

THE HIGH COURT

[2017 No. 30 SP]

BETWEEN

JAMES WALSH

PLAINTIFF

AND

THE GOVERNOR AND THE COMPANY OF BANK OF IRELAND

DEFENDANT

**JUDGMENT of Ms. Justice Eileen Creedon delivered on the 12th day of October 2018;**

1. These proceedings were commenced by the plaintiff by way of special summons against the defendant.
2. The plaintiff claimed:
  - (i) An order pursuant to O. 3 r. 4 of the Rules of the Superior Courts directing payment of the surplus monies in the amount of €73,840.52 to the plaintiff's solicitors.
  - (ii) In the alternative, an order pursuant to O. 3 r. 4 of the Rules of the Superior Courts directing payment of the surplus monies in the sum of €73,840.52 to the plaintiff's solicitors on condition of an undertaking by the plaintiff's solicitors the terms of which are to be fixed by this honourable Court directing that they repay the extant judgment creditor and indemnify the defendant accordingly.
  - (iii) Damages for negligence and breach of duty including fiduciary duty and/or breach of trust in failing to return the surplus monies when they became due and owing.
  - (iv) An order that the defendants account to the plaintiff in the amount of surplus monies retained by them.
  - (v) All necessary further accounts and enquiries.
  - (vi) Interest pursuant to the Courts Act, 1981.
  - (vii) Such further other order as this honourable court shall deem appropriate.
  - (viii) The costs of these proceedings
3. The special summons was subsequently amended by the Master of the High Court on consent withdrawing the claim for damages for negligence and breach of duty as set out in para. 3 of the original special summons.
4. This claim was set out in the endorsement of claim in the special summons and was further set out in the grounding affidavit of Antoinette McMahon, solicitor, within the firm of McMahon & Co. Solicitors on behalf of the plaintiff. The replying affidavit on behalf of the defendant the Governor and Company of the Bank of Ireland, was filed by Mr. Brendan Moriarty, Solicitor and partner in the firm of Whitney Moore on the 3rd March, 2017. Mr. Moriarty also filed two subsequent affidavits that is a second affidavit dated

the 24th April, 2017 and a further affidavit dated the 22nd June, 2017. The plaintiff himself, Mr. James Walsh, swore an affidavit on the 8th May 2017.

### **Background**

5. It was common case between the parties that the defendants sold the property at 57 Mountain View Drive, Churchtown, Dublin 14, being all of the property registered on Folio 68096L County Dublin, as mortgagee in possession in exercise of its power of sale which sale closed in late April 2016. It was also common case between the parties that the sale price was €282,000 and that a total of €128,318.95 representing the costs and expenses of the sale the principle and interest due to the defendant and secured by its mortgage over the property fell to be deducted from the sum leaving net sale proceeds of €153,681.05 in the possession and control of the defendants to be paid over to the party or parties next entitled thereto.
6. It appeared to be common case between the parties that the plaintiff James Walsh and Francis Power, held the property jointly and enjoyed equal beneficial interests in the net sale proceeds of the property. It also appeared that only one encumbrance after the defendant's mortgage was registered against the interests of Francis Power in the property. Accordingly, after payment of the sum due on that one encumbrance the balance of Ms. Power's half share entitlement in the net sale proceeds of the property in the sum of €65,090 was paid out to Mrs. Power care of her own solicitors and accepted by her. What remained was the sum of €76,840.52 referable to the plaintiff's half share interest in the net proceeds from the property.
7. What also appeared to be common case between the parties and what was evident from an examination of an up to date copy of Folio 6096L County Dublin was that the new owners of the property have now been registered as such and that encumbrances over which the defendant's mortgage had priority had been cancelled which said encumbrances were overreached by the defendant's sale as mortgagee by virtue of section 21 of the Conveyancing Act 1881, which governed the sale as the mortgage was a pre-2009 mortgage. While these encumbrances have been cancelled on the Folio from entries 9 to 15 inclusive in part 3 of the Folio, there were seven separate judgment mortgages subsequent to the defendant's mortgage registered against the interest of the plaintiff in the property. These judgment mortgages are set out in full at para. 7 of the defendant's replying affidavit, dated the 3rd day of March, 2017. The last of those judgment mortgages at entry number 15 is in favour of M. & J. Gleeson & Co. for a non-stated amount on foot of an order of the Circuit Court dated the 21st March, 2010.

### **Plaintiff's case**

8. The plaintiff's solicitor in her grounding affidavit averred inter alia that there were a number of judgment mortgages registered against the interests of the plaintiff but that all but one of them, namely that in favour of M. & J. Gleeson Ltd, have become statute barred. She further averred that in relation to the statute barred judgment mortgages it is the position of the defendant that notwithstanding the unenforceability of the debt, they are duty bound to withhold the proceeds of sale from the plaintiff. She averred that the basis for this would appear to be the defendant's contention that the plaintiff's failure

to have the judgment mortgages cancelled before the sale is a legal bar to recovery of the monies for his own benefit. She avers that the plaintiff's position is that by operation of law, in particular the overreaching effect of the sale of the property by a mortgagee in possession, the interests of the judgment creditors that are statute barred are now spent, void and unenforceable with the result that there is no obligation on the defendant to withhold monies from the plaintiff. She averred that these matters have been more comprehensively discussed between the party's representatives across a series of correspondence which she exhibits to her affidavit.

9. She averred that in relation to the interests of M. & J. Gleeson Ltd, the plaintiff had negotiated and agreed in principle to a number of compromises in settlement of his obligations which will bring about a financially efficient and beneficial outcome for the plaintiff. She averred that each of the said agreements have failed due to lapse of deadline for payment caused by the defendants withholding of the sale proceeds. She said as a comfort to the defendants, the plaintiff's solicitor offered an undertaking to discharge the monies due to M. & J. Gleeson Ltd if the sale proceeds were to be released to them. She averred that that offer was rejected and that she had been advised that there was no obvious legal basis for such rejection and further certainly none that has been articulated by the defendant. She again exhibited relevant correspondence.
10. She asserted that it is necessary and proper that the defendant ought to immediately release the monies that represent the plaintiff's share of the sale proceeds subject to whatever provision is required to secure the interests of M. & J. Gleeson Ltd and prays this honourable Court for the relief sought in the endorsement of claim in the special summons.
11. In the plaintiff's oral and written submissions before the Court, the plaintiff asserted that he agreed a compromise with M. & J. Gleeson & Co. Ltd, with a partial payment in full and final satisfaction of the debt limited in time for 21 days from the 28th September, 2016 and which would therefore expire on the 19th October, 2016. The plaintiff complained that the defendant, through its solicitors, failed to act in accordance with their duty as trustee by ensuring that the agreement that the plaintiff had reached with Gleesons was honoured within the 21-day time limit. In this regard, the plaintiff made reference to the correspondence and interaction between the parties which will be referred to later in this judgment.
12. The plaintiff alleged that the defendant ought to have acted in accordance with ordinary standards of prudence and reasonableness by ascertaining encumbrances prior to arranging the sale. The plaintiff contended that the defendant should have followed the same course of conduct followed by the Examiner of the High Court in a court sale, which he said is the normal and appropriate method of sale by mortgagee in possession. The plaintiff alleged that the failure of the defendant to conduct an inquiry of encumbrances in advance of sale was prejudicial to his interests in a number of ways, these were as follows:

- (i) He was deprived of a compromise in the debt due to M & J Gleeson Ltd at a discount of approximately €20,000.
  - (ii) This loss is caused by the delay in conducting an inquiry after the sale rather than in advance and/or by reason of the defendants notifying Gleesons that monies adequate to make full repayment were available to it.
  - (iii) The defendant made that disclosure to Gleesons at such a time when it was aware that Gleesons would accept a reduction of approximately €20,000 in satisfaction of their debt.
  - (iv) The plaintiff further said that in terms of assessing the prudence of the defendant's conduct of the sale and subsequent execution of his duties as trustee of proceeds, the plaintiff relies on the delay in engaging with the plaintiff at a time when he would have availed of a discounted compromise.
13. The plaintiff further says that he relied on an assertion that the plaintiff was required to apply for a cancellation of judgment mortgages, subsequent abandonment of that position and the disclosure of the existence of a surplus, as well as other confidential matters, to all former judgment mortgagees as matters of relevance that corroborate the lack of reasonableness in the exercise of the power of sale and in particular the distribution of the sale proceeds. The plaintiff referred the court to the cases of *Allied Irish Banks Plc v. Daragh Heagney* High Court 29th March, 2012 [2012] IEHC 138, *Holohan v. Friends Provident and Century Life* [1966] I.R. 1 O'Dalaigh C.J. and also to the duties of a mortgagee in possession as set out in Fisher and Lightwood's *Law of Mortgage* (Butterworths 11th ed. 2002) at p. 737.

#### **Defendant's case**

14. The defendant set out its case in its replying affidavit of Brendan Moriarty dated the 3rd March, 2017 and the second and third affidavits of Brendan Moriarty dated the 24th April, 2017 and the 22nd June, 2017 respectively. The defendant also provided both written and oral submissions to the Court.
15. In his replying affidavit, Mr. Moriarty asserted that it was his understanding on foot of legal advice that the defendant, having discharged the costs of repossession and sale and having discharged the principle interest due to it and secured by its mortgage, is a trustee in respect of the said remaining sale proceeds for the person next entitled thereto.
16. He went on to aver that ordinarily the plaintiff might have been the next person entitled however in this case, there were several registered encumbrances affecting his interest in the property intervening. He averred that it could be seen that the judgments in the first six of these seven judgment mortgages are more than twelve years old. However he further stated that he was advised by counsel and believed that by virtue of the provisions in sections 53 and 63 respectively of the Statute of Limitations Act 1957 acknowledgment and part payment of a judgment debt are both events which will cause a judgment mortgage and the underlying judgment to endure beyond the twelve-year

limitation period ordinarily applicable under sections 11 (6), 32 (2) (a) and 36 (1) (a) of the Statute of Limitations Act, 1957.

17. He said the defendant herein could not know whether any such acknowledgments or part payments may have operated on the statutory time limits. He also went on to aver that it was also possible that proceedings have been commenced in the Circuit Court by one or more of the judgment creditors for an order for sale of the property which he said he was advised and believed would again in the ordinary course, stop time running under the Statute of Limitations and there were no public search facilities available to the defendant to confirm whether that was or was not the case.
18. He said in those circumstances and having taken the advice of counsel on the matter, it was necessary and appropriate for the defendant as trustee for the next person entitled to the purchase monies, to give the parties who registered those judgment mortgages both notice and the opportunity to make any case they might have for the statute of limitation period in respect of their judgment having been restarted by the commencement of an action, or had it been extended by acknowledgment or part payment as the case may be.
19. He said that this reflected the practice of the Property Registration Authority when dealing with applications to cancel judgment mortgages.
20. He went on to aver that even if the above approach were considered over cautious or if the six older judgment creditors, having been given notice acknowledged that their claims were indeed all out of time, that would still not address the position of M. & J. Gleeson & Co. whose judgment mortgage is considerably less than twelve years old. He stated that the plaintiff's solicitor's correspondence showed that the plaintiff expected the defendant to accept some form of undertaking from him to discharge the debt due to M. & J. Gleeson & Co. if the entire monies were released to him. He averred however that that would be an inversion of the order of priority and would amount to a trustee delegating his duties to the person whose interests most conflicted with the beneficiary. He stated that he was advised and believed that this would be wholly improper and was not to be contemplated in the circumstances.
21. He said that the correspondence of the solicitor representing the plaintiff further expressed the view that the overreaching effect of the sale by the defendant somehow allowed the defendant to ignore the subsequent mortgages and to pay the monies directly to the plaintiff as mortgagor. The defendant averred that this was fundamentally incorrect and averred that all that the mortgage sale achieved was to protect the purchasers against any claims by the judgment mortgagees. The claims of those parties against the proceeds of sale were perfectly unimpaired by the sale to the extent that the statute of limitations had not barred them.
22. He further averred that having taken the prudent step of contacting the other judgment mortgagees and allowing a period of time within which they might make their claims, he

believes that he is now both entitled and bound to proceed on the basis that M. & J. Gleeson & Co. is the incumbrant or next entitled.

23. He further stated that he has been advised by counsel and believed that as a matter of decided authority in the case of *Thompson v. Bruty* [1921] CH 508, all of the remaining net proceeds of sale, subject only to the issue of costs, must now be passed to the said M. & J. Gleeson and Co. Additionally, that any issue between them and the plaintiff will be a matter to be resolved between themselves, the said M. & J. Gleeson & Co. becoming a trustee in respect of all monies over and above what is due to it.
24. He stated that he was advised and believed that any order that would impair the position of M. & J. Gleeson & Co. would require the joinder of that party to these proceedings.
25. In the circumstances he prays this honourable Court to refuse the relief sought by the plaintiff in the special summons and for an order instead entitling the defendant;
  - (a) to deduct from the net proceeds of the property now in its possession its costs of these proceedings same to be fixed by this honourable court or taxed in default of agreement and;
  - (b) to pass the residue to M. & J. Gleeson & Co. or such other person as this honourable court deems to be the next entitled to the said balance of the purchase monies.

**The facts**

26. In his written legal submissions, the defendant set out a chronology of the facts of the case in paragraph 26 which were not contested by the plaintiffs and which were supported by the exchanged correspondence.
27. The factual issue of contention between the parties, as asserted by the plaintiff, is as set out in the grounding affidavit of the plaintiff's solicitor at paras. 7 and 8 namely, that in relation to the interests of M. & J. Gleeson Co. the plaintiff had negotiated and agreed, in principle, a number of compromises in settlement of his obligations which would have brought about a financially efficient and beneficial outcome for the plaintiff. The plaintiff asserted that each of the said agreements have failed due to lapse of deadline for payment caused by the defendant's withholding of the sale proceeds. They further stated that as a comfort to the defendants, the plaintiff's solicitors offered an undertaking to discharge to the monies due to M. & J. Gleeson Ltd if the sale proceeds were to be released to them. The plaintiffs averred that that offer was rejected and that they were advised that no obvious legal basis for same existed and certainly none that has been articulated by the defendant. In those circumstances the plaintiff said and believed that it is necessary and proper that the defendant ought to immediately release the monies that represent the plaintiff's share of the sale proceeds subject to whatever provision is required to secure the interests of M. & Gleeson Co.
28. The defendants reject these assertions both in the grounding affidavit of Brendan Moriarty and in the defendant's written legal submissions to the court.

29. In short the defendant asserts that;

- (i) The plaintiff's solicitor in her grounding affidavit avers that in relation to the interests of M. & J. Gleeson Ltd the plaintiff has negotiated and agreed in principle a number of compromises in settlement of his obligations which would bring about a financially efficient and beneficial outcome for the plaintiff. Each of the said agreements failed due to lapse of deadline for payment caused by the defendant's withholding of the sale proceeds. The defendant said however that the plaintiff's solicitor fails to disclose any "agreement in principle" other than the agreement of the 28th September, 2016 and failed to disclose how the defendant's "withholding of the sale proceeds" caused the failure of the agreements in circumstances where Mr. Moriarty solicitor (on behalf of the defendant )being the only person on behalf of the defendant who dealt with either the plaintiff or his solicitor, averred that he was unaware of any deadline or any other terms of any other agreement by way of corroboration or any other translating of any agreement. The defendant said that Mr. Moriarty had been corroborated in this assertion by the fact that there was no reference in any of this correspondence prior to the 19th October, 2016 or indeed afterwards that there was any time sensitivity relating to any agreement. Despite requests they stated that there was a marked reluctance to provide any details or copy of the agreement with M. & J. Gleeson & Co.
- (ii) The defendant went on to assert that in her letter of 3rd November, 2016, the plaintiff's solicitor stated "the only judgment that Mr. Walsh has acknowledged within the past twelve years is that of M. & J. Gleeson & Co. and in respect of which he has a payment schedule in place" in circumstances where the offer from M. & J. Gleeson & Co. (as evidenced in the letter of the 28th September, 2016) lapsed on the 19th October, 2016 and there was no evidence of any renewal of that offer still less any payment schedule.
- (iii) Thirdly, the defendant asserted that the plaintiff's solicitor in the grounding affidavit, again at para. 7, stated that "the plaintiff's solicitor offered an undertaking to discharge the monies due to M. & J. Gleeson & Co. if the sale proceeds were released to them." In fact, the defendant stated that no undertaking was offered and referred to the letter of the 3rd January, 2017 although it was clear that such an undertaking would not be acceptable anyway and they referred to a letter of the 12th January, 2017. They further claimed that by the time the undertaking was even mentioned the offer by M. & J. Gleeson & Co. had long since lapsed.

### **The Arguments**

30. The following legal principles were opened to the Court by the defendant. The defendant asserted that in the case of a pre-2009 mortgage which is the case in this litigation, the duties of a mortgagee with surplus funds in its hands or in the sale of mortgage lands are set out in section 21 (3) of the Conveyancing Act, 1881; as follows;

"The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances to which the sale is not made subject, if any, or

after payment into Court under this Act of a sum to meet any prior encumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof."

31. In support of its position the defendant referred the Court to the case of *Charles v. Jones* [1887] 35 ChD 544, which established that a mortgagee once he has paid himself and has any money remaining in his hand which is no longer his property, holds that money in trust for the next incumbrancer in priority. The defendant therefore asserted that the first incumbrancer is trustee for the second incumbrancer and the second incumbrancer is the trustee for the third incumbrancer and so on until the mortgager is put in funds. See case of *Thomson v. Bruty* [1921] Ch. 508. The defendant said that where a mortgagee has actual or constructive notice of the existence of an encumbrance that has priority over the title of the mortgagor and pays out to the mortgagor, then in the ordinary course he will have to account to the subsequent incumbrancer for the loss occasioned to the latter and quoted the case of *West London Commercial Bank v. Reliance Permanent Building Society* [1885] 29 ChD 954. The defendant canvassed the various options open to it in discharging its duty as trustee and the various matters which must be taken into consideration including the possibility that certain encumbrances have become statute barred.
32. The defendant set out the law in respect of the Statute of Limitations, 1957 as it applies to judgment mortgages, in particular how the statute extends certain statute limitation periods in cases of disability acknowledgement, part payment, fraud and mistake. In light of the law in this area, the defendant concluded that it would be foolhardy in the extreme for a mortgagee in the position of a trustee to exclude the possibility that judgment mortgages more than twelve years old remain valid and enforceable encumbrances on the funds in its possession. In the circumstances, the defendant contended that it was right and reasonable that the defendant made proper inquiries. Additionally, they asserted that the mortgagee holding funds, having made reasonable efforts to ascertain the subsequent encumbrances and having made reasonable efforts to contact them, it was respectfully submitted that the onus fell on the claimants to the funds to have made their position known.
33. If it was clear and undisputed which party is first entitled, then the mortgagee was free to pay all monies to that person and that person becomes the trustee in accordance with the principles outlined. However if there was any dispute, it was respectfully submitted that it was imprudent for the mortgagee holding funds to interpose themselves as arbitrator, or adjudicator, in respect of the competing claims and he certainly should not bear any liability for not taking on that role. In those circumstances the defendants contended that the plaintiff's assertion that he was the beneficiary of the trust of which the defendant is



trustee, that he was deprived of an opportunity of an attractive settlement of his debt due to M. & J. Gleeson & Co. because the defendant in breach of a fiduciary duty neglected to release the surplus monies to him or his solicitors is incorrect. The defendant asserted that the beneficiary of the trust affecting the mortgagee with surplus funds on its hands after a sale was not the mortgagee but the party next entitled to give valid receipt for the purchase monies. This case and the inquiries made the beneficiaries M. & Gleeson & Co. Ltd.

34. The defendant further stated that unless M. & J. Gleeson & Co. agreed to take a lesser sum and the defendant agreed to give it a lesser sum and to take on the duty of distributing to the next person entitled, all of the funds must be given to M. & J. Gleeson & Co. Ltd. The defendant further said that consequently the plaintiff is not the beneficiary and no fiduciary or other duties were owed by the defendant to the plaintiff. The defendant further said that following from the above far from being under duty to the plaintiff to facilitate in reaching a "financially efficient and beneficial outcome for the plaintiff" the defendant was if anything, under a duty to M. & J. Gleeson & Co. as the person next entitled not to facilitate a degradation of its interest. They said that the plaintiff has been coy about what circumstances persuaded M. & J. Gleeson & Co. to accept a reduced sum in lieu of the fully secured judgment which was due to them. Ordinarily a creditor will only give a discount in such circumstances where there is a deficit in the assets available to meet their claim.
35. The defendant says that there is no deficit here so the plaintiff has left hanging a question of no little importance in these proceedings. The defendant said further that in light of the fact that the defendant was not advised of the terms of any agreement with M. & J. Gleeson & Co. still less of any time sensitivity around same, there was no causative link between any act or omission of the defendant still less any wrongful act or omission and any loss sustained by the plaintiff.

#### **Decision**

36. The Court accepts the law as set out by the defendant, and in particular that issues of a mortgagee with surplus funds in its hands following the sale of mortgaged lands are governed by the provisions of s. 21 (3) of the Conveyancing Act, 1881. In those circumstances to discharge its duty as trustee the mortgagee is obliged and entitled to make reasonable efforts to ascertain the subsequent encumbrancers in order that it can properly discharge its duty as trustee. The Court further agrees that when it is clearly undisputed as to which party is first entitled, then the mortgagee is free to pay all monies to that person and that person becomes a trustee in accordance with the principles set out.

Accordingly, unless M. & J. Gleeson & Co. agrees to take a lesser sum and the defendant agrees to give it a lesser sum and assume the duty of distributing to the next person entitled, all of the funds must be given to M. & J. Gleeson & Co. It has been submitted that M. & J. Gleeson & Co. Ltd are reluctant to take on this role and they have not been joined as a party to these proceedings.

37. Accordingly, the Court refuses the reliefs sought by the plaintiff on a special summons and orders as follows;

- (i) That the defendant stands entitled to deduct from the net proceeds of the property now in its possession its costs of these proceedings same to be fixed by this honourable court.
- (ii) That the defendant should then pass the residue to M.& J. Gleeson & Co. the next entitled to the said balance of the purchase monies.