

**THE HIGH COURT
LAND REGISTRY**

[2022] IEHC 232
[Record No. CT16/2020]

**IN THE MATTER OF SECTION 31 OF THE
REGISTRATION OF TITLE ACT 1964
AND IN THE MATTER OF ORDER 96 OF
THE RULES OF THE SUPERIOR COURTS
AND IN THE MATTER OF FOLIO 1237L COUNTY SLIGO**

BETWEEN

ALLIED IRISH BANKS PLC

APPLICANT

AND

**THE PROPERTY REGISTRATION AUTHORITY, SHANE TULLY AND FRANCES TULLY, AND
CLAIRE CONROY AND MICHAEL CONROY**

RESPONDENTS

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 4th day of April, 2022

Issue

1. The application before this Court is brought by way of notice of motion of 5 May 2020 seeking to reinstate a charge discharged in error. The charge was discharged prior to the registration of a transfer to the third and fourth named respondents.
2. The relevant edischarge effected a discharge on 12 June 2017 of a prior judgment registered in favour of the applicant, on 5 September 2006, over the subject folio. The said folio (Folio 1237L County Sligo) relates to Apartment No. 11, Block 2, Gateway Apartments, Ballinode, Co. Sligo.
3. Section 31(1) of the Registration of Title Act 1964 provides:

"The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."
4. The application for reinstatement is resisted by Vincent Kelly, legal personal representative in the estate of Liam Kelly deceased. The deceased, Liam Kelly, registered a judgment mortgage he obtained against the first named respondent's interest in the instant folio on 1 February 2010.

Background

5. Shane Tully was registered as full owner of the instant property on 5 September 2006, and subsequently on 21 November 2006, Shane and Frances Tully were registered as full owners thereof.

6. The judgment mortgage registered on behalf of Liam Kelly, now deceased, is considered the first in time encumbrance against the registered ownership of the Tullys if the applicant's charge is not reinstated, and hence the interest of Vincent Kelly in resisting such reinstatement. Mr. Kelly and five other judgment creditors were placed on notice of the instant application following the matter first coming before this Court, and since such notice Mr. Kelly has objected strenuously to the reinstatement of the charge.
7. Although Vincent Kelly has filed an affidavit before this Court it is the case that he is not in a position to advance the circumstances whereby the applicant's charge was discharged on 12 June 2017. Neither he nor his father had any involvement at the time.
8. Both written and oral submissions were tendered to the Court on behalf of the applicant and on behalf of Vincent Kelly.
9. In addition to the affidavit on behalf of Vincent Kelly several other affidavits have also been filed in this matter. Elaine O'Connor, AIB Case Manager has filed two affidavits respectively dated 14 May 2020 and 19 March 2021. A further affidavit is filed by Kate O'Brien, AIB Solicitor, of 10 February 2021, with an affidavit of Michael Bohan, Solicitor on behalf of the Tullys during the currency of the sale transaction to the Conroys, of 19 March 2021. There is an affidavit of Edele Devins who previously worked for AIB and was the relationship manager for the Tullys during the currency of the relevant transaction aforesaid, and she has now sworn an affidavit of 13 July 2021. Finally, there is an affidavit of Claire Conroy on behalf of both Conroys bearing date 23 February 2022.
10. The affidavits of Ms. Conroy and Ms. Devins are unambiguous in stating that the sale to the Conroys was intended to be completed by AIB as mortgagee in possession so that the judgment mortgages would not attach to the Conroy interest on a completion of the sale, and that there was an error in registering the edischarge prior to the execution and registration of such a transfer to the Conroys. The affidavit of Mr. Bohan supports this contention.

Correspondence

11. The affidavits aforesaid between them exhibit correspondence passing between the parties commencing with a demand for payment of monies by the plaintiff bank following default by the Tullys of 16 November 2015.
12. On 29 June 2016 the Tullys' solicitor indicated that they had located a purchaser and inquired if the applicant would join in the deed to circumvent the judgment mortgagees. By a further letter of 25 July 2016 the Tullys' solicitor indicated that the Tullys would have to surrender the property.
13. In November/December 2016 the applicant and the Tullys restructured the Tully indebtedness to the applicant and it is clear from this restructuring that the Tullys were to sell the subject premises and furnish the net sale proceeds to the applicant whereupon the applicant's charge would be discharged from the folio.

14. Insofar as the applicant's argument, to the effect that it was intended to be a sale by mortgagee in possession, there are two complicating exhibits namely:
- (1) A letter of 6 September 2016 from the Tullys' solicitors to the applicant inquiring if the applicant was prepared to consent to the sale and on payment of the net sale proceeds the applicant would remove the charge over the folio by edischarge.
 - (2) The only contract the Conroys entered into was a contract of 23 January 2017, with the Tullys, in which there is no mention of the judgment creditors, and the special conditions merely cater for a discharge of the AIB charge over the premises. The contract also does not mention anything about the sale being completed by the applicant as vendor. The contract records the Tullys as vendors.
15. The arguments on behalf of Vincent Kelly might be conveniently summarised as follows:
- (a) There is no mention in the applicant's letter of 6 January 2017 (or indeed in any other communication from the applicant at that time) confirming that they would join in the deed of transfer or accept a surrender of the property from the Tullys.
 - (b) The contract of 23 January 2017 which the Conroys entered into, was with the Tullys, and provides that the purchaser will get a discharge of the applicant's charge, which was in fact effected by the edischarge.
 - (c) The asserted strict understanding mentioned in the affidavit of Ms. Conroy is not recorded in any of the documents before the Court.
 - (d) There is no mistake under s.31 having regard to the judgment of Gearty J. in *The Davy Platform ICAV v. O'Sullivan and O'Brien* [2020] IEHC 273, para. 4.2, where the Court indicated that the register is conclusive evidence as to ownership of land under s.31 and stated that:

"It is clear from the act and from the detailed judgment of Mr. Justice Owens on this issue, in *O'Riordan and O'Shea v. SLGI Holdings, ADT Limited and PRA*, [2019] IEHC 247, that any error or fraud which results in unreliable information being recorded in the Register can be corrected by the High Court."
 - (e) The cancellation of the applicant's charge is consistent with the applicant's letter of 6 January 2017, where it was stated that the bank confirms the authorisation to sell the property at the price of €63,000, and further states that upon receipt of the net sale proceeds the bank will arrange for release of the security held in favour of the bank and/or AIB Mortgage Bank over the property. It is pointed out that there is no

reference in this letter to joining in the deed as mortgagee in possession or otherwise.

- (f) Whether or not the Conroys have the entire beneficial interests in the property is not relevant as this is an interest not capable of registration.
- (g) The applicant submits that whether or not the applicant was a mortgagee in possession, or is currently a mortgagee in possession, is not relevant to the issue of reinstatement. Mr. Kelly accepts that this issue may not need to be considered by the Court, however, argues that the applicant cannot establish being a mortgagee in possession now (in this regard no deed of transfer has yet been executed by the applicant or any other party in favour of the Conroys).
- (h) The only prejudice the Conroys have suffered is that the Tullys have not completed the sale on foot of the contract. In this regard it is acknowledged that by reason of the content of the contract, and the fact that the special conditions have not overridden the general conditions, effectively the Tullys have agreed to transfer the property free from encumbrances. If the Tullys cannot do this, then the cause of action is against the Tullys on foot of the said contract in respect of which the applicant was not a party.
- (i) There is confusion or uncertainty as to how matters would unfold, with a lot of suggestions by the Tullys' solicitor, but no indication of an acceptance by the applicant that they would execute a contract as mortgagees in possession or accept any surrender of the property from the Tullys – although there was no objection to this course of action there was no express agreement either.
- (j) The failure of the Tullys to execute a transfer free from encumbrances comprises the error or prejudice to the Conroys, and no prejudice or error arises by reason of AIB discharging the charge when it did so on 12 June 2017.
- (k) Effectively the applicant is asking the Court to manipulate the register to circumvent the rights of the judgment mortgagees and this was not the purpose of s.31.
- (l) No prejudice arises to the bank on foot of the discharge.

Mortgagee in possession

16. Insofar as the issue of the applicant being a mortgagee in possession either at some point prior to 12 June 2017, or currently, the applicant has relied on two decisions of the UK courts as follows:

- (1) *Noyes v. Pollock* [1886] 32 Ch D 53 (Eng. C.A.), an issue which fell to be determined was whether or not mortgagees could be considered to be mortgagees in possession. During the course of his judgment Pearson J. stated:

“He may fall under the principle as a person who enters and takes possession of the rents and profits; but only, as it seems to me, if he does something which goes beyond the mere receipt of sums of money to which the rents and profits may amount, and reaches a point at which he displaces, for the purpose of realizing the security, the mortgagor from the control and dominion of the reversion of the estate which is demised. Unless the dominion and control is taken in that sense, the mere receipt of the produce of the management may be taken by the mortgagee, and yet he may stop short of taking the management itself.”

(b) In *Kirby v. Cowderoy* [1912] AC 599, House of Lords, the Court was again considering the mortgagee being a mortgagee in possession and it was held that possession of land must be considered in every case with reference to its peculiar circumstances.

17. I accept the proposition on behalf of the applicant that as to whether or not the applicant was a mortgagee in possession prior to 12 June 2017, or currently, is not a matter that will influence the s.31(1) application before the Court – this latter issue being confined to considering if the applicant’s charge was discharged because of a mistake within the meaning of s.31(1) aforesaid.

Mistake

18. Insofar as determining reinstatement of the charge under the rubicon of mistake, the applicant relies on the judgment in *NRAM Plc v. Evans* [2015] EWHC 1543. In that matter there was a discharge of a charge, said to be in error. Although the debtor contributed to the confusion leading to the mistake there was also an effective systems error within the procedures of the mortgagee. The Court was satisfied that the charge was in fact discharged in error and thereafter relied on the case of *Garwood v. Bank of Scotland Plc* [2013] EWHC 415 where Mr. Justice Norris indicated the approach as to whether a mistake could be corrected on the basis of the discharge being a unilateral transaction, and he stated at para. 63 of his judgment:

“To invoke the equitable jurisdiction to set aside a voluntary disposition for mistake there must be a mistake of sufficient gravity either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction”.

19. Significantly in my view, the judgment in *NRAM Plc* also quotes from the UK Supreme Court in the case of *Futter & Anor. v. Revenue and Customs* [2013] UKSC 26, where Lord Walker commented at para. 114:

“It does not matter if the mistake is due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong... Nor need the mistake be known to (still less induced by) the person or persons taking a benefit under the disposition.”

20. At para. 128 he went on to state:

“In my opinion the same is true [the requirement of unconscionableness] of the equitable doctrine of mistake. The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case.”

Prejudice

21. Insofar as prejudice or an unconscionable status is concerned, the applicant argues that if the charge is not reinstated (to enable an unencumbered transferred to the Conroys), the Conroys take an interest in the property subject to judgment mortgages, which in fact far exceed the value of the property at the date of the transaction. The Conroys have been in possession since 2017 and have conducted improvements to the property and now wish to sell same.
22. No prejudice will be suffered by Mr. Kelly as the value of his judgment mortgage was always contingent upon the prior discharge of the applicant’s charge over the property. The mistake yields a windfall to Mr. Kelly if not corrected.

Decision

23. Although it is argued by the applicant that the communications in or about 2016/2017 do not create any confusion, this argument is made without effectively addressing the reality of:
 - (1) The letter from the Tullys’ solicitor of 6 September 2016 enquiring as to whether the applicant is prepared to consent to the sale, and on payment of the net sale proceeds remove the charge by edischarge; nor,
 - (2) the fact that a contract was signed between the Tullys and the Conroys of 23 January 2017 wherein there is no reference to the sale being concluded other than by the Tullys to the Conroys.
24. There does appear to me therefore to be some scope for confusion. However, it does not appear to me that confusion would determine whether or not a mistake existed as to the lodgement of the edischarge prior to a transfer being executed in favour of the Conroys.
25. In the matter before Ms. Justice Gearty the applicant was registered as owner of the relevant folio. The Court was satisfied that this was unreliable information on the register and it could be corrected. I am not persuaded that Ms. Justice Gearty intended the court’s jurisdiction preserved under s.31(1) *vis-à-vis* mistake was limited in the manner argued for by Mr. Kelly in the manner set out at para. 15(d). Rather, I am satisfied that in dealing with the concept of mistake within the context of s.31, the equitable doctrine of mistake as dealt with in the UK decision of *NRAM Plc v. Evans* and the case law therein cited, represents the correct approach to a determination of whether or not a mistake was made capable of remedy under *inter alia*, s.31 of the 1964 Act.

26. There is uncontroverted evidence before the Court that the filing of the edischarge in advance of a transfer to the Conroys was a mistake. This mistake, in the circumstances, is in my view central to the transaction – without removing the judgment creditors from the relevant folio on a registration of the Conroys as full owners, the Tullys could not complete the transaction for which they entered into, and no bargain would be achieved by the Conroys because of the extent of the judgment mortgage incumbrances.
27. There is evidence before the Court that on the balance of probabilities the Tullys believed that the applicant would conclude the transaction as mortgagee in possession and this fact has been confirmed by Ms. Devins who was the agent for the applicant at the relevant period.
28. The only means by which the Conroys could in fact take the property free from encumbrances was by transfer from the applicant and in circumstances where the applicant's charge has been discharged, such a transfer from the applicant to the Tullys cannot be registered.
29. Without reinstatement of the charge under s.31 it will be impossible for the Conroys to achieve the bargain which they understood they were to get, and in respect of which there is ample evidence before the Court to suggest both the applicant and the Tullys also intended for this bargain to be given to the Conroys. The prejudice to the Conroys is manifest.
30. I am satisfied in all of the circumstances that neither the judgment of Mr. Justice Owens referred to in the judgment of Ms. Justice Gearty, nor indeed the judgment of Ms. Justice Gearty, seek to limit jurisdiction of the Court in respect of mistake as preserved under s.31(1) of the 1964 Act, rather, the jurisdiction so preserved by s.31 is as set out in *Futter & Anor. v. Revenue and Customs*, the judgment of the House of Lords of 2013, requiring there be a causative mistake of sufficient gravity, the mistake being as to either the legal character or nature of the transaction to some matter of fact, or law, which is basic to the transaction.
31. In the instant circumstances I am satisfied that that test has been satisfied and I am further satisfied that:
 - (a) Insofar as the letter of 6 September 2016 is concerned, it was of course the case that the Tullys wished the applicant's charge to be discharged from the folio, and therefore it was not a letter which limited the prior and subsequent requirements of the applicant executing a deed as mortgagee in possession;
 - (b) insofar as the contract of 23 January 2017 is concerned, the only mechanism by which the Tullys could perform their bargain of an assurance free from encumbrances was by securing transfer from the applicant to the Conroys;

and therefore I am satisfied that any confusion by virtue of the foregoing documents did not result in an intention on the part of any of the parties to the dealings in 2016/2017,

that the transaction would proceed with a transfer to the Conroys subject to the judgment creditors.

32. It is not appropriate in this matter to express any view as to whether or not the applicant was a mortgagee in possession at the time of the transaction in 2016/2017, or currently.
33. In the circumstances therefore an order will be made reinstating the applicant's charge originally registered on 30 December 2004, and removed by mistake on 12 June 2017, together with an order that such charge is reinstated pursuant to order of this Court.

Costs

34. If either party contends for an order regarding costs, written submissions no longer than 2,000 words should be filed in hard copy in the High Court List Room and in soft copy by email to the High Court Submissions Inbox (highcourtsubmissions@courts.ie) within 14 days following electronic delivery of this judgment; the other party being entitled to respond by written submission no longer than 2,000 words within a further period of 14 days thereafter. The Court will thereafter consider same and the matter will be listed for mention at the next sitting of the land list.
35. Otherwise, in default of any submission seeking costs being filed as above provided and within the time specified, parties can make oral submissions on costs when the matter is next listed.