

APPROVED

[2024] IEHC 501



THE HIGH COURT

2021 187 SP

BETWEEN

DAN & ELLEN COMERFORD LTD
(IN VOLUNTARY LIQUIDATION)

PLAINTIFF

AND

PATRICK ENRIGHT

DEFENDANT

AND BY ORDER OF THE COURT

CHARLES CASS

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 August 2024

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.

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.

4. The principal relief sought in the present proceedings is an order directing the sale of co-owned property to enforce a judgment mortgage against one of the

two co-owners. It is necessary, therefore, to consider the circumstances in which the making of an order for sale might be appropriate.

5. 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.
6. 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."
7. 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.

PROCEDURAL HISTORY

8. These proceedings relate to two parcels of land situate in County Laois. The first parcel is comprised in Folio 17003. This land consists of what are described as the common areas relating to the construction of three dwelling houses at Steeple View, Abbeyleix, Co. Laois. It seems that these common areas have not

yet been taken in charge by the local authority. There is no evidence before the court to the effect that this land would have any value on the open market. The second parcel is comprised in Folio 2022 F. This land consists of a commercial premises circa 129 square metres (1,380 sq. feet) with road frontage and side access (*“the commercial premises”*). The commercial premises had initially been valued at approximately €150,000, but this figure has since been revised to €100,000.

9. The registered owners of each parcel of lands are Patrick Enright and Charles Cass. Each owner is a tenant in common of one undivided half share of the lands.
10. These proceedings are taken by a company known as Dan & Ellen Comerford Ltd (*“the Company”*). The Company has registered a judgment mortgage against Mr. Enright’s interest in each of the two parcels of land. This registration came about as follows. The Company had instituted an earlier set of proceedings against both Mr. Enright and Mr. Cass: High Court 2008 2216 S (*“the debt proceedings”*). The debt proceedings related to ground works supposedly carried out by the Company in respect of the construction of the three dwelling houses at Steeple View, Abbeyleix, Co. Laois. A compromise was reached between the Company and Mr. Cass. As to Mr. Enright, judgment was entered against him in the sum of €25,317.71 by the High Court (Lavan J.) on 23 November 2009 (*“the judgment debt”*).
11. The Company has since registered this judgment debt as a judgment mortgage against Mr. Enright’s interest in each of the two parcels of land. The two judgment mortgages were entered in the Land Registry on 4 May 2011. It should be noted that there is at least one judgment mortgage registered against Mr.

Enright's interest which appears to have priority over the Company's judgment mortgage.

12. The Company has since gone into liquidation. The within proceedings were instituted on behalf of the Company on 22 October 2021 by its then liquidator. It should be explained that the original liquidator died in January 2023. A replacement liquidator was appointed in November 2023 and has taken over carriage of these proceedings. This resulted in a change in the counsel representing the Company. It should be noted, therefore, that the initial litigation strategy had been pursued, on the instructions of the original liquidator, by a *different* counsel than now on record. In particular, the choice made as to venue, i.e. whether to pursue the proceedings in the High Court rather than the Circuit Court, had been made by the original liquidator. The Circuit Court would have had jurisdiction to entertain the proceedings in circumstances where the market value of the lands is well below the prescribed threshold of three million euro: see the Courts (Supplemental Provisions) Act 1961, Schedule 3, points 19 and 23. As explained presently, the choice of venue is relevant to the incidence of the legal costs of the proceedings.
13. The proceedings, as instituted, had named only one of the two co-owners of the relevant lands. This was procedurally incorrect. In circumstances where the principal relief being sought in the proceedings is an order for sale, the second co-owner, Mr. Cass, is a person directly affected by the proceedings. As such, he should have been joined in the proceedings from the outset. In the event, an order was made directing his joinder to the proceedings as a notice party on 9 May 2022.

14. Mr. Enright has not participated in these proceedings at any stage. Service of the proceedings has been effected on Mr. Enright at an address at Summerhill, Portlaoise, Co. Laois. There is an affidavit of personal service of the proceedings on Mr. Enright dated 15 February 2022. There is a further affidavit of service dated 11 March 2022. Thereafter, Mr. Enright has been notified, by registered post, of the various court listings in these proceedings.
15. Mr. Charles Cass has sworn two affidavits in these proceedings. Mr. Cass has set out a brief history of his business dealings with Mr. Enright in respect of the two parcels of land. Mr. Cass has averred that he has not had contact or communication with Mr. Enright for many years.
16. Mr. Cass arranged to have the commercial premises valued by Mr. John V. Dunne of Hume Auctioneers. The valuation is dated 28 September 2022 and estimates the open market value of the premises at €150,000. Mr. Dunne subsequently revised the estimate downwards to €100,000. This revised estimate is dated 17 January 2024. Mr. Dunne has explained that despite the commercial premises having been advertised for sale since September 2022, there has been very little interest. Mr. Dunne has averred that those who have viewed the property had commented on the state of disrepair of the roof and upon the lack of parking.
17. Separately, the liquidator had arranged to have the commercial premises valued by Mr. Richard Cleary of Property Partners Cleary. This valuation is dated 11 November 2022 and estimates the open market value of the property at €147,500.
18. There have been negotiations between Mr. Cass and the liquidator. These culminated in a proposal that Mr. Cass would purchase Mr. Enright's half share

in the commercial premises for a sum of €25,000. The details of this proposal are discussed under the next heading below.

DISCUSSION AND DECISION

19. There are three principal issues to be addressed in this judgment as follows. The first is whether it is appropriate to make an order directing the sale of the commercial premises pursuant to Section 31 of the Land and Conveyancing Law Reform Act 2009. The second is whether the court should sanction the proposed sale of Mr. Enright's interest to Mr. Cass. The third is whether the court should direct that "*accounting adjustments*", within the meaning of subsection 31(4)(b), be made in favour of Mr. Cass in respect of expenditure incurred by him.
20. The making of an order for the sale of co-owned property gives rise to special considerations in circumstances where one or more of the joint owners is not a debtor. As discussed at paragraphs 4 to 7 above, the making of an order for sale adversely affects the property rights of the non-debtor co-owner. The sale of the property will have been foisted upon them. In some instances, the sale of the property may result in the non-debtor co-owner being rendered homeless. Fortunately, this latter consideration does not arise on the facts of the present case. The property to be sold is a commercial premises, not a family home.
21. The non-debtor co-owner, Mr. Cass, has not advanced any argument as to why the commercial premises should not be sold. As Mr. Cass puts it on affidavit, he has resigned himself to the fact that the commercial premises will have to be sold. Mr. Cass's concern is to ensure that his financial interests are protected. In principle, therefore, this is an appropriate case in which to direct the sale of

the property. The non-debtor co-owner will, of course, be entitled to be paid his proportion of the sale proceeds.

22. In the ordinary course, a court ordered sale would be supervised under the auspices of the Examiner's Office in accordance with the procedures under Order 51 of the Rules of the Superior Courts. This would involve the preparation of conditions of sale by court appointed conveyancing counsel and the settling of same by the High Court. In the present case, however, it is proposed that the court should sanction the sale of Mr. Enright's half share in the commercial premises to Mr. Cass. More specifically, it is proposed that the court would sanction the sale of Mr. Enright's interest in the commercial premises to Mr. Cass for a sum of €25,000. The Company could then make a claim for payment out from the balance, if any, of the sale proceeds remaining once all prior incumbrances and the costs of sale have been discharged. (As noted earlier, there appears to be at least one incumbrancer with priority).
23. The difficulty with the proposed sale is that it would appear, by reference to the previously obtained valuations, to involve the sale of Mr. Enright's half share at a steep discount. The commercial premises were initially valued at €150,000, which would give Mr. Enright's half share a notional value of €75,000. Even taking the revised valuation of €100,000, the half share would have a notional value of €50,000. The proposed purchase price of €25,000 falls well short of this.
24. An attempt has been made to justify this discount on the basis that the sale of a *half share* in the commercial premises would be problematic on the open market. The implication being that it would be necessary to identify a purchaser who would be prepared to acquire a share in co-owned property. With respect, this

submission overlooks the legal consequence of Section 31 of the Land and Conveyancing Law Reform Act 2009. The order for sale would allow the entire interest in the commercial premises to be sold, i.e. the interest of the non-debtor co-owner would be *overreached*, and the co-owner would be confined to his proportion of the sale proceeds. From the perspective of the purchaser, they would obtain full ownership. The open market value of the property must be estimated on this basis.

25. The sale of the commercial premises at an undervalue would prejudice Mr. Enright. The debt which he owes to the Company will only be reduced by the proportion of the sale proceeds which is attributable to his half share. If the purchase price has been inappropriately discounted, then his debt will have been reduced by less than it should have been. Of course, it is a fact that Mr. Enright has not sought to protect his position by participating in the proceedings. Nevertheless, the court must seek to ensure that the best price is achieved for the property. This is especially so in circumstances where, as in the present case, there are *other* judgment mortgages registered against the property to be sold. The position of these incumbrancers would be prejudiced were the property to be sold at an undervalue. In the circumstances, having regard to the state of the evidence in relation to valuation, it is fairer to all that the sale of the commercial premises be by way of a court sale.
26. Turning to the third issue, Mr. Cass has averred that he expended some €6,000 in labour and materials in refurbishing the commercial premises at an unspecified date. Mr. Cass goes on to explain that in circumstances where he had undertaken all of this work himself, he does not have any receipts to vouch this expenditure. Nevertheless, Mr. Cass has sought that an “*accounting*

adjustment” be made to reflect this expenditure. Section 31 of the Land and Conveyancing Law Reform Act 2009 provides, in relevant part, that “*accounting adjustments*” may be made directing that compensation be paid by a co-owner to any other co-owner who has incurred “*disproportionate expenditure*” in respect of the land (including its repair or improvement).

27. The use of the phrase “*disproportionate expenditure*” implies that the objective of the statutory provision made for “*accounting adjustments*” is to ensure that the other co-owners are not unjustly enriched by expenditure which has been incurred by another co-owner and which has resulted in an increase in the value of the property. It follows that the concept of a “*repair*” or “*improvement*” is confined to works of a type which have resulted in an increase in the value of the property. There is no evidence before the court on this application which indicates that Mr. Cass has undertaken works of this type. Certainly, basic painting and decorating of the sort mentioned does not meet the threshold of “*disproportionate expenditure*”. Accordingly, it is not appropriate to make an “*accounting adjustment*”.

CONCLUSION AND PROPOSED FORM OF ORDER

28. 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.
29. A declaration that, as of 4 May 2011, the sum of €25,317.71 (together with accruing interest pursuant to the statutory rate under the Courts Act 1981 and the legal costs of High Court proceedings 2008 No. 2216 S) is well charged on the defendant’s interest in the lands and premises comprised in Folio 2022 F County Laois (“*the Property*”).

30. 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 defendant and notice party, 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 sale proceeds is to be paid to Mr. Charles Cass or to his credit. For the avoidance of doubt, this is subject to any prior incumbrances affecting his interest in the Property.
31. The perfected order may be served on the defendant, Mr. Enright, by sending same by pre-paid registered post to the address at Summerhill, Portlaoise, Co. Laois identified in the affidavit of service of 15 February 2022.
32. The parties have liberty to apply.
33. This judgment has not directed the sale of the lands at Steeple View, Abbeyleix, Co. Laois (Folio 17003, Co. Laois). The reason for this is that no evidence has been put before the court in relation to the open market value of these lands. It appears that the lands are the common areas of a residential development and are unlikely to have any significant value to a third party. If the Company wishes to pursue relief in this regard, it has liberty to apply.
34. The views that are expressed below in respect of legal costs are *provisional*, and the parties will have an opportunity, if so desired, to make submissions as to why a different form of costs order than that proposed should be made.

35. As to legal costs, it is necessary to distinguish between the position of Mr. Enright and that of Mr. Cass. Mr. Enright is a judgment debtor. The necessity to pursue an application for a well charging order and order for sale arose as a result of his failure to discharge his judgment debt. It would seem, therefore, that the Company is entitled to recover its reasonable legal costs of these proceedings as against Mr. Enright. This is subject to the caveat that, having regard to the monetary value of the lands, these proceedings should have been instituted before the Circuit Court, not the High Court. Accordingly, any costs recoverable are properly confined to those on the Circuit Court scale in accordance with Section 17 of the Courts of Justice Act 1981. The costs recoverable are to exclude the additional costs incurred in consequence of the failure to join the co-owner to the proceedings initially. This failure caused the proceedings to be prolonged, with a number of additional listings which could have been avoided. The costs are to be measured by the benchmark of a conventional application for an order for sale and confined to a single "*for mention*" date and a single "*for hearing*" date before the Circuit Court. None of the costs associated with the other listings are recoverable.
36. The position in relation to Mr. Cass is more nuanced. Mr. Cass is an innocent party in the sense that he has only become enmeshed in these proceedings as a result of his co-owner owing a debt to the Company. Mr. Cass was a necessary party to the proceedings in circumstances where he would be directly affected by an order for sale. As such, he should have been joined to the proceedings from the outset. Mr. Cass's participation in the proceedings will not have caused any additional costs to the Company. Mr. Cass has taken a pragmatic approach to the proceedings from the outset and had conceded that an order for sale would

be necessary. Had the proceedings been instituted in the Circuit Court, the appropriate costs order would probably have been that Mr. Cass should bear his own costs. However, the choice made by the original liquidator to pursue proceedings in the High Court will have resulted in Mr. Cass incurring additional costs unnecessarily. Mr. Cass has been put to the trouble of participating in High Court proceedings not Circuit Court proceedings. In principle, therefore, Mr. Cass would seem entitled to a differential costs order pursuant to Section 17(5) of the Courts Act 1981 (as substituted by the Courts Act 1991). Put otherwise, the Company should be obliged to pay Mr. Cass the difference between the costs he incurred before the High Court and the (lesser) costs which he would have incurred had the proceedings been instituted before the Circuit Court. Unless the parties request the court to measure the costs differential itself, it is proposed to direct that same be adjudicated by the Office of the Chief Legal Costs Adjudicator pursuant to subsection 17(5)(a)(ii) of the Courts Act 1981 and Part 10 of the Legal Services Regulation Act 2015. The costs order is to rank in priority for the purposes of the liquidation.

37. If any party wishes to contend for a different costs order than that proposed, they should notify the High Court Registrar by 30 September 2024 and arrange to have the matter listed for argument on costs at a date convenient to the parties.

Appearances

Brian Walker for the plaintiff instructed by Hunter & Company

No appearance on behalf of the defendant

Simon Charles McDonald for the notice party instructed by Gerard A O'Donoghue