

APPROVED

[2022] IEHC 626



THE HIGH COURT

2020 No. 276 SP

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

KELLIE GREENE (OTHERWISE KELLIE BYRNE)
KENNETH GREENE

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 November 2022

INTRODUCTION

1. This judgment addresses the question as to whether an order for sale should be made pursuant to Section 31 of the Land and Conveyancing Law Reform Act 2009. This judgment is supplemental to the principal judgment delivered in these proceedings on 19 August 2022. The principal judgment bears the neutral citation [2022] IEHC 493.

NO REDACTION REQUIRED

STATUTORY FRAMEWORK

2. Section 31 of the Land and Conveyancing Law Reform Act 2009 confers a discretion on the court to make orders affecting land which is in co-ownership.

The orders which may be made under the section include the following:

- (a) an order for partition of the land amongst the co-owners,
- (b) an order for the taking of an account of incumbrances, if any, affecting the land and the making of inquiries as to the respective priorities of any such incumbrances,
- (c) an order for sale of the land and distribution of the proceeds of sale as the court directs,
- (d) an order directing that accounting adjustments be made as between the co-owners,
- (e) an order dispensing with consent to severance of a joint tenancy as required by Section 30 where such consent is being unreasonably withheld,
- (f) such other order relating to the land as appears to the court to be just and equitable in the circumstances of the case.

3. An application for an order under the section may be made by any person having an estate or interest in land which is co-owned (whether at law or in equity). A “*person having an estate or interest in land*” is defined for the purposes of the section as including a mortgagee or other secured creditor, a judgment mortgagee or a trustee.

PROCEDURAL HISTORY

4. The first and second defendants are the registered co-owners of a dwelling house at 19 Hamlet Avenue, Chieftain’s Way, Balbriggan (“*the Property*”).

5. As appears from the principal judgment, this court held that the first defendant's interest in the Property stands charged with a debt in a specified sum, which is owing by the first defendant to the plaintiff bank. The plaintiff bank is, therefore, entitled to a declaration that a specified sum (together with interest) is well charged on the first defendant's interest in the Property. It was further held that the second defendant's interest in the Property had not been charged with the debt.
6. The plaintiff bank seeks to recover the first defendant's debt by way of an order for sale of the Property. The intention is that the Property would be sold, and the debt owing to the plaintiff bank would then be discharged (in whole or in part) from that half of the sale proceeds which is referable to the first defendant's interest in the Property. The other half of the sale proceeds would be paid over to the second defendant.

DISCUSSION AND DECISION

7. The making of an order for sale adversely affects the property rights of the non-debtor co-owner. Whereas the non-debtor co-owner will be entitled to receive their share of the sale proceeds, their ability to deal with their property as they would have wished will have been interfered with. The sale of the property will have been foisted upon them. Moreover, in certain circumstances, a non-debtor co-owner may be rendered homeless if the property to be sold is their family home and if there will be insufficient funds remaining from the sale proceeds to allow them to obtain alternative accommodation.
8. The Supreme Court has identified the type of factors to which a court should have regard in deciding whether to make an order for sale in *Kenny v. An Bord*

Pleanála [2020] IESC 77. Although the judgment was delivered in the context of an application for sale made prior to the enactment of the Land and Conveyancing Law Reform Act 2009, the same considerations apply, by analogy, to an application under Section 31 of that Act. The factors are summarised at paragraph 54 of the judgment as follows:

“The factors that might merit consideration in the exercise of the discretion to order a sale are in the light of the principles and illustrations just analysed broadly speaking the following:

- (1) Whether the ‘innocent’ i.e. non-debtor co-owner might be rendered homeless as a result of the sale: *Drillfix Ltd v. Savage, First National Building Society v. Ring, Muintir Skibbereen v. Crowley*;
- (2) As a corollary, whether the proceeds of sale available to the non-debtor co-owner might be enough to accommodate that person or both owners following a sale; this was the primary determining factor in the decision of Laffoy J. in the present case;
- (3) While it must be a factor, the fact that the sale would not provide sufficient funds to discharge the judgment creditors debt is not in itself a factor that would be determinative: *Flynn v. Crean, Drillfix v. Savage*;
- (4) Whether the non-debtor co-owner got value for the loan or other debt: *Muintir Skibbereen v. Crowley, Drillfix v. Savage*;
- (5) The court will look at the living arrangements of a non-debtor co-owner, be that a spouse, a civil partner, a parent, sibling or child, and whether the order for sale might lead to hardship: *O’D v. O’D, Drillfix v. Savage*;
- (6) The age and means of the parties could be material, and it would seem relevant to take into the account the ages of both the debtor and non-debtor co-owner as the justice of the case requires;
- (7) An offer to make a payment in reduction of a liability would be a factor: *Drillfix v. Savage, Flynn v. Crean*;

- (8) The likely financial consequences of the making of an order for sale are relevant and perhaps sometimes even central to the discretionary exercise. It was central to Laffoy J. who considered that Mrs. Kenny's share of the net proceeds of sale, after the discharge of the legal joint mortgage and the costs of sale, would be sufficient to enable Mrs. Kenny to acquire suitable alternative accommodation."
9. In the ordinary course, it is a matter for the party resisting an application for an order for sale to identify those factors which militate against the making of an order. In the present case, the defendants have never participated in the proceedings at any stage. I am satisfied on the basis of the affidavits of service that the defendants were made aware of the judgment delivered in August 2022 and of the listing of the matter before the High Court in October 2022. For whatever reason, the defendants chose not to avail of the opportunity afforded to them to address the court on the consequential orders following from the principal judgment.
10. In the absence of any submissions or evidence from the defendants, there are practical difficulties in addressing the various discretionary factors identified in the case law discussed above. The following matters are, however, relevant to the exercise by the court of its statutory discretion.
11. The property is not the family home of either of the two defendants. As appears from the affidavits filed in support of the application for substituted service in April 2022, the defendants reside at a different address. As such, an order for the sale of the property seems unlikely to render the defendants homeless.
12. Insofar as the question of whether the non-debtor co-owner obtained any benefit from the borrowings, it is apparent from the affidavit evidence filed in support of the well charging application that the second defendant had executed a guarantee in respect of the loans taken out by the first defendant. The finding in

the principal judgment is to the effect that this guarantee was not supported by the grant of an equitable mortgage over his share of the Property. It is nevertheless relevant to the exercise of the statutory discretion to observe that not only was the second defendant aware that his spouse had granted security over the Property; in fact, he had participated to the extent of providing a guarantee for the underlying loans. This is not a case, therefore, of the non-debtor co-owner being unaware that the joint property was at risk of being sold in order to realise security granted by the other co-owner.

13. In all the circumstances, I am satisfied that it would be just and equitable to make an order for sale. The plaintiff bank is entitled to enforce its security as against the first defendant's interest in the property, and the position of the second defendant will be protected by directing that he be paid one half of the net sale proceeds. The details of the form of order are set out under the next heading below.

CONCLUSION AND FORM OF ORDER

14. For the reasons outlined above, I am satisfied that it would be just and equitable to make an order for sale. The following orders will be made.
15. A declaration that, as of 16 October 2020, the sum of €413,188.25 (together with accruing interest pursuant to the Courts Act 1981) is well charged on the first defendant's interest in the lands comprised in Folio 169302F County Dublin ("*the Property*"). This sum is well charged upon the lien registered pursuant to Section 73 of the Registration of Deeds and Title Act 2006.
16. In default of payment of the said sum (together with accrued interest) within three months of the date of service of the court order on the defendants, the

following orders pursuant to Section 31 of the Land and Conveyancing Law Reform Act 2009 will take effect:

- (1). The Property is to be sold at such time and place, and subject to such conditions of sale, as shall be settled by the High Court.
 - (2). The Examiner's Office is to take an account of incumbrances, if any, affecting the Property, and to make inquiries as to the respective priorities of any such incumbrances.
 - (3). One half of the net sale proceeds (that is, net of any prior incumbrances and net of the costs of sale) is to be paid to the second defendant or to his credit.
17. As to legal costs, there will be no order made in circumstances where the plaintiff bank was only partially successful in the proceedings, in that it failed to obtain a well charging order against the second defendant's interest in the Property.
18. The perfected order may be served on the defendants by sending same by pre-paid registered post to the address specified in the High Court order of 25 April 2022, namely [details of address redacted from the published judgment].
19. The parties have liberty to apply.

Appearances

Keith Rooney for the plaintiff instructed by Mason Hayes and Curran LLP
No appearance by either defendant

Approved
SCOTT SIMONS