

APPROVED

[2023] IEHC 191



THE HIGH COURT

2018 No. 286 SP

BETWEEN

SEACONVIEW DAC

PLAINTIFF

AND

LIAM FAHEY

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 24 April 2023

INTRODUCTION

1. This judgment is delivered in respect of an application to approve the sale of property pursuant to a well charging order. Ordinarily, such a sale would be carried out as a court sale under the supervision of the Examiner of the High Court. This process entails important safeguards including, relevantly, the obtaining of an independent valuation of the property, and the settling of the terms and conditions of sale by conveyancing counsel.
2. The plaintiff in the present case, seeks, in effect, to have the court approve *retrospectively* a hybrid form of sale. The proposed sale has advanced to the point of the execution of a contract for sale without the plaintiff having submitted

NO REDACTION REQUIRED

to supervision by the Examiner's Office. Indeed, it appears that the intention had been to close the sale without any meaningful court supervision. The plaintiff seeks to rely on the fact that it enjoys a power of sale in respect of *part* of the property (by virtue of a legal mortgage) and that it has the benefit of a well charging order in respect of the remaining part of the property. In the event, however, the purchaser has, seemingly, raised concerns in relation to the sale and has sought the safeguard of a court order.

3. By way of general observation, it is unsatisfactory that a party should seek, in effect, to change tack midcourse. The proper approach for a party who wishes to depart from the normal type of court sale is to bring an application for directions promptly, and certainly well in advance of the execution of a contract for sale. It is not appropriate to present the High Court with a *fait accompli*, whereby a court order is sought to rescue a sale which is in danger of not closing.

PROCEDURAL HISTORY

4. These proceedings relate to three retail units located at Ardfallen Retail Park, Douglas, Cork ("***the retail units***"). The title to the retail units is unregistered. Ulster Bank Ireland Ltd ("***Ulster Bank***") had, seemingly, advanced loans in an amount of €4,550,000 to the defendant in March 2011. The plaintiff in these proceedings asserts that it has succeeded to Ulster Bank's interest in the loans and in the mortgage discussed immediately below.
5. The plaintiff contends that, as of March 2011, it had been intended that the defendant's indebtedness to Ulster Bank would be secured by way of a legal mortgage in respect of the retail units, including the ground floor and basement of each unit. In the event, however, the deed of mortgage identified the property

to be charged as extending to the “*ground floor only*” of each of the three retail units.

6. No explanation has ever been provided for the supposed misdescription of the property by the omission, from the description of the mortgaged property, of the basements of each of the three retail units. Indeed, a director of the plaintiff, Seaconview DAC, has acknowledged on affidavit that he has been unable to ascertain how and why the supposed misdescription occurred.
7. In consequence of the fact that the description of the mortgaged property as per the legal mortgage does not extend to the basements of the three retail units, any power of sale which the plaintiff *qua* mortgagee enjoys under statute or contract is confined to the ground floor of each of the three retail units.
8. The plaintiff has since sought to assert that it has an *equitable* interest in the three basements. Presumably, this is on the basis that equity will regard an interest as having come about by way of an equitable mortgage by virtue of the terms of the facility letter, notwithstanding the fact that the legal mortgage is confined to the “*ground floor only*” of each of the three retail units.
9. The plaintiff instituted these well charging proceedings in June 2018. There were difficulties in effecting personal service on the defendant. An order for substituted service was made on 17 December 2018. The special summons was amended on 8 April 2019 to reflect the correct spelling of the defendant’s surname.
10. The application for a well charging order ultimately came on for hearing before the High Court (Eagar J.) on 18 November 2019. The High Court made an order on that date in the following terms:

“The Court Doth Declare that the principal moneys secured under and by virtue of the Facility Letter issued by Ulster Bank Ireland Limited dated the 23rd day of March 2011 the interest thereon and the costs hereinafter awarded stand well charged on the Defendant’s interest in the lands and premises described in the Second Schedule hereto

And It Appearing that there is due to the Plaintiff on foot of the said Facility Letter a total sum of €3,290,645.81 as of the 10th day of May 2018 together with continuing interest

IT IS ORDERED that in default of payment to the Plaintiff of the said sum together with continuing interest until payment and the costs hereinafter awarded within three months from the date hereof the said lands and premises be sold at such time and place subject to such conditions of sale as shall be settled by the Court and the following Account and Inquiry are to be taken and made in the Examiner’s Office namely

No1 An Account of all incumbrances subsequent as well as prior to and contemporaneous with the Plaintiff’s demand

No2 An Inquiry as to the respective priorities of all such demands as shall be proved”

11. As appears, the order expressly provides that the conditions of sale are to be settled by the High Court. This is normally done in the Examiner’s Office and involves the matter being referred to conveyancing counsel.

12. The plaintiff wishes to sell the three ground floor units and two of the basements as a single lot. It has been explained on affidavit that two of the three basements do not have their own independent access, and, accordingly, it is said that it would not be “*commercially practicable*” to sell them in isolation.
13. The plaintiff embarked upon a tender process, which involved a commitment by the tenderers to enter into a contract for sale in prescribed form. Notwithstanding that its power of sale under the legal mortgage does not extend to the two basements, the plaintiff has purported to enter into a contract for sale in respect of a lot which includes the two basements. This has been done without reference to the High Court.
14. The plaintiff issued a motion on 16 March 2023 seeking the following reliefs:
 - “1. An Order further to the Order of this Honourable Court made the 18th day of November 2019 providing for the sale of part of the property the subject of the facility letter of 23rd March 2011 out of Court or in the alternative fixing the mode of sale of part as being by private treaty contract dated 3 October 2022.
 2. An Order permitting the sale proceeds to be retained by the Plaintiff in circumstances where no party has claimed any prior or subsequent encumbrance and the best price obtained does not exceed the debt of the respondent found to be due by this Honourable Court.”
15. The motion came on for hearing on 17 April 2023 and judgment was reserved to today’s date.

DECISION

16. The application is refused for the following reasons. First, it is not possible for the court to be satisfied, on the basis of the limited evidence put before it, that the price achieved by the tender process represents the best price that can be got. There is a requirement under the Rules of the Superior Courts that a court sale

should strive for this: see Order 51, rule 5. This is, ordinarily, achieved by way of the appointment of an independent valuer and by the fixing of a reserve price.

17. The point has been made, albeit not on affidavit, that the court can take some comfort from the fact that the tender process was carried out by a reputable firm of commercial real estate agents. Without in any way doubting the *bona fides* or expertise of the agents, this is not a substitute for the safeguard of an independent valuation carried out by direction of the court.
18. The second reason for refusing the application is that the conditions of sale have not even been considered by, still less settled by, conveyancing counsel. This is a case where there have already been difficulties in relation to the conveyancing history of the land. Indeed, the very reason it became necessary to seek a well charging order had been that the description of the property as per the terms of the legal mortgage is supposedly incorrect. Having regard to this unhappy history, this is a case where the involvement of conveyancing counsel is of especial importance because of possible concerns in relation to good marketable title.
19. For completeness, it should be observed that the fact that a well charging order has been obtained does not address the question of good marketable title. The well charging proceedings merely address the position as between the plaintiff, as the holder of an equitable interest, and the defendant *inter se*. The proceedings address the (supposed) discrepancy between the terms of the legal mortgage and what is said to have been the actual intention of the parties in relation to the extent of the property to be charged by the legal mortgage.
20. The motion also seeks a declaration that the plaintiff is entitled to retain the sale proceeds. This application must be refused in consequence of the fact that the

court is not prepared to sanction the form of sale involved. Even without this concern, it would not be appropriate, at this stage, to grant such a declaration. The question of whether there are other encumbrancers is something which should be dealt with, through the Examiner's Office, on the *completion* of the sale. The advertisement for encumbrancers in the present case was placed as long ago as September 2020. It cannot simply be assumed that no incumbrances have arisen in the intervening two and a half years.

21. Accordingly, the reliefs sought in the motion are hereby refused. I propose to make no order for costs in respect of the motion given that the defendant did not appear before court to contest same and will not, therefore, have incurred any recoverable costs.

Approved
Gareth S. Moss