

THE HIGH COURT

[2021] IEHC 361
2014 No. 33 SP

BETWEEN

ROSCREA CREDIT UNION LIMITED

PLAINTIFF

AND

CON (OTHERWISE CONLETH) O'SULLIVAN

DEFENDANT

ALLIED IRISH BANKS PLC

NOTICE PARTY

JUDGMENT of Mr. Justice Quinn delivered on the 18th day of May, 2021.

1. Commonly made in mortgage suits is an order declaring that the plaintiff's claim stands well charged on the defendant's interest in the subject property, that in default of payment the property be sold, and that there be taken an account of incumbrances and an inquiry as to their priorities. As a general principle, such an order inures for the benefit of every party having an interest in the proceeds of the sale. (*In re Colclough's Estate* (1858) 8 Ir. Ch. Rep. 330). There are limited qualifications or exceptions to this principle, but this case illustrates how they can arise.
2. The plaintiff obtained a well charging order and order for sale on 28 July, 2014. The defendant later settled the claim and the plaintiff applied to discharge the order. The notice party is an incumbrancer ranking in priority to the plaintiff and proved its claim before the Examiner. It now seeks to be substituted for the plaintiff in the proceedings with a view to proceeding with the sale of the defendant's property. This application is opposed by the defendant. I have been referred to a number of judgments regarding the application of the relevant rules of court, but no direct authority on such an application by a prior incumbrancer.

Background

3. The defendant and a Ms. Olive Lynch are registered as full owners of Folio No. 40458F County Tipperary ("the Folio" or "the property") and other folios. On 17 May, 2011, the notice party registered two charges against the Folio to secure the following:
 - (a) Advances made to the defendant, guaranteed by Ms. Lynch; and
 - (b) Advances made to Grove Oil (Roscrea) Limited, guaranteed by the defendant and by Ms. Lynch.
4. On 24 January, 2012, the plaintiff registered a judgment mortgage against the Folio and eight other folios of which the defendant and Ms. Lynch were registered as owners.
5. On the same date, the plaintiff registered a second judgment mortgage on the same Folio and on three other folios.
6. On 21 February, 2019, BWG Foods Limited registered a judgment mortgage against the Folio and five other folios. That incumbrance has not been proved in the proceedings.

7. On 21 January, 2014, the plaintiff issued a special summons and on 28 July, 2014, an order was made by this court (McGovern J.) in the following terms:
 - (i) A declaration that the principal monies secured by the plaintiff's judgment mortgages together with interests and costs stand well charged on the defendant's interest in the lands described in the schedule to the order, being nine folios, including the Folio;
 - (ii) A declaration that there is due to the plaintiff on foot of the judgment mortgages the sum of €743,007.15, and interest, totalling €886,641.63;
 - (iii) An order that in default of payment, the lands be sold;
 - (iv) The taking of an account of all incumbrances subsequent as well as prior to and contemporaneous with the plaintiff's demand; and
 - (v) An enquiry as to the respective priorities of all such demands as should be proved.
8. The matter proceeded before the Examiner who directed advertisements for incumbrancers to submit claims. The notice party submitted affidavits in response to the advertisement.
9. On 14 July, 2016, at a sitting before the Examiner the claims of the notice party in amounts of €51,656.48 and €183,312.02 were admitted.
10. A settlement was subsequently concluded between the plaintiff and the defendant. Neither court counsel nor an auctioneer was appointed. In compliance with a term of the settlement, on 6 July, 2020, the plaintiff issued an application for an order discharging the well charging order of 28 July, 2014, in respect of all of the folios recited in the schedule to that order.
11. The grounding affidavit of the plaintiff's solicitor recites that the plaintiff had agreed to accept a sum of money from the defendant in full and final settlement of his liabilities to the plaintiff and confirmed that the defendant through his financial representative had discharged the amount of the settlement in full.
12. On 20 July, 2020, this court made an order discharging the well charging order and order for sale in respect of eight of the nine folios subject of the original order. As regards the Folio, liberty was granted to the notice party to issue this notice of motion. On 19 October, 2020, the notice party issued this motion seeking the following relief.
 - I. An order that all further proceedings herein be carried on and prosecuted by and between Allied Irish Banks Plc and Con (otherwise Conleth O'Sullivan).*
 - II. An order that the carriage of all further proceedings in this suit in respect of Folio 40458F County Tipperary (over which the Applicant has a first legal charge and in*

respect of which the Applicant's claim was admitted by the Examiner of the High Court) are hereby transferred to the said Allied Irish Banks Plc."

13. The application is grounded on an affidavit sworn by Ms. Marie Moylett sworn 28 October, 2020.
14. Ms. Moylett refers to the original proceedings and special summons and the order made by McGovern J. on 28 July, 2014. She said that the notice party then wished to take over the proceedings in this suit in respect of Folio 40458F, Co. Tipperary.
15. A supplemental affidavit was sworn on behalf of the notice party by Ms. Éadaoin Jackson, a solicitor in the firm of Holmes O'Malley Sexton. Ms. Jackson exhibited a letter dated 14 July, 2016, from the Examiner to the notice party confirming that he had admitted the claims of the notice party against the defendant in these proceedings.
16. Ms. Jackson refers also to the provisions of O. 33 r. 8 of the Rules of the Superior Courts ("RSC") and the judgment of Finlay Geoghegan J. in *Allied Irish Banks Plc v Dormer* [2010] 2 IR 491.
17. An affidavit was sworn by the defendant on 26 January, 2021, in which he states his objection to the notice party's application.
18. The defendant exhibited a letter written by his solicitor on 22 December, 2020, to the notice party's solicitors requesting that they would "*outline the basis in law on which you seek to rely in seeking the order sought*". No reply was made to this letter.
19. The defendant also stated a number of objections. He states that the applicant "*did not satisfy the formalities which were required of the plaintiff in these proceedings*". He states that the applicant had not provided to the court a certified copy of an order for judgment "*in a particular sum*" against him and states that the applicant had not shown compliance with s. 116 of the Land and Conveyancing Law Reform Act, 2009 in that no application was made to the Property Registration Authority to register any judgment as a charge against Folio 40458F.
20. He refers also to the fact that no court counsel had been appointed to advise on title and that no auctioneer had been appointed by the court.
21. None of these objections were pursued at the hearing of this application. This is understandable since the Examiner had already admitted the notice party's claims.

Order 33

22. Order 33 rules 7 and 8 provide as follows:

"7. *A judgment or order for an account given or made on behalf of an incumbrancer shall direct an account to be taken of all incumbrances subsequent as well as prior to, or contemporaneous with the plaintiff's demand, and an inquiry as to the respective priorities of all such demands as shall be proved; and when any surplus produce of any sale, had under such judgment or order, after payment of the*

demands and costs of the plaintiff, and prior and contemporaneous incumbrances shall remain in Court, the same shall be distributed amongst the incumbrancers who may have proved their demands in the cause, according to their priorities, if the Court shall so order: Provided always, that if the Court shall be of opinion that extending the account to incumbrances subsequent to the demand of the plaintiff will improperly delay the plaintiff in recovering his demand, the account shall be confined to the rights of the plaintiff, and of incumbrancers prior to and contemporaneous with him. (emphasis added)

8. *Any incumbrancer subsequent in order of priority to the demand of the plaintiff, in case any lands or property the subject of such suit shall remain unsold, after provision for the plaintiff's demands and those of prior incumbrancers, shall be at liberty to apply to the Court for an order directing a sale of such unsold lands or property, or a competent part thereof, for payment of the demands subsequent to that of the plaintiff, which may have been proved as aforesaid; and the Court may accordingly direct such sale, if of opinion that such incumbrancers, or any of them, would be entitled to have their demands raised by a sale of such lands or property; or may direct a receiver to be appointed or continued over such unsold land or property, for the benefit of such subsequent incumbrancers and distribute the funds to be received by such receiver accordingly". (emphasis added)*
23. These rules were the subject of detailed consideration by Finlay Geoghegan J. in *AIB Plc v Dormer* [2009] IEHC 586, [2010] 2 IR 491.
24. In *Dormer*, the plaintiff held an equitable mortgage by deposit of a land certificate on 9 August, 1989. The notice party (a Mr. Roe), registered a judgment mortgage on 17 December, 1993, puisne to the plaintiff's mortgage. On 7 July, 1995, the plaintiff obtained a well charging order and order for sale of the relevant property (Laffoy J.).
25. The matter proceeded before the Examiner. Court counsel and an auctioneer were appointed. The plaintiff and the defendant concluded a settlement before further steps were taken and no advertisement for incumbrances was placed. The plaintiff applied to discharge the well charging order. The notice party then applied for an order pursuant to O. 33 r. 8 directing the sale of the defendant's interest in the lands and premises and if necessary a consequential order substituting the notice party for the plaintiff in the proceedings.
26. The application was refused. The order of Laffoy J. was vacated and the proceedings struck out. Finlay Geoghegan J. considered the authorities extensively. She found that in the cases in which the court had applied the principle that the order for sale should benefit all incumbrancers, that benefit had only been conferred on those incumbrancers who had come in and proved in the proceedings and were therefore entitled to be paid out of the proceeds of sale.
27. Finlay Geoghegan J. concluded that the judgment debt relied on by Mr. Roe had become extinguished by s. 38 of the Statute of Limitations, 1957. It would therefore have been

unjust if, the plaintiff having been discharged and satisfied, the court were to direct the sale of the lands on the application of a notice party seeking, only fortuitously, to realise a debt which was otherwise no longer recoverable.

28. An important factor in the *Dormer* decision, in contrast to the facts of this case, is that the application was made pursuant to O. 33 r. 8 by a notice party which was a subsequent or puisne incumbrancer, as specifically contemplated by r. 8.

29. Finlay Geoghegan J. quoted from Lord Blackburn L.J. in *Re Colclough's Estate* (op. cit.) where he stated:

"...where an order for a sale has been made, that order is to be considered as having been made on behalf of every person who has an interest in the proceeds of the sale; and a party thus interested is exonerated from the necessity of taking proceedings, which might otherwise have been necessary".

30. Finlay Geoghegan J. considered the scope of r. 7 and r. 8 and distinguished the position in relation to three different periods which need consideration, namely: -

- (i) between the date of commencement of the proceedings and the date on which an order for sale comes into effect;
- (ii) from the date in which the order for sale comes into effect until an advertisement for incumbrancers is published; and
- (iii) subsequent to the advertisement for incumbrancers.

31. In relation to the third of these, the court continued: -

*"...once the advertisement for incumbrancers has been placed and, one or more incumbrancers have come in and proved in the proceedings within the time specified, then the position would appear to change. There are no longer only the plaintiff and defendant participating in the proceedings. If the sale proceeds, then those incumbrancers who prove benefit under the order for sale in the sense that they are entitled to participate in the proceeds of sale in accordance with their determined priority. If, however, the plaintiff then determines not to proceed with the sale either by reason of the discharge by the defendant of the debt due to the plaintiff or some other reason, it would appear that the incumbrancer who has proved is still not entitled to require the plaintiff to proceed with the sale but does have a right to apply in the proceedings pursuant to O.33, r.8 for an order for sale and (if necessary well charging order) and that the proceeds of sale be applied inter alia for its benefit. This was the decision in *Munster and Leinster Bank v. Mackey* [1917] 1 IR 49. That was an application by a puisne incumbrancer that the suit be continued by the original plaintiff, the first incumbrancer, who had been paid in full and it was stated no longer to have any interest in the suit, against the personal representative of the defendant, a mortgagor who had died. Part of the lands had been sold and the plaintiff paid off and the balance paid to the applicant puisne*

incumbrancer in part discharge. The applicant puisne incumbrancer must therefore have proved in the proceedings by the time of this application."

32. Finlay Geoghegan J. continued:

"Notwithstanding the terms of the rules [being rules 7 and 8], the practice has been not to make a fresh order for sale, but to make a well charging order, if necessary, having regard to the nature of the incumbrance held by the applicant incumbrancer and to substitute the applicant incumbrancer for the plaintiff in the proceedings. The sale then continues pursuant to the original order for sale. It may be necessary in an appropriate case to consider whether this is the proper form of order. It is not necessary on the facts of this case".

33. The court then quoted rules 7 and 8 extensively and continued:

"Order 33, rule 8 is consistent with the absence of any obligation on a plaintiff to proceed with an order for sale even where incumbrancers have proved in the proceeding. It provides, in the alternative, a procedure by which as is sometimes said the incumbrancer who has proved may take over carriage of the order for sale. The underlying fairness and purpose of this rule would seem obvious. If a plaintiff whose debt has been discharged is not obliged to proceed with the sale for the benefit of other incumbrancers who have proved in the proceeding, then such incumbrancers as persons who have already participated by making a claim in the proceeding, should be entitled in the existing proceeding to proceed with the sale provided, of course, they are at the relevant date entitled to have their debt realised out of the sale. An incumbrancer who had proved in the proceeding might well have decided not to commence separate proceeding and if he were not permitted to do so might have permitted his claim to become statute-barred. He may also have incurred costs in proving his claim." (emphasis added)

34. Finlay Geoghegan J. refers to the incumbrancer which has proved having a right to apply in the proceedings pursuant to O. 33 r.8 for an order for sale and *"if necessary well charging order and that proceeds of sale be applied for its benefit"*. The court's attention does not appear to have been drawn in that case to the distinction between an application being made by a prior or a subsequent incumbrancer. The issue did not arise because the application was made by a puisne incumbrancer.

35. In this case, the notice party is not now applying "afresh" for an order for sale, but seeking to rely on the order for sale originally made by McGovern J. and to be substituted as plaintiff with a view to enforcing that order. It is clear from the analysis of Finlay Geoghegan J. that she regarded the facility for a duly admitted incumbrancer to apply to be substituted for the plaintiff and to proceed with the sale provided for by the original order for sale to be consistent with the fundamental principle that such an order inures for the benefit of all incumbrancers or all parties having an interest in the lands.

36. One of the purposes served by this principle is the necessity to avoid duplication of proceedings in circumstances where an incumbrancer responds to an advertisement for incumbrancers and participates in the proceeding and has its claim admitted by the Examiner. If the position were otherwise such further and duplicate proceedings would be necessary if the other incumbrancers, prior or subsequent, were not to risk becoming statute barred whilst the original proceedings took their course.
37. Reliance was placed by the defendant on the judgment of McMahon J. in *Bank of Ireland v Moffitt & ACC Bank Plc* [2009] IEHC 545. In that case, an application was made by ACC to be substituted for the plaintiff in circumstances where its claims were partly prior and partly subsequent to those of the plaintiff. The application was refused on the grounds of inordinate and conscious delay on the part of the applicant, and estoppel in that the applicant had up to a certain point relied on proceedings which it had commenced in the Circuit Court, and had not proved its claim in the High Court proceeding. The court also rejected the notice party's submission that it ought to be entitled to be substituted for the plaintiff in order to avoid duplicity in proceedings, having regard to the fact that it had pursued and maintained proceedings in respect of the same debts before the Circuit Court.
38. McMahon J. took the view in that case that the reason ACC did not seek a new order for sale but an order of substitution was to avoid the clear language of O.33 r.8 which contemplates an application for a sale order being made only in favour of an incumbrancer "*subsequent in order of priority*" to the plaintiff. Insofar as McMahon J. was considering the express terms of r.8 and the limitation of that rule to a "*subsequent incumbrancer*" he was unimpressed by what he perceived as an attempt to avoid the language of that rule. Nonetheless, the *ratio decidendi* was that the court exercised its discretion against making a substitution order by reason of the failure of the applicant to prove its debt, delay and estoppel. None of those factors are invoked or apply in this case.

Conclusion

39. The combined effect of rules 7 and 8 is to respect and apply the general principle that a well charging order and order for sale inures for the benefit of all incumbrancers having an interest in the lands.
40. Rule 7 specifically recognises that the "*surplus produce of any sale*" should be distributed amongst the incumbrancers in accordance with their priorities and express reference is made to the claims of incumbrancers "*subsequent as well as prior to, or contemporaneous with the plaintiff's demand*".
41. Rule 8 is a facility for a subsequent incumbrancer to apply to a court for an order directing a sale where lands or property the subject of the proceedings remain unsold. Submissions were made to me as to whether this rule can only apply where there has been a sale of part of the relevant lands. It is not necessary to determine that question, because the notice party in this case is not seeking a new order for sale. The order made by McGovern J. on 28 July, 2014, stands in full force and effect and it follows from my

reasoning in this judgment that I shall not vacate it. The application by the notice party is to be substituted for the plaintiff. Although it cites r. 7 and r. 8 in support of the general principle, it does not make the application under r. 8.

42. Finlay Geoghegan J. in *Dormer* was not required to focus on the distinction for the purpose of r. 8 between a subsequent and a prior incumbrancer. However, it is clear that she considered that the general principle of respecting priorities is given effect to by the rules: -

"Notwithstanding the terms of the rules set out below, the practice has been not to make a fresh order for sale, but to make a well charging order, if necessary, having regard to the nature of the incumbrance held by the applicant incumbrancer and to substitute the applicant incumbrancer for the plaintiff in the proceedings. The sale then continues pursuant to the original order for sale". (emphasis added)

This is the nature of the application made by the Notice Party in this case.

43. If the notice party were not permitted to be substituted for the plaintiff, it would follow that every incumbrancer, having submitted its claim for adjudication in response to an advertisement for incumbrancers, and having been admitted by the Examiner, who is charged with the function of such adjudication, would be required to commence and pursue parallel proceedings against the same debtor in respect of the same asset. This would lead to a multiplicity of such proceedings and would defeat the very purpose of the advertisement for incumbrancers and adjudication of such claims before the Examiner.
44. I shall therefore make the order sought, namely that all further proceedings in this matter be prosecuted by and between the notice party and the defendant and that the carriage of all further proceedings in this matter in respect of Folio 40458F, Co. Tipperary be transferred to the notice party.