

LAND REGISTRY

County Cork

Folio 60352

Application of Christine McCarthy

Judgment delivered by Mr. Justice
McWilliam on the 27th July 1984

This matter has come before the Court on a reference by the Registrar of Titles pursuant to section 19(2) of the Registration of Title Act, 1964, upon an application by Christine McCarthy, the registered owner, for the cancellation of a judgment mortgage registered on the folio on 22nd. July, 1983, the judgment creditor being John McCarthy, a brother-in-law of Christine McCarthy. The folio contains a note that the amount of the judgment was stated to be £79,058.60 and that, as between such burden and any lien on the property created by deposit of the Land Certificate prior to the date of the registration of the judgment mortgage, the judgment mortgage ranks in priority after such lien.

Christine McCarthy was married to Patrick, Gabriel McCarthy in England on 8th. September, 1973. Subsequently Patrick Gabriel McCarthy purchased the land^{and} was registered as full owner on the folio on 3rd February, 1975. The lands comprised about one and one third acres on which there was a dwellinghouse known as Eldon House. The husband and wife lived in the house with their two children and it became their family home.

Patrick Gabriel McCarthy became an alcoholic and was frequently a patient in St. John of God's hospital between 1980 and 1983.

In 1981 Christine McCarthy brought proceedings against her husband, and, on 19th February, 1982, an Order was made that she should continue to live in the family home and it was noted that her husband undertook to remain away from it. Various provisions were made as to custody and access and Patrick Gabriel McCarthy was ordered to pay maintenance at the rate of £150 per week.

On 3rd June, 1983, the husband and wife entered into a separation agreement whereby the wife agreed to support and

maintain herself and the children and to abandon all her various statutory rights against her husband and he agreed to convey the house and premises to his wife. The wife also agreed, with the consent of the Court, to withdraw all proceedings whether for divorce a mensa et thoro or otherwise. Clause (m) of the agreement provided as follows: "Whereas and from the date hereof the wife irrevocably undertakes to pay and discharge all existing debts and liabilities together with all debts and liabilities incurred by her after the date hereof in respect of the said dwellinghouse, land and hereditaments attaching thereto and will at all future times indemnify and keep indemnified the Husband against all actions, proceedings, claims, demands, costs, damages, losses and expenses against all debts hereinafter contracted by her and against all liabilities whatsoever in respect of the issue of the said marriage and on any account of any matter."

On 17th. June, 1983, Patrick Gabriel McCarthy transferred the property to his wife in consideration of the settlement and she was registered as full owner on 19th. August, 1983. It appears from the application to the Land Registry for the registration of Christine McCarthy that the Land Certificate was furnished with the application. It was probably received by the Land Registry on 19th. August, 1983. It would appear also that no entry of the judgment mortgage was made on the land certificate at that time, although the land certificate was not produced for inspection in Court. In April, 1984, Christine McCarthy entered into a contract for the sale of the property and then discovered that the judgment mortgage had been registered on the folio in the previous July.

This led to the present application to the Land Registry for the cancellation of the entry of the judgment mortgage and, on notification of the application being given to John McCarthy, his solicitors formally object to the cancellation on the grounds that the transfer to Christine McCarthy was made in effort to defraud and defeat creditors and is therefore void.

The proceedings by John McCarthy against his brothers had taken an unusual course. They were brought against Patrick Gabriel McCarthy and a third brother, William. The claim was for the sum of £78,992.55. Both the defendants were served with the proceedings while they were in hospitals. William was served at

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the Mercy Hospital, Cork. Patrick Gabriel was served at St. John of God's Hospital, Stillorgan. Judgment in default of appearance was given against both of them on 29th. October, 1982, for the sum of £79,000 and £58.40 for costs.

Although this judgment was, on the face of it, a final judgment, John McCarthy issued a notice of motion on 19th November 1982, claiming interlocutory injunctions to prevent the defendants from disposing of their assets, an application having previously been made in July for the appointment of a receiver by way of equitable execution to receive money alleged to be due to Patrick Gabriel. On 28th. June, 1983 a garnishee order was made by Barron, J., in respect of £8,000 alleged to be due to Patrick Gabriel.

In October, 1983, an application was brought on behalf of Patrick Gabriel to have the judgment of 29th. October, 1982, set aside on the ground that the service of the proceedings was defective because of his incapacity at the time. This application was supported by an affidavit of a consultant psychiatrist. In his affidavit in support of that application, Patrick Gabriel alleged that he had a good and bona fide defence to the proceedings. By Order of 21st December, 1983, the application by Patrick Gabriel was adjourned, John was given liberty to serve an amended statement of claim up to and including 20th. January, 1984, Patrick Gabriel was given liberty to file an amended defence denying that the sum of £79,000 or any sum had been lent, this defence to be delivered within four weeks from the delivery of the statement of claim which was delivered on 12th. December, 1983.

By notice of motion dated 9th. May, 1984, application was made to the Court on behalf of John for an Order re-affirming and entering judgment in the sum of £79,992 with interest, the defendant having failed to deliver a defence within the time limited, and, on 21st. May, 1984, an Order was made on consent which recited that the judgment of 29th. October, 1982, had been set aside and giving judgment for the sum of £78,992.55 and the costs of the proceedings and an order of garnishee was made in respect of the sum of £8,000.

The matters which have been referred by the Registrar of Titles to the decision of the Court are:-

Whether the consideration as expressed in the Transfer dated 19th. June, 1983 and registered on 19th. August, 1983, was full and valuable consideration or whether having regard to paragraph

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(m) of the Separation Agreement dated 3rd. June, 1983, made between Patrick Gabriel McCarthy and Christine McCarthy whereby the said Christine McCarthy undertook to pay all existing debts and liabilities) there remained in the transferor under the Transfer of 17th. June, 1983, any estate or interest in the property to which the said Judgment Mortgage could attach, and

(2) The validity of the objection of the Judgment Creditor in said Judgment Mortgage that the said Transfer dated 17th. June, 1983, was to defraud and defeat creditors.

On behalf of Christine McCarthy I was referred to the case of Murphy v. McCormick (1928) I.R. 479 and Re Strong (1940) I.R. 38 in support of the proposition that, after the execution of the deed of transfer, Patrick Gabriel had no beneficial interest in the property which could be affected by the mortgage. I accept this proposition as correct, but this is not a question which has been referred to the Court by the Registrar, who had only asked for the opinion of the Court as to whether the transfer to Christine was a voluntary transfer. On this question I was referred to Halsbury Ed. 4, Volume 22, paragraph 1132. There is a wealth of authority for the proposition that a separation agreement constitutes valuable consideration and, in the present case, there is actually valuable consideration in the agreement by Christine to forego her right to a very considerable sum for maintenance.

It has been suggested that clause (m) in the separation deed constituted an agreement by Christine to pay all existing debts and liabilities in respect of the dwellinghouse. The clause is not elegantly phrased, but I interpret it as meaning that she was undertaking to pay all debts and liabilities incurred by her. Even if I am wrong in this, this submission has already been dealt with by holding that there was no charge on the house at the time that she got her conveyance.

In view of the prolonged proceedings between the husband and wife I do not see how it could be held, without some very clear and convincing evidence, that the purpose of the deed of separation and the consequent transfer was to defraud creditors. No such evidence has been adduced although I fully agree that the conduct of Patrick Gabriel of the proceedings brought against him by his father was most unsatisfactory and must be condemned.

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The final point made on behalf of Christine was that the judgment which was registered as a mortgage was set aside by consent and, therefore, the registration cannot stand. A judgment mortgage is a form of execution and I do not see how there can be any form of execution on foot of a judgment which has been set aside. This matter has not been raised on the reference to the Court by the Registrar but it appears to me that this would be a good ground for having the registration cancelled.

The answers to the questions will be:

The transfer in pursuance of the deed of separation was made for valuable consideration.

On the correct interpretation of clause (m), Christine McCarthy only covenanted to pay the existing debts and liabilities incurred by her whether before or after the date of the separation deed.

There was, in any event no judgment mortgage registered or any affidavit for the purpose sworn at the time of the deed of separation.

There is no evidence from which it could be held that the transfer was executed for the purpose of defeating or defrauding creditors.