

THE HIGH COURT

COMMERCIAL

[2023] IEHC 135

[Record No. 2022/96SP]

BETWEEN

ULSTER BANK IRELAND DAC

PLAINTIFF

AND

BRIAN MCDONAGH

DEFENDANT

THE HIGH COURT

COMMERCIAL

[Record No. 2022/108SP]

BETWEEN

ULSTER BANK IRELAND DAC

PLAINTIFF

AND

KENNETH MCDONAGH

DEFENDANT

THE HIGH COURT
COMMERCIAL

[Record No. 2022/107SP]

BETWEEN

ULSTER BANK IRELAND DAC

PLAINTIFF

AND

MAURICE MCDONAGH

DEFENDANT

JUDGMENT of Mr Justice Mark Sanfey delivered on the 14th day of March
2023.

Introduction

1. In each of the three proceedings in the title to this judgment, Ulster Bank Ireland DAC ('the plaintiff' or 'the bank') seeks a well-charging order, order for sale and, notably, an order for possession together with other ancillary orders in respect of properties set out in each of the indorsements of claim on the respective special summonses.
2. The three defendants – Brian, Maurice and Kenneth McDonagh, who are brothers – were represented at the hearing before me on 11-12 January 2023 by a

single legal team of senior and junior counsel. As essentially the same relief is sought on the summonses against each of the defendants, it is appropriate and convenient to deal with all three cases in the same judgment.

3. An application was made by Fiona McDonagh, the spouse of Kenneth McDonagh, at the callover of the Commercial list before McDonald J on 21 December 2022. That day was in fact the last working day for the courts prior to the hearing of the cases on 11 January 2023, the first day of Hilary Term, due to the intervening vacation over the Christmas period. The court, after hearing from counsel for Ms McDonagh and the bank, set out strict conditions (including the submission of affidavits) with which Ms McDonagh would have to comply for this Court to consider her participation at the hearing. Ms McDonagh renewed her application to participate in the hearing before me on 11 January 2023. Another counsel also appeared, for the first time, on that date seeking to make submissions on behalf of Angela McDonagh, the spouse of Maurice McDonagh.

4. In the event, the representations made on behalf of Fiona McDonagh, and certain correspondence from solicitors on behalf of Angela McDonagh, had caused the bank to reconsider its position in relation to the orders to be sought in the Maurice McDonagh and Kenneth McDonagh proceedings. I shall refer to the circumstances of the interventions on behalf of the spouses and the orders to be made later in this judgment.

5. An application was made at the hearing by a counsel instructed on behalf of Yeoksee Ooi, the life partner of Brian McDonagh, seeking to intervene in the hearing of the proceedings against Brian McDonagh with a view to making submissions in relation to the orders to be made in those proceedings. This application was

vehemently opposed by the bank, and after hearing submissions from both sides, I refused the application. Once again, I shall refer to this in more detail below.

The proceedings

- 6.** Each of the proceedings is commenced by special summons: the special summons against Brian McDonagh was issued on 10 June 2022, and special summonses were issued separately against Maurice and Kenneth on 24 June 2022. Each of the properties against which the orders are sought is the principal private residence of the defendant in each case.
- 7.** In each case, the special indorsement of claim seeks an order that the sum of €19,947,202.85 together with interest thereon until payment stands well charged on the defendant's interest in the lands described in the schedule to the special summons under and by virtue of the judgment mortgage registered by the plaintiff on the property.
- 8.** The indorsement of claim refers to an order of the High Court (Twomey J) of 23 July 2020, on foot of reserved judgments of 6 April 2020 and 23 June 2020, granting judgment against each of the defendants in the sum of €22,947,202.85 together with costs. This order was appealed to the Court of Appeal, which on 6 April 2022 dismissed the appeal and affirmed the order of Twomey J.
- 9.** On 7 January 2022 in the case of Maurice and Kenneth McDonagh, and on 16 May 2022 in the case of Brian McDonagh, a judgment mortgage was registered by the bank against each of the properties in respect of the interest of the defendant in question. Each of the defendants was subsequently notified by the plaintiff of the registration of a judgment mortgage and the intention to issue the present proceedings.
- 10.** The plaintiff's position is that no payment has been made by any of the defendants in respect of their indebtedness in the sum of €19,947,202.85 – the original

judgment sum having been reduced by €3m following the sale of an underlying security – together with costs and accruing interest. Accordingly, the plaintiff wishes to realise, in each of the cases, the security comprised in the judgment mortgage registered against the defendant's property.

Background

11. The grounding affidavit on behalf of the bank in each of the proceedings is sworn by Ted Mahon, a Senior Manager of the plaintiff. In each of his affidavits, Mr Mahon sets out the background to the matter, and the individual circumstances of the defendant.

12. By a facility letter of 20 July 2007, later restructured by a facility letter of 5 January 2009, the plaintiff lent to Brian McDonagh, Kenneth McDonagh and Maurice McDonagh (collectively referred to as 'the McDonaghs') on a joint and several basis the sum of €21,855,000 for the purpose of purchasing approximately eighty acres of land at Kilpedder, County Wicklow ('the Kilpedder lands'). The McDonaghs purchased the Kilpedder lands with the intention of developing a data centre thereon, although the development never ultimately proceeded. A mortgage was registered over the Kilpedder lands in favour of Ulster Bank.

13. The McDonaghs failed to repay the facility to the plaintiff. Subsequently, the bank and the McDonaghs arrived at a compromise, whereby the bank agreed not to pursue the McDonaghs for the residual debt following the sale of a number of secured properties. Mr Mahon avers that the McDonaghs failed to comply with the terms of this compromise agreement, as a result of which the bank appointed receivers over the Kilpedder lands.

14. Mr Mahon avers at para. 7 of his affidavits that Brian McDonagh "sought to surreptitiously purchase the Kilpedder lands at a significantly reduced price of

€1,501,000 whilst at the same time avoid his residual liability to Ulster Bank, then standing in excess of €20 million. In attempting to do so Brian McDonagh used a corporate vehicle, called Granja Limited (**'Granja'**), as a 'front' for his dishonest endeavour". It appears that Mr McDonagh alleged that Granja had entered into a binding agreement to purchase the Kilpedder lands for €1,501,000. This gave rise to High Court proceedings in which Granja sued the bank, the receivers and the McDonaghs. The case proceeded to hearing; Mr Mahon avers that "...on day 5 of the hearing Granja discontinued its claim against Ulster Bank and the receivers, and the Granja proceedings were ultimately struck out as between Granja and the McDonaghs" [para. 8].

15. Mr Mahon then refers to the proceedings to which I have referred at para. 8 above, in which Twomey J gave judgment following nineteen days at hearing. Mr Mahon goes on to refer to the decision of the Court of Appeal affirming the order of Twomey J. He states that Mr Brian McDonagh was represented by solicitor and counsel in the Court of Appeal, having represented himself in the High Court; Mr Maurice McDonagh and Mr Kenneth McDonagh were represented by solicitor and counsel in both the High Court and the Court of Appeal.

16. It appears that, by a declaration of trust of 12 February 2015, Promontoria (Aran) Limited acquired the economic interest in the loan facility and security underpinning the proceedings in which judgement was obtained, although the plaintiff in the present proceedings retained the legal interest in the facility and security, and thus is entitled to pursue enforcement of the judgment mortgage.

17. At para. 13 of his affidavit, Mr Mahon avers that he "...cannot sufficiently emphasise the extent to which Brian McDonagh has gone to obstruct and frustrate Ulster Bank in recovering the monies due to it from the McDonaghs", and sets out at

length his views in that regard in that paragraph and para. 14 of each of his affidavits in the three proceedings. At para. 14 of his affidavit in relation to Brian McDonagh, Mr Mahon avers that "...the McDonaghs, and primarily Brian McDonagh, have put Ulster Bank to enormous expense arising from two sets of complex and lengthy Commercial Court proceedings...", and commends to the court the "detailed analysis of the deception of Brian McDonagh as set out in the judgment of Mr Justice Twomey of 6 April 2020..." and quotes para. 18 of that judgment in this regard.

18. In the case of Maurice McDonagh, Mr Mahon avers in his affidavit in those proceedings that, while Brian McDonagh was "the primary instigator of the scheme to frustrate and obstruct Ulster Bank in recovering the monies due to it, Maurice McDonagh supported Brian McDonagh in so doing". Mr Mahon refers to a number of statements in the judgment of Twomey J which are critical of Mr McDonagh's veracity.

19. At para. 14 of his affidavit in the Kenneth McDonagh proceedings, Mr Mahon acknowledges that Twomey J "...was not as critical in his judgment of Kenneth McDonagh as he was either Brian McDonagh or Maurice McDonagh...", but avers that the court "...was nonetheless critical of Kenneth McDonagh, referring to him as having not been a 'fully co-operative witness' (para. 203), having provided inconsistent evidence and evidence that was 'simply not credible' (para. 205), and having "changed his sworn evidence thereby calling into question the reliability of his recollection of events (para. 206)".

The Brian McDonagh proceedings

20. At para. 16 of his affidavit, Mr Mahon refers to Brian McDonagh as the owner of "...a property, comprised of unregistered land, referred to as the dwelling house and premises known as Dromin House, Drummin East, Delgany, County Wicklow,

held in fee simple and shown on the map attached to a conveyance dated 4 May 2005 and made between Andrew Wilson of the one part and Brian McDonagh of the other part (the ‘property’). Mr Mahon avers that the property is the principal private residence of Mr McDonagh, who resides in the property with his partner, Ms Yeoksee Ooi, and their children. Mr Mahon avers that the proceedings would be served on Ms Ooi, “who is believed to also be in occupation of the property”.

21. In a replying affidavit which I am told is sworn on 13 October 2022 – the copy in my papers is unsworn – Mr McDonagh responds to Mr Mahon’s affidavit. He refers to the appointment by the bank of receivers over the Kilpedder lands, and makes a number of criticisms of the deed of appointment of those receivers. He is also critical of Mr Mahon’s grounding affidavit, in that Mr Mahon “...failed to reveal that in circumstances where the lands were sold the Plaintiff had done so with an attached profit participation agreement with the buyer Fane Investments Limited...” [para. 11]. He alleges at para. 13 that “...the plaintiff in effect conducted a sham sale of the asset through retaining an interest of a profit participation agreement backed up by a charge on the folio”.

22. At para. 16 of his affidavit, Mr McDonagh alleges that the application “is made with malice on the part of the Plaintiff”. He contends that “...the within application and the Circuit Court application [a reference to proceedings by Promontoria (Aran) Limited] are taken absent cognizance of the right of my spouse. I say the Plaintiff has no entitlement to attack the property rights of my spouse in this application absent her involvement as a party. I say my spouse has a right to be heard in matters pertinent to the family dwelling”.

23. By an affidavit of 28 October 2022, Mr Mahon replied to the affidavit of Mr Brian McDonagh. At para. 8 of that affidavit, he pointed out that “...Mr Justice

Twomey determined as part of the Underlying Proceedings that the receivers had been validly appointed over the lands; a finding not overturned on appeal. The issue has therefore been finally and conclusively determined”. He averred, for reasons set out at para. 9 of the affidavit, that the clause of the mortgage relied upon by Mr McDonagh to establish the infirmity of the appointment of the receivers “is of no relevance whatsoever to the appointment of the receivers ... [the clause] is expressly concerned with any reversionary leasehold interest in the secured property and nothing else. No leasehold property was secured by the mortgage. The Kilpedder lands comprised of freehold property only.”

24. At para. 10 of his affidavit, Mr Mahon acknowledges that the bank entered into a profit participation agreement with Fane Investments Limited (‘Fane’), but averred that he did not understand the reference to the sale of the Kilpedder lands being “questionable” by reason of the profit participation agreement.

25. Mr Mahon also referred to the reference by Mr McDonagh to Ms Ooi as being his “spouse”. He set out his belief that Ms Ooi is not in fact the spouse of Brian McDonagh, and his grounds for that belief. At para.16 of his affidavit, he averred that “...I do not believe Ms Ooi to have any property rights in the property, nor am I aware of any such claim having previously been asserted by Ms Ooi. Indeed I note that Brian McDonagh is the sole owner of the property...”. At para. 17 of his affidavit, Mr Mahon averred that “...Ms Ooi was in fact served with these proceedings and was further notified of the directions made by this Court...”.

The Maurice McDonagh proceedings

26. In his affidavit grounding the bank’s application against Maurice McDonagh, Mr Mahon avers that Maurice McDonagh is an owner of a property comprised of unregistered land at 50 Charleston Road, Ranelagh, Dublin 6. He acknowledges that

Mr McDonagh is the joint owner of the property with Ms Angela McDonagh, who is the wife of Maurice McDonagh. At para. 20 of his affidavit, Mr Mahon avers that he is “not aware of any other person being in occupation of the property or in receipt of rent therefrom”, and confirms that the proceedings would be served on Ms McDonagh.

27. It appears that Mr Maurice McDonagh swore a replying affidavit on 13 October 2022, although once again my copy of that affidavit is unsworn. Mr McDonagh makes particular complaint in relation to the sale of the Kilpedder lands: he avers that “...the plaintiff in effect conducted a sale of the asset while retaining an interest in the asset by virtue of the aforementioned profit participation agreement backed up by a charge on the Folio in favour of the said Plaintiff” [para. 12].

28. At para. 15 of his affidavit, Mr McDonagh makes reference to the financial circumstances of himself and Ms Angela McDonagh, in relation to the family home:

“...[w]e have a mortgage currently owned by Pepper with an outstanding balance of circa E2.4m. I say that our family home is worth approximately E2.25m[.] I say that the Plaintiff in its capacity as a bank had ample opportunity to research the charges on the property including the mortgage which is in place with Pepper. I say this mortgage on the property is being repaid on an interest only basis. I say the sale of my family home will crystallise an additional debt as it is in negative equity. A sale will not benefit the Plaintiff, at least financially. I say in my current circumstances that my spouse is paying most of the mortgage and has done so for many years. I say the Plaintiff has no entitlement to attack the property rights of my spouse...”.

29. At para. 16 of his affidavit, Mr McDonagh states that Ms McDonagh “...is seeking a meeting with her solicitors in order to obtain advice on how best to protect

her interest in our family home and if necessary to bring proceedings to establish her legal and equitable interest in the family home”.

30. By an affidavit of 28 October 2022, Mr Mahon swore an affidavit on behalf of the bank in response to the affidavit of Mr Maurice McDonagh. Again, Mr Mahon acknowledged the profit participation agreement with Fane, averring that “...there were no ‘irregularities’ in the sale of the Kilpedder lands to Fane, despite the averments of Maurice McDonagh at para. 13 of the replying affidavit...” [para.10].

31. At para. 12 of his affidavit, Mr Mahon averred that the proceedings had been served on Angela McDonagh, and that she had been notified of directions made by the court, but that no evidence had been tendered in support of Mr McDonagh’s averment that Ms McDonagh was “paying most of the mortgage and [had] done so for many years”. It was also pointed out that no evidence had been tendered in relation to the valuation of the property against which the well charging order had been sought.

The Kenneth McDonagh proceedings

32. At para. 14 of his grounding affidavit for the proceedings against Kenneth McDonagh, Mr Mahon acknowledged that Twomey J “...was not as critical in his judgment of Kenneth McDonagh as he was either Brian McDonagh or Maurice McDonagh...”, although he went on to aver to criticisms made of the evidence of Mr McDonagh and his credibility in general.

33. Mr Mahon also acknowledges that Mr McDonagh is the joint owner of the property at 48 Charleston Road with Ms Fiona McDonagh, who is his wife. He avers that he is not aware of any other person being in occupation of the property or in receipt of rent therefrom, and that the proceedings would be served on Ms McDonagh. Mr McDonagh swore – apparently on 13 October 2022; once again, my copy is unsworn – an almost identical affidavit to that proffered by Maurice McDonagh on

the same date, even putting forward the same figures in relation to the value of his family home, the mortgage relating thereto, and the fact that the mortgage was being discharged on an interest only basis. He also made, in relation to his wife Fiona McDonagh, the averment made by Maurice McDonagh in relation to his wife Angela McDonagh regarding the seeking of legal advice, which is quoted at para. 29 above.

34. As in the other cases, Mr Mahon replied by an affidavit of 28 October 2022. In addition to the replies made to the affidavits of Brian McDonagh and Maurice McDonagh, Mr Mahon notes that no evidence is tendered in support of Mr Kenneth McDonagh's averment that his wife is "paying most of the mortgage and has done so for many years". Mr Mahon states that he is aware that Mr McDonagh "operates a jewellers business known as 'Dawson Jewellers' on Dawson Street". He avers that the proceedings "have in fact been served on Ms Fiona McDonagh, and she has also been notified of the directions made by this Court". Mr Mahon is also critical of the lack of documentary evidence supplied by Mr McDonagh to support his averments in relation to the value of the property owned by Kenneth and Fiona McDonagh, or of the figure required to redeem the mortgage in relation to that property.

Interrogatories

35. An application to compel the plaintiff to answer interrogatories was brought by Maurice McDonagh, who swore the grounding affidavit for the application, although the application appears to have been treated as an application on behalf of all of the McDonaghs in the three sets of proceedings. The matter came before McDonald J on 19 December 2022, and concluded on 20 December 2022. In the opening sentence of his ruling, McDonald J refers to the application as being in the proceedings against Maurice McDonagh. Both the applicant and the bank were represented by junior counsel.

36. The court examined each of the interrogatories sought; McDonald J came to the conclusion that “each one of them is misconceived” [Transcript day 2 p.77 line 25], and accordingly refused the entirety of the application to compel the plaintiff to answer the interrogatories. An order for costs was made against Mr Maurice McDonagh, although the order was stayed pending the determination of the proceedings.

The application of Fiona McDonagh

37. On 21 December 2022 – the last day of Michaelmas Term – an application was made by junior counsel on notice to the bank on behalf of Ms Fiona McDonagh, the wife of Kenneth McDonagh, to McDonald J. Counsel submitted that Ms McDonagh was a party affected by the orders sought in the substantive proceedings against Kenneth McDonagh, and in particular the order for sale of the principal private residence of Kenneth and Fiona McDonagh.

38. Counsel informed the court that Ms McDonagh had not been a participant in the proceedings, but had attended a solicitor to take her own advice in relation to the appointment of a receiver over Mr McDonagh’s shareholding in the business of Dawson Jewellers. That solicitor became aware of the present well-charging proceedings, which caused Ms McDonagh to take further advice which led to the present application which, essentially, was to intervene in the well-charging proceedings and be heard in relation to her position in the matter.

39. Having heard counsel for Ms McDonagh and the bank, McDonald J indicated that he would grant Ms McDonagh liberty to file an affidavit no later than 6pm on 21 December 2022, and that she would not be entitled to tender any further evidence at the hearing of the special summons proceedings against Mr McDonagh other than as set out in that affidavit. While she would be permitted to participate in the hearing of

the special summons, this would be solely for the purpose of addressing matters arising on her affidavit. Further, Ms McDonagh was to file and serve an affidavit on or before 4 January 2023 for the purpose of explaining

(a) what occurred having been served with the special summons and grounding affidavit of Ted Mahon under cover of letters 24 June 2022 and 28 June 2022;

(b) what occurred following the averment made by Kenneth McDonagh at para. 16 of his replying affidavit in the proceedings that Ms McDonagh was aware of the proceedings and had been seeking legal advice in respect thereof; and

(c) why, in light of the foregoing, Ms McDonagh did not apply to court to participate in the proceedings prior to 21 December 2022.

40. McDonald J directed that this Court be satisfied as to the adequacy of the explanation provided by Ms McDonagh for not having applied to participate in the proceedings prior to 21 December 2022 notwithstanding that they were brought to her attention in late June 2022. It was also directed that Ms McDonagh bear her own costs in respect of her participation in the proceedings, and that she should not apply for an order for costs as against the plaintiff.

41. Affidavits were sworn by Fiona McDonagh pursuant to the directions of McDonald J, and delivered to the plaintiff. Subsequently, on 6 January 2023, a firm of solicitors representing Angela McDonagh, the wife of Maurice McDonagh, wrote to the plaintiff's solicitors intimating a proposed application to this Court on 11 January 2023 – the first day of the substantive hearing of the proceedings – to allow Ms McDonagh to be heard in relation to the matter on the same basis as that envisaged for

Ms Fiona McDonagh. It was suggested that this Court would be requested to allow an affidavit of Angela McDonagh to be handed into court for this purpose.

42. In fact, matters were somewhat overtaken by events. By letter of 6 January 2023, the plaintiff's solicitors wrote to the solicitors acting for Kenneth McDonagh and Maurice McDonagh stating that the plaintiff would no longer be pursuing an order for sale of 48 and 50 Charleston Road, Ranelagh, Dublin 6 "at this juncture", and that the plaintiff would be seeking to "have that particular relief adjourned with liberty to re-enter". The plaintiff's solicitors, by letter of the same date, wrote to Ms Fiona McDonagh's solicitors conveying this position, and by a further letter of 9 January 2023 to the solicitors acting for Ms Angela McDonagh.

43. At the commencement of the hearing before this Court on 11 January 2023, the position of Fiona McDonagh and Angela McDonagh was raised, with separate counsel representing those parties. Counsel for the bank indicated that the plaintiff had no objection to the admission of the affidavits of Fiona McDonagh or Angela McDonagh and, having regard to the "very belated representations" received from those parties in the affidavits, and also with regard to the decision of the Court of Appeal in *Muintir Skibbereen Credit Union Limited v Crowley* [2016] 2 IR 665, the bank had agreed not to proceed "for the time being" with applications for an order for sale in respect of 48 and 50 Charleston Road.

44. Counsel for the bank submitted that the applications for orders for sale in respect of the properties of Kenneth McDonagh and Maurice McDonagh should not be struck out, as counsel for Fiona McDonagh and Angela McDonagh contended, but that he would be applying that they be adjourned generally with liberty to re-enter. That application was renewed by counsel at the end of his submissions.

45. Counsel for Angela McDonagh submitted simply that his position was identical to that of counsel for Fiona McDonagh, and that he was seeking the same orders on behalf of Angela McDonagh. Counsel also appeared for Ms Yeoksee Ooi and indicated at the outset that he wished to make an application to be heard in relation to the orders to be made against Brian McDonagh, and would be seeking liberty to file an affidavit in this regard, although he acknowledged the extreme lateness of the application and the fact that the bank, in contrast to its attitude in respect of Fiona and Angela McDonagh, was implacably opposed to his application.

The arguments of the parties

46. The plaintiff regards its application in each of the three proceedings as being entirely straightforward. The written submissions on behalf of the plaintiff and the submissions of counsel at the hearing in that regard outlined the basis of the applications, but were mainly concerned with setting out the background to the matter and refuting the various arguments made by the defendants in their respective affidavits. After substantial replying submissions at the hearing from counsel on behalf of all of the defendants, counsel for the plaintiff set about dealing with the points made, some of which were made for the first time.

47. I propose therefore to set out briefly the legal basis for the plaintiff's application, and to deal then in detail with the objections to the application advanced on behalf of the defendants, before setting out the plaintiff's response to such arguments. While, as we have seen, an accommodation was reached in relation to the orders for sale sought in respect of the properties the subject of the Maurice McDonagh and Kenneth McDonagh proceedings, the legal team for the defendants opposed the reliefs sought by the plaintiffs in all three proceedings.

48. I propose to concentrate on the arguments made by Brian McDonagh in the proceedings against him, and which were adopted by the other two defendants.

The position of the plaintiff

49. In the special summons in each of these proceedings, the first relief sought by the plaintiff is as follows: -

“(1) A declaration that the sum of €19,947,202.85 together with interest thereon pursuant to the order of the High Court (Twomey J) of 23 July 2020 until payment, (the ‘**Debt**’) stands well charged on the Defendant’s interests in the property described in the schedule hereto under and by virtue of the judgment mortgage registered on or about 16 May 2022”.

50. In the case of Maurice and Kenneth McDonagh, relief is also sought pursuant to s.31 of the Land and Conveyancing Law Reform Act 2009 (‘the 2009 Act’) for partition of the property in the schedule in each case, due to each of those properties being co-owned with the defendants’ respective spouses. For the reasons explained above, the reliefs pursuant to s.31 of the 2009 Act are not presently being pursued against Maurice or Kenneth McDonagh. Various ancillary reliefs are sought against all three defendants in the various proceedings.

51. Section 117 of the 2009 Act is as follows: -

“(1) Registration of a judgment mortgage under section 116 operates to charge the judgment debtor's estate or interest in the land with the judgment debt and entitles the judgment mortgagee to apply to the court for an order under this section or section 31 .

(2) On such an application the court may make—

- (a) an order for the taking of an account of other incumbrances affecting the land, if any, and the making of inquiries as to the respective priorities of any such incumbrances,
- (b) an order for the sale of the land, and where appropriate, the distribution of the proceeds of sale,
- (c) such other order for enforcement of the judgment mortgage as the court thinks appropriate.

(3) The judgment mortgage is subject to any right or incumbrance affecting the judgment debtor's land, whether registered or not, at the time of its registration.

(4) For the purposes of this section, a right or incumbrance does not include a claim made in an action to a judgment debtor's estate or interest in land (including such an estate or interest which a person receives, whether in whole or in part, by an order made in the action) whether by way of claim or counterclaim in the action, unless the claim seeks an order—

- (a) under the Act of 1976, the Act of 1995 or the Act of 1996,
- (b) specifically against that estate or interest in land.

(5) Section 74 applies to a voluntary conveyance of land made by the judgment debtor before the creditor registers a judgment mortgage against that land under section 116 as if the creditor were a purchaser for the purposes of section 74.”

52. Ulster Bank submits that it has satisfied the necessary proofs for the application in each case. It summarises its compliance with the proofs in respect of Brian McDonagh at para.18 of its written submissions as follows: -

“18.1 Ulster Bank holds a judgment in the sum of €19,947,202.85 as against Brian McDonagh, *i.e.*, the Judgment Order.

18.2 Brian McDonagh is the sole registered owner of the Property.

18.3 Ulster Bank has registered the Judgment Order as a judgment mortgage as against the interest of Brian McDonagh in the Property.

18.4 Ulster Bank has written to Brian McDonagh notifying him of the fact of the registration of the judgment mortgage against the Property.

18.5 Ulster Bank has demanded discharge of the Judgment Order but Brian McDonagh has failed to do so.

18.6 Brian McDonagh remains indebted to Ulster Bank on foot of the Judgment Order.”

53. The plaintiff also contends that, in each of the three cases, it has complied with O.9, r.14 of the Rules of the Superior Courts, which is as follows: -

“Every affidavit of service of a summons in other actions for recovery of land, shall state that the deponent does not know of and does not believe that there is any person, other than those who have been served, in the actual possession or in receipt of the rents and profits of the land sought to be recovered, or any part thereof, and the said statement shall be verified by the affidavit of the plaintiff or of one of the plaintiffs, or of the solicitor for the plaintiff”.

54. In the case of Brian McDonagh, Mr Mahon averred as to Ms Yeoksee Ooi and her children residing in the property, and the subsequent service on Ms Ooi of the proceedings.

The position of the defendants

55. In the written submissions proffered on behalf of all defendants, the position adopted was that the applications should either be dismissed or remitted to plenary

hearing. This stance was substantially altered in the oral submissions made by Patrick O'Reilly SC on behalf of the three defendants.

56. Counsel submitted that the relief sought by the plaintiff pursuant to s.117 of the 2009 Act was a “gateway requirement” for execution against the property charged, and that equitable principles applied to whether or not this relief should be granted. It was emphasised that the court had a discretion in this regard, and it was submitted that a number of factors required to be taken into account in the exercise of this discretion.

57. Among the factors to be taken into account were the fact that Ulster Bank had transferred the economic interest in the loan to another entity and, in the characterisation of counsel for the defendants, was effectively acting as a “collection agent” for Promontoria (Aran) Limited. It was contended that Ulster Bank had received sums from other sources which would have reduced the amounts due on foot of the defendants’ loans, including the sale to Fane, so that the registered judgment did not reflect the amount which was presently due and owing. Accordingly, counsel submitted that it would be appropriate that, each time an application was made for a well charging order the purpose of which was to procure an order for sale thereby, a fresh application should be made to amend the judgment mortgage which had been registered to reflect the amount currently owing [Transcript day 1, p.106].

58. It was submitted that the plaintiff should have disclosed, in the context of the present application, the profit participation arrangement which it had concluded as part of the sale of the lands to Fane. As the court is being asked to exercise an equitable jurisdiction, it was submitted that the court needs to consider all of the circumstances, and in particular the theoretical possibility that the indebtedness of the defendants could be satisfied by profits generated and received through the profit participation agreement [day 1, pp. 113 to 114]. It was contended that this was a

factor which was central to the court's discretion whether or not to grant the well charging order.

59. As regards the properties contained in the schedules to each of the special summonses, counsel submitted that the plaintiff did not submit a valuation of those properties which would reveal whether or not there was likely to be equity in the property [day 1, pp. 118 to 119], which would assist the court in its discretion as to whether or not it was necessary at all to make an order. It was suggested by counsel that "equity would not act in vain"; if the defendants' properties were in negative equity, an order for sale should not be made.

60. Counsel stated that, contrary to what was the position in the written submissions submitted on behalf of the defendants, the defendants were not seeking a plenary hearing of the plaintiff's applications, but rather were seeking cross-examination of Mr Mahon on foot of his two affidavits in each of the applications [day 2, pp 4 to 5]. The defendants were not seeking an order disallowing the reliefs sought; rather, they were arguing that it was "too early" for the court to exercise its discretion whether or not to grant those reliefs.

61. In this regard, counsel identified two central issues which would be canvassed in cross-examination: -

- The circumstances in which the profit participation agreement with Fane was not disclosed by Mr Mahon;
- the values which the bank placed on the properties in respect of which the well-charging orders were sought [day 2 p.18].

62. Counsel referred to a number of judgments in support of his submissions. He referred to the decision of the Supreme Court (Baker J) in *Bank of Ireland v Cody* [2021] 2 IR 381, in which the Supreme Court considered an application for a grant of

summary possession pursuant to s.62(7) of the Registration of Title Act 1964, and the circumstances in which affidavit evidence might not be considered sufficient for the court to be able to decide the issues in such an application. Counsel referred in particular to the following passage from the judgment –

“76. Many applications for summary judgment ... will involve the proffering of evidence or argument by a defendant by way of defence which is not sufficient to rebut the evidence of the plaintiff to enable the judge to make a positive finding against the plaintiff, but which offers enough doubt as to the truth or completeness of the plaintiff's evidence, or credibly presents reasonable arguments or evidence that a defendant has a basis of defence which merits further scrutiny, evidence or argument. In that instance the trial judge is constrained by the inability to decide between contested affidavit evidence of fact, or resolve complex questions of law, the action cannot therefore be disposed of summarily and will be adjourned to plenary hearing.”

63. In *Cody*, the court referred to the respondent having “...made a number of averments and assertions which threw sufficient doubt on the veracity or completeness of the facts leading to the making of the loans to require that the action be adjourned to plenary hearing” [para. 78].

64. Counsel emphasised that he was not seeking adjournment to plenary hearing, but submitted that the court must be satisfied as to the “completeness” of the affidavits, and if not, direct that there should be cross-examination [day 2, p.36]. In addition to the jurisdiction to adjourn a matter heard on affidavit to plenary hearing, counsel referred to the following passage from *Cody*: -

“101. The jurisdiction [to adjourn a matter to plenary hearing] is one vested by the Rules of the Circuit Court, but may properly be said to be one that exists in

any case heard on affidavit. It is perhaps the default position in any case where the affidavit evidence is evenly balanced, where there is a conflict on the affidavits between the parties which cannot be or has not been resolved by way of further affidavit, where the court considers that a matter raised on affidavit, particularly one raised in defence, might have such a bearing on the outcome that its credibility deserves to be fully tested, or where a judge considers that in the light of certain averments which are credible, but not dispositive, it would be either difficult or unfair to resolve the matter without giving both sides the opportunity to further advance that evidence or, where necessary, to test it. The adjudicative function is not a matter of box ticking or a purely logical engagement with a checklist of proofs that must be met by a plaintiff. Certain evidential presumptions or burdens can make the task of adjudication at times appear almost effortless, but the fact remains that a judge met with evidence, whether contested or not, must weigh that evidence, assess its veracity, credibility, and importance for the purposes of proving those matters that are required to be established. In a case where the action is heard on affidavit, courts are vigilant to consider the option to adjourn the matter for plenary hearing. The vigilance derives from the fact that affidavit evidence of its nature is often in terms which have a tone of certainty which is not always found in oral testimony, particularly where that is cross-examined, and because the affidavits are often drafted by lawyers with a view to the legal test”.

65. Counsel referred also to the decision of Baker J in the High Court in *Barrett v Leahy* [2015] IEHC 734, in which the defendant sought an order that the plaintiff be

directed to remove and/or discharge a judgment mortgage from the defendant's lands.

Counsel referred in particular to para. 43 of the judgment: -

“43. Insofar as the defendant relies on the principles of equity, I consider that no equitable principles arise. The court has a discretion as regards to the reliefs it may grant following registration of the judgment mortgage, and, as outlined above, the court has the power to direct that the judgment mortgage be vacated or extinguished, but that is not to say that the courts of equity have a general role in regard to the continued maintenance by a judgment creditor of a judgment mortgage against the interest of a debtor in registered or unregistered land. The right to register a judgment mortgage is a statutory right, and the rights created thereby are statutory in origin, and no equitable principles are in play.”

66. Counsel suggested that this passage demonstrated that equitable principles did apply to the “gateway” requirement of s.117 relief, if not perhaps to “the continued maintenance by a judgment creditor of a judgment mortgage...”.

67. Considerable emphasis was laid by counsel on the decision in the High Court of Baker J in *Flynn v Crean* [2019] IEHC 51. In that case, the plaintiff sought a well charging order in respect of a judgment mortgage against the interest of the first defendant, Peter Crean, in certain lands in County Kerry. Orders were sought pursuant to s.117 of the 2009 Act, and also pursuant to s.31 of that Act for an order partitioning the lands and providing for sale of the property for the purpose of discharging the amount secured by the judgment mortgage.

68. The second defendant, Michelle Crean, the wife of the first named defendant, was directed by the court to furnish an affidavit showing her means and expenditure given that she and Mr Crean pooled their income and resources to meet family and

household expenses. The plaintiff indicated a wish to cross examine both defendants on their respective affidavits, and the court directed such cross-examination.

69. The court reviewed the case law relevant to the exercise of the court's power under s.31 of the 2009 Act to order partition and sale, and particularly the judgment of the Court of Appeal in *Muintir Skibereen Credit Union Limited v Crowley* [2016] 2 IR 665. The court stated that the valuation evidence adduced by Mr & Mrs Crean was to the effect that the sale of the subject property would not produce any funds for the judgment mortgagee, and that it was in "very significant negative equity and that the consequence of the sale of the property would not result in the payment to the plaintiff of any proceeds of sale whatsoever" [para. 54].

70. Having reviewed certain of the authorities dealing with the exercise of the court's discretion in circumstances where there was a question over the likelihood of a sale resulting in a return to the judgment mortgagee, the court concluded as follows: -

"63. In the light of the authorities, the correct approach is that the financial consequences of the making of an order for sale are a relevant and, sometimes, central discretionary factor that falls for consideration, but the mere fact that a sale may not release sufficient funds to discharge the debt is not a factor which, taken alone, might defeat the interest of the judgment mortgagee. To hold otherwise would be to fail to recognise the security interest created by the registration of a judgment mortgage and well charging order."

71. In considering the application of the legal principles to the facts, Baker J stated as follows: -

"71. The authorities do bear out the general proposition that the mere fact that the sale of a property will not achieve a discharge of the debt is not, in itself, a reason to refuse sale. There are a number of reasons for this and part of the

thinking of the courts in those cases must be that the making of an order for sale is a draconian remedy which might, in suitable cases, lead to a settlement in relation to the indebtedness before an order for sale becomes operative (see Laffoy J. in *Trinity College v. Kenny*, at p. 21). This is a factor that influenced Dunne J. in *Drillfix v. Savage*, where she adjourned the matter pending further information and investigations. The making of an order for sale could, in many cases, lead to some move to reach an alternative accommodation with a judgment creditor to the mutual satisfaction of the parties.

72. Apart from this is the fact that the valuation evidence given to a court in a mortgage suit often does not properly reflect the true value of a property, and this is a factor that may operate to the advantage of the judgment creditor or, as the case may be, to the advantage of the judgment debtor. A property could achieve more or less than the amount estimated by a valuer. There is a certain risk of putting the property on the market, but equally there may be a certain advantage in doing so in that a property may achieve more than the family expected. Valuation could never be said to be an exact science.

73. In those circumstances, a court exercising its discretion may be constrained by the practical fact that, in many cases, the evidence before it might be some months, or even years, out of date, and in a rising property market, the sale might well achieve sufficient to discharge in whole or in part a judgment debt, notwithstanding apprehension that that would not happen.

74. In general, mere impecuniosity or the mere likelihood that the sale of property would not satisfy a debt does not properly recognise the interest of the judgment creditor and the recognition of that interest and the making of an

order to protect that interest is one that the court has the statutory power to make and a statutory imperative to, at least, consider.

75. However, when, as a matter of high probability, the sale of [a] principal private residence would render a couple homeless and leave them with an unsecured debt to their primary mortgage holder, and when the result is as a matter of high probability likely to lead to there being no funds available to meet the judgment creditor, then the question of feasibility must be an important factor in the court's consideration. A further factor is that the making of an order for sale and the consequent sale of the property will have the effect that the judgment debt would no longer be secured, and the preservation of the well charging order and its continued presence as a burden on title may well be, in many cases, the preferred means by which the interest of the judgment creditors is best to be recognised.”

72. In *Crean*, the court considered that the prudent and just approach was to make an order for sale with a long stay and with certain conditions. Counsel accepted that the decision in *Crean* did not directly concern the discretion in relation to whether or not to make a well charging order. However, he submitted that the court, in exercising its discretion in relation to s.31 of the 2009 Act, “...conducted a thorough examination of the circumstances pertaining to the defendants and [Ms Justice Baker] wanted to be sure of their circumstances before she would make the order and she heard the evidence by way of cross-examination...” [day 2, p.66].

The plaintiff's response

73. The plaintiff's counsel, Andrew Fitzpatrick SC, submitted that no authority or basis had been put forward by the defendants for the propositions that: -

- A plaintiff must make a fresh application for registration of a judgment mortgage after a payment against the debt had been made, or that any existing registration must be amended;
- creditors on a well charging order application must put before the court evidence of what it contends the value of the property is;
- the plaintiff had a legal obligation to reveal the terms of the contract with a third party for the sale of the lands which were security for the defendants' indebtedness.

74. Further, counsel submitted that the decision in *Flynn v Crean* did not assist the defendants. In that case, it was the defendants rather than the plaintiff who promoted the issue of the valuation of the property. Those defendants also presented evidence of their own financial position. Ultimately, the court in that case made an order for sale, although it granted a stay on the order on certain conditions based on the evidence the defendants had proffered.

75. In the present case, none of the defendants had put forward any valuation evidence, or evidence as to their respective financial positions. Counsel submitted that, even if they had, it was established that this Court had on previous occasions found the evidence of Brian McDonagh in particular to be unreliable, and drew particular attention to the findings of Twomey J expressed at para. 18 of his judgment of 6 April 2020 [2020] IEHC 185: -

“18. For the reasons set out below, this Court has concluded that much of the evidence provided in support of the McDonaghs' claims was inconsistent and unreliable. In particular, this Court found that Mr. Brian McDonagh was party to two forged Declarations of Trust and he put a ‘fake’ letter on his file. In addition, this Court concluded that Mr. Brian McDonagh gave incorrect sworn

evidence, which he must have known was false. (Although it was not relevant to this Court's conclusions, it is worth noting that this is not the first time that Mr. Brian McDonagh's credibility has been called into question in the courts – as noted below, he was found to have misled the High Court on two separate occasions (McDermott J. and Keane J.) by his failure to disclose relevant evidence and the English High Court has found him to be an unreliable witness (Morgan J.).”

76. The only application on behalf of the defendants, in the context of the current applications, was for liberty to cross-examine Mr Mahon as to what was the plaintiff's view of the valuation of the lands against which orders were sought, and as to why the profit participation agreement was not disclosed to the court. Counsel for the plaintiff submitted that there was no factual conflict between the parties which was necessary to resolve by cross-examination, which cannot be permitted “simply because of a desire to ask questions” [day 2, p.94]. The plaintiff was seeking well charging orders against the three defendants, and an order for sale against Brian McDonagh. Counsel submitted that “...the issue on which cross-examination would be required would have to be a disputed issue of fact that it's necessary for the court to resolve to determine whether or not [the plaintiff is] entitled to that relief” [day 2, p.94].

77. The plaintiff's position was simply that the proofs for the applications in each of the three cases had been met. While O.38, r.8 of the Rules of the Superior Courts gives the court in the course of proceedings instituted by a special summons power to determine questions of fact where “the determination of some question or questions of fact is necessary for the proper decision or ruling as to the relief to be granted in such proceedings or as to any matter arising therein”..., and to require evidence to be given orally or by affidavit for this purpose, the plaintiff contended that there were no such

disputed issues of fact which were necessary to determine the applications. The defendants, it was contended, “had advanced no good reason for the proposed cross-examination”.

78. It was submitted that O.40, r.36 of the Rules of the Superior Courts sets out the procedure for service of a notice requiring production of a deponent for cross-examination. In the present case, a notice had been served on behalf of the defendants on the morning of the commencement of the trial. Order 40, r.36 requires the notice to be served “at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court may specially appoint...”.

79. In *Permanent TSB v Beades* [2014] IEHC 81, McGovern J held that, where service by a defendant of a notice to cross-examine was not in compliance with the rules, he is not entitled to rely on same. Notwithstanding that finding, the court considered the points made by the defendant, and whether a derogation from this principle was necessary in the interests of justice. However, the court found that the defendant’s case would not be supported by the cross-examination sought, and that the justice of the case did not require cross-examination.

80. It was suggested by counsel that the motivation for seeking cross-examination was to delay the granting of relief, and characterised the attitude of the defendants as to simply “have a crack at Mr Mahon and then we’ll see where we are” [day 2, p.106], and that in the absence of any substantive dispute between the parties, cross-examination should not be ordered.

Analysis

81. I propose to deal firstly with the three points identified by the counsel for the plaintiff at the commencement of his response to the defendants' submissions, as set out at para. 73 above.

82. The first of these is the contention that a fresh application has to be made for the registration of a judgment mortgage, or a supplemental affidavit must be filed in the Registry of Deeds, every time a payment is made against the judgment debt. As counsel for the plaintiff suggests, this contention appears to confuse the concepts of registration of a mortgage and execution on foot of it. It is the judgment of the court which is registered; the enforcement of the judgment mortgage depends on how much is due and owing on foot of the judgment debt. It is not necessary to amend the judgment mortgage, and in any event the terms of s.116(3)(a) of the 2009 Act, which provides that "there is no requirement to re-register a judgment mortgage in order to maintain its validity or enforceability against the land or purchaser of the land..." would appear to confirm that this is so.

83. In relation to the suggestion that the plaintiff should have put valuation evidence before the court in order to satisfy the court that there will be some equity for the plaintiff in the event that a sale is ordered, no authority was proffered to support this proposition. It is difficult to see how it could be justified. How is the plaintiff to know the extent of liabilities of the defendants to prior encumbrancers? There may be factors affecting the value of the land of which the defendants are aware, but of which the plaintiff could have no means of knowledge. The defendants seek to impose a duty on the plaintiff to provide evidence as to the value of the lands the subject of the judgment mortgages, and yet put forward themselves no such valuation evidence, or evidence in relation to their financial circumstances which

might affect their ability to discharge the loans to the plaintiff, or cause the court to examine the equity of the situation as affecting the interests of justice.

84. In *Flynn v Crean*, on which the defendants heavily rely, the defendants themselves proffered the evidence which persuaded the court to impose a stay with conditions regarding repayment on the order for sale. Mr Brian McDonagh, against whom an order for sale is sought, has chosen not to do so in the present proceedings.

85. What the defendants want to do is to put the onus on the plaintiff and Mr Mahon in particular to explain its position in relation to the valuation of the assets in the hope of eliciting evidence or information which may be helpful to them, without in any way contesting any factual matters on which the plaintiff relies or putting forward any evidence themselves in this regard. It does not seem to me that this is a permissible approach to the application, particularly in circumstances where it is clear that the plaintiff has complied with the basic proofs for the reliefs it seeks.

86. In any event, it is well established that the mere fact that the proceeds of sale would not meet the debt is not a reason for a court to refuse to grant an order for sale. In *Drillfix Limited v Savage* [2009] IEHC 546, Dunne J considered that the issue was whether the defendants had shown a good reason that the court should not order a sale of a family home under the Partition Act 1868, and that the onus was on the defendant to satisfy the court in this regard. In *Quinns of Baltinglass Limited v Smith* [2017] IEHC 461, Keane J adopted a similar approach in respect of lands which did not comprise a family home. In that case, the court stated as follows: -

“46. ... In so far as the defendants have sought to argue – in a roundabout way – that, in considering whether good reason exists for not ordering a sale, the court should consider what other options, less prejudicial to the defendants, are open to Quinns to enforce its security, it seems to me that the problem here

is the same as that identified by Laffoy J [in *Irwin v Deasy* [2011] 2 IR 752]; namely, that Mr Smith has failed to provide any evidence to the Court concerning his means; the value of the lands; and the value of the debts charged as security over the lands, beyond the bare assertion that he is “practically insolvent” and that the debts charged on the lands match or exceed their value...”

87. The principles in these cases were applied by Baker J in *Flynn v Crean*: see para. 63 of her judgment, quoted at para. 70 above. While the application of the principles to the facts at paras. 71 to 75 of her judgment (see para. 71 above) led the court to grant an order for sale with a stay on certain conditions, this was in the context of a proactive engagement by the debtors with the value of their property and their economic circumstances. No such substantive engagement has occurred in the present case in respect of any of the three defendants.

88. The defendants also suggest that the profit participation agreement, a copy of which they have in fact acquired by other means, should have been disclosed in the present applications, in particular due to the at least theoretical possibility that a sale of the lands could ultimately yield sufficient profits to the plaintiff under that agreement that the debt could be discharged. However, as the plaintiff points out, a judgment creditor may well have multiple sources of potential repayment by a debtor. The judgment debt may be secured on other properties. It may be the subject of a personal guarantee by a third party. It may or may not be so that, in a given case, all of the means of recovering the debt may result in a situation where the debt is discharged in full.

89. However, it is not incumbent on the judgment creditor to explain all the ways in which it might be possible to recover the debt before the court will order a sale of

the property. Even if such a course were deemed appropriate, there might be many practical reasons why an accurate assessment of means of a recovery could not be attempted. A judgment creditor might not be in a position to value securities accurately, or the liabilities attaching to them, or to predict whether recovery on foot of a personal guarantee or other security might be feasible. To expect a creditor, who has already obtained judgment and simply wishes to enforce its security, to be obliged to carry out such an exercise would in my view be impractical and inappropriate, particularly where the debtor against whom judgment has been obtained has not himself proffered any evidence of valuation or of his own economic circumstances.

Conclusions on well charging order relief

90. I am of the view that the plaintiff has complied with the proofs necessary to establish its entitlement to the reliefs sought at para. 1 of each of the special summonses against each of the defendants. The defendants however argue that I should not make those orders without first ordering the cross-examination of Mr Mahon.

91. For the reasons set out above, I do not consider such a course to be appropriate or necessary. I shall make an order in each of the proceedings herein in the terms set out at para. 1 of the respective special summonses: in this regard, see para. 49 above.

Order for sale against Brian McDonagh

92. Brian McDonagh is the sole owner of the property in the schedule to the plenary summons ('the property') in the present proceedings against him. He makes reference at para. 16 of his replying affidavit to proceedings being taken against him in the Circuit Court by "Promontoria", and avers that the present application and an application against him by Promontoria in the Circuit Court for possession of the property "are taken absent cognizance of the right of my spouse. I say that the

plaintiff has no entitlement to attack the property rights of my spouse in this application absent her involvement as a party. I say my spouse has a right to be heard in matters pertinent to the family dwelling. In this regard I shall be guided by court direction”.

93. The reference to a “spouse” appears to be to Ms Yeoksee Ooi. It was accepted by the parties at the hearing before me that Ms Ooi and Mr McDonagh are not married. In his second affidavit, at para.15, Mr Mahon sets out his grounds for his belief that Ms Ooi is not the “spouse” of Mr McDonagh, and exhibits an affidavit sworn by her on 26 January 2019 in winding up proceedings involving Granja Limited in which she refers to Mr McDonagh as her “partner for over twenty years now and the father of my three sons...”. Counsel instructed by Ms Ooi who appeared before me for the purposes of an application which I shall address below confirmed to the court that this averment was correct, and that Mr McDonagh and Ms Ooi are not married.

94. Further, the plaintiff produced before the court a declaration made by Mr McDonagh on 28 July 2007, in which he declared that the property “is not a family home within the meaning of that term in the Family Home Protection Act, 1976, as amended by the Family Law Act, 1995. No married couple has ordinarily resided there since I acquired an interest therein”.

95. At para. 17 of his second affidavit, Mr Mahon averred that Ms Ooi “...was in fact served with these proceedings and was further notified of the directions made by this Court...despite this, Ms Ooi has not participated in the proceedings to date.” Notwithstanding this, counsel for Ms Ooi attended on the first day of the hearing before me to say that he had been instructed to make an application on behalf of Ms Ooi. In fact, while counsel intimated at the outset of the hearing that he wished to

make an application, the affidavit grounding his application was not in fact available until after lunch on the second day of the hearing. Counsel at that point applied to file the affidavit in court and be heard in relation to it. This application was strenuously resisted by counsel for the plaintiff, who described it as “a blatant attempt to derail these proceedings...”.

96. In the event, I refused the application to file the affidavit and participate in the application against Mr Brian McDonagh. My ruling is set out at pages 85 to 89 of the transcript of day 2 of the hearing. In the course of that ruling, I pointed out that “...to the extent that Ms Ooi may wish to contend that she has an interest in the property, that can be dealt with by the examiner. It is normal to make an order that the examiner conduct an inquiry in relation to encumbrances on the property and that would normally encompass an inquiry in relation to anybody who maintained that they had a beneficial interest in the property” [p.88, lines 5 to 12].

97. No good reason has been advanced to me as to why an order for sale of the property should not be made. For the reasons set out above in relation to the reliefs sought at para. 1 of each of the summonses, I do not consider that cross-examination is necessary before proceeding to an order for sale against Brian McDonagh. The position of any encumbrancer or person alleging an interest in the property will be protected by an appropriate order for inquiry as to encumbrances. I shall convene a brief hearing to deal with ancillary matters, including the question of a stay on the order or the length thereof, given Mr McDonagh’s domestic situation.

Orders for sale in the Maurice/Kenneth McDonagh proceedings

98. While the parties have agreed that an order for sale will not presently be pursued in the Maurice McDonagh or Kenneth McDonagh proceedings, Keith Farry BL on behalf of Fiona McDonagh expressed a concern that his client be served in

relation to any such application in the future, and contended that she should in that event be joined as a co-defendant. Mr Evan O'Donnell BL for Angela McDonagh adopted this submission in respect of his client. After some debate, counsel for the plaintiff accepted that those parties should certainly be put on notice of any application for an order for sale, and that an application to join those parties as co-defendants would be made if the court considered it appropriate.

99. I am of the view that, if an order for sale of the property is sought by the plaintiff, the co-owner of that property should be joined as a defendant to the proceedings, and my order will direct that, in the event that the plaintiff proceeds for an order for sale at some time in the future in the Maurice McDonagh or Kenneth McDonagh proceedings, the plaintiff apply to join Angela McDonagh and Fiona McDonagh respectively as a co-defendant to those proceedings.

Conclusions

100. In summary, the orders which I propose to make are as follows: -

- In respect of each of the defendants, a well charging order in respect of the defendants' interests in the lands set out in the schedules to the respective special summonses;
- in each of the proceedings herein against Maurice McDonagh and Kenneth McDonagh, an order adjourning the proceedings as regards reliefs two, three and four of the special summons generally with liberty to re-enter;
- the court will direct that, in the event of the re-entry of the proceedings in accordance with the previous paragraph, an application be made by the plaintiff in each or either case to join the co-owner of the property as a co-defendant;

- in the case of Brian McDonagh, an order that payment of the debt referred to at para. 1 of the reliefs in the special summons be enforced by a sale of the property set out in the schedule to the summons pursuant to s.117 of the 2009 Act;
- in the case of the proceedings against Brian McDonagh, an order for the taking of an account of other encumbrances affecting the lands set out in the schedule to the special summons, and the making of inquiries as to the respective priorities of any such encumbrances;
- in relation to the proceedings against Brian McDonagh, an order for an inquiry as to the persons interested in the lands and premises set out in the schedule to the special summons, their shares and proportions.

101. I propose to convene a short hearing at 10.15am on Tuesday 28 March 2023 for submissions as to the format of the order and any ancillary orders which the parties may consider appropriate, and as to the costs of the matter. Under no circumstances will any submissions as to the substantive orders to which I have made reference above be entertained. The order will thereafter be finalised without further reference to the parties.