiff is correct, the only means by which it could have been severed was a court order for the sale of the lands and division of the proceeds.
31. It seems to me that s. 30(4) clearly contemplates severance otherwise than by an order for sale: specifically by the unilateral act of one of the joint tenants, subject to the prior

consent in writing of the other or others, unless dispensed with by court order. Moreover, s. 30(4) is specifically directed to cases in which a judgment mortgage has been registered against the interest of one of the joint tenants, but not the others. The only consent required is that of the other co-owners, and not the judgment mortgagee. In my opinion, the proposition that the only means by which Mr. Kieran Bergin could have avoided the risk that Mr. James Bergin would become entitled to his share was to obtain an order for sale and division is inconsistent with the express power in s. 31(1)(e) to make an order dispensing with consent to severance without making an order for sale. It does not make sense to me to contemplate that the availability to an innocent or companion joint tenant of the option to sever would depend upon the unreasonable withholding of consent by the judgment mortgagor.

32. In support of his third proposition, Mr. Buttanshaw relies on *Lord Abergavenny's case* (1604) Pasch. 5 Jacobi, which was referred to by Finnegan J. in his judgment in *Mahon v. Lawlor* [2011] 1 I.R. 311. That was a case in which one of two joint tenants, against whom judgment had been obtained, released to her companion before execution. On the later death of the debtor, the survivor was found not to take discharged of execution because she had taken by the release and not by survivorship, which had been taken away by the release.
33. It is submitted that the effect of the decision in *Lord Abergavenny's case* is that a judgment debtor joint tenant cannot by his own act put the interest he or she held in the land beyond the reach of the judgment creditor. I agree. I do not, however, accept that the effect of the deed of 8th May, 2013 was a release by Mr. Jim Bergin of an equal undivided moiety of the interest which he held. Nor do I accept that the object or effect of that deed was to put the interest which Mr. Jim Bergin had in the lands beyond the reach of his creditors. Rather the common intention of the owners was to put the interest of Mr. Kieran Bergin beyond the reach of the plaintiff. I can see nothing whatsoever wrong with that.
34. The deed of 8th May, 2013 was in form a transfer from Kieran Bergin and James Bergin, as joint tenants, to themselves as tenants in common but the declared purpose of the instrument was to effect a severance of their joint tenancy and the instrument has been referred to in the defendants' written submissions and in argument as a deed of severance. The substance of the transaction was not that either divested himself of anything, or transferred anything to the other, but that the joint tenancy was converted to a tenancy in common. Before and after the transaction, the interest of Mr. James Bergin was subject to the judgment mortgage in favour of the plaintiff, but the interest of Mr. Kieran Bergin was not. Nothing passed from Mr. James Bergin to Mr. Kieran Bergin to which the judgment mortgage might have been attached.
35. The submissions on behalf of the defendants are more straightforward and focus on the effect of the deed of 8th May, 2013 in equity.

36. As a matter of law, it is said, a judgment mortgage is a process of execution. Reference is made to *Containercare v. Wycherley* [1982] I.R. 143 and *Goodbody Pensioneer Trustees v. Hevac* [2019] IEHC 114. That is well established.
37. The judgment mortgage attaches to the interest of the judgment debtor at the time of registration. It does not attach to future or contingent interests. Reference is made to *Re: Rae's Estate* (1877) L.R. Ir. 174, *Tempany v. Hynes* [1976] I.R. 101, and *Goodbody Pensioneer Trustees v. Hevac* [2019] IEHC 114. I accept the submission as a correct statement of law, but I disagree with the premise of the submission which is that the right or prospect of survivorship of a joint tenant is a future or contingent interest in land. Rather, as I understand the law, the possibility of survivorship is an incident of the joint tenancy.
38. Mr. Dermot Cahill, for Mr. James Bergin, and Mr. Kennedy, for the interests of Mr. Kieran Bergin, submit that it is clearly established that joint tenants may agree to hold as tenants in common and that effect will be given to such a contract. So it is.
39. Section 30(4) of the Act of 2009 expressly preserves the long established jurisdiction of the court to find that all the joint tenants by mutual agreement or by their conduct have severed the joint tenancy in equity.
40. Wylie at para 8.42 notes that: -

*"... Apart from [severance by a contract to alienate] there is no reason why the joint tenants should not enter into a contract that thenceforward they should hold as tenants in common, and equity will give effect to such a contract. Indeed, the joint tenants may not even formalise their agreement to that extent. There is ample authority in Ireland to the effect that equity will infer such an agreement from the joint tenants' conduct, eg, where they seem to have treated their interests in the property as severed over a substantial period of time. This equitable jurisdiction to find that a severance based on mutual agreement or conduct of all the joint tenants was expressly saved by s. 30(4) of the Land and Conveyancing Law Reform Act, 2009." [The emphasis is that of Prof. Wylie]*

41. Mr. Cahill, leaving nothing to chance, went back to the authorities relied on by Wylie, in particular *Williams v. Hensman* (1861) 1 J & H 546, 70 E.R. 862, in which Page-Wood V-C is reported as saying: -

*"A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his share may create a severance as to that share. The right of each joint-tenant is a right of survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund – losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of*



*dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common."*

42. In this case, it is said, Mr. Kieran Bergin and Mr. James Bergin agreed to hold as tenants in common and executed a deed accordingly. So they did. That being so, it seems to me that any issue as to the effect of the deed in law evaporates and the issue becomes whether there was any impediment to Mr. James Bergin consenting to the severance in equity.
43. It is accepted by Mr. Buttanshaw that the effect of the registration of the judgment mortgage was to charge the interest of Mr. James Bergin, only, in the land. The interest of Mr. Kieran Bergin in the lands was unaffected, as were his rights attached to that interest: one of which was the right, circumscribed as it was, to unilaterally sever the joint tenancy, another of which was to apply to the court for an order under s. 31, and yet another of which was to agree a severance. If Mr. Kieran Bergin, at the age he was, wanted to sever the joint tenancy with a view to his interest in the lands passing to his grandchildren rather than his son's creditors, that, it seems to me, was perfectly reasonable. If Mr. James Bergin has withheld his consent, his father might have applied to court for an order dispensing with that consent and I cannot think of any reason why such an order, if required, would not have been made. If the judgment mortgagee of Mr. James Bergin's interest would have been entitled to be heard on any such application (and I do not say that it would) I cannot think that the plaintiff would have been heard to say that it wanted to lock down Mr. Kieran Bergin's interest in an unwilling game of survivorship roulette. The difficulty in this case, however, would have been that Mr. Kieran Bergin could not have invoked his right to apply for an order dispensing with consent because it was forthcoming. If Mr. Kieran Bergin had applied to court for an order for the sale of the lands and division of the proceeds, that would have matched precisely what the plaintiff wanted.
44. In my view, there was no impediment in law or in equity to the Messrs. Bergin agreeing that thenceforth they would own the lands as tenants in common rather than as joint tenants. This, as a matter of law, changed the nature of Mr. James Bergin's interest in the lands, but he did not divest himself of anything or pass anything to Mr. Kieran Bergin.
45. I find that Mr. Kieran Bergin and Mr. James Bergin by the deed they executed on 8th May, 2013 severed their joint tenancy by mutual agreement.
46. It will have been noted that there was a long delay in registering the transfer. Mr. David Doyle, solicitor, who acted for Mr. Kieran Bergin at the time of execution of the deed has confirmed that it was executed on the date for which it is dated and that the reason for the delay in registration was that he was not in funds for the necessary outlays. Whatever the actuarial prospects of survivorship may have been, the effect of the deed was to crystallise the rights of the plaintiff as well as Mr. Kieran Bergin. Counsel are agreed that the fact that the deed was executed before, but registered after, the well charging order was made makes no difference. The issue is whether there was any impediment to the severing of the joint tenancy by agreement at any time between the

registration of the judgment mortgage and the death of whichever of the co-owners who might first die or the making of an order for sale under section 31. In my view there was not.

### **Conclusions**

47. There will be an order pursuant to O. 15, r. 13 of the Rules of the Superior Courts joining Eimear Bergin and Ciaran Bergin, as legal personal representatives of Kieran Bergin, as defendants.
48. The judgment mortgage registered by the plaintiff on 9th September, 2010 against the interest of the first defendant in the lands in Folio 7642, County Kilkenny, did not affect the interest of Mr. Kieran Bergin, who was at that time a joint tenant.
49. The judgment mortgage did not attach to the lands, but only to the judgment mortgagor's interest in the lands: which was an undivided share as joint tenant with his father.
50. The judgment mortgage did not sever the joint tenancy but neither did it affect the right of Mr. Kieran Bergin to sever the joint tenancy, or the right of Mr. James Bergin to consent to such severance or to agree to severance. Nor, since it took effect as a charge, did the judgment mortgage affect Mr. James Bergin's ability to deal with his interest.
51. The deed of 8th May, 2013 was effective to sever the joint tenancy.
52. The effect of severing a joint tenancy, in law and in equity, is not to convey or transfer the interest, or any part of the interest, of either co-owner to the other but to convert the undivided share of each joint tenant into an undivided moiety in the lands.
53. The right, or prospect, or possibility, of survivorship is not a future or contingent interest in land but an incident of joint tenancy.
54. Before severance, the plaintiff's judgment mortgage was attached to the undivided share of Mr. James Bergin. After severance, it was attached to his undivided moiety and it is to be satisfied out of that interest.
55. Folio 7642, County Kilkenny, correctly shows each of Mr. Kieran Bergin and Mr. James Bergin as the owners as tenants in common of one undivided half share, and that the interest of James Bergin is subject to a judgment mortgage in favour of the plaintiff.