



THE SUPREME COURT

Record Numbers: 259/2010, 272/2010
High Court Record Number: 2008/478SP

MacMenamin J.

O'Malley J.

Baker J.

BETWEEN/

**THE PROVOST, FELLOWS AND SCHOLARS OF
THE UNIVERSITY OF DUBLIN, TRINITY COLLEGE**

Plaintiff/Respondent

- AND -

JAMES KENNY AND PATRICIA KENNY

Defendants/Appellants

JUDGMENT of Ms. Justice Marie Baker delivered the 21st day of December, 2020

1. This is the appeal from the order of Laffoy J. of 29 of January 2010, [2010] IEHC 20 by which at the suit of the plaintiff (“Trinity”) she ordered the sale of the principal private residence of Mr. and Mrs. Kenny at 4 Temple Road, Dartry, Dublin. In addition to the order for sale, she made an order that three judgment mortgages registered by Trinity were well charged against the interest of Mr. Kenny in that premises in Dartry, and against his interest in registered lands in Co. Donegal comprised in Folios 21400 and 43061, being a weekend

or holiday home of Mr. and Mrs. Kenny, and the adjoining lands. The well charging orders have not been appealed.

2. The three judgment mortgages were registered on foot of judgments for taxed costs awarded against Mr. Kenny in long running litigation regarding the development of student accommodation close to his home. The amount stated to be due for costs at the date of the High Court judgment was €663,239.34, and Laffoy J. declared that sum, and continuing interest, well charged against the interest of Mr. Kenny in the two premises.

3. Laffoy J., having reviewed the authorities and the evidence, was satisfied that the value of that house at Dartry was such that Mrs. Kenny, the co-owning non-debtor spouse, would, after a sale and discharge of a prior legal mortgage for which she was jointly liable, have sufficient funds to purchase alternative accommodation, and that, while “there will be a degree of disruption”, an order for sale would not deprive the couple of a home. She regarded that as being the “crucial factor in determining whether the Court’s discretion should be exercised in favour of ordering a sale” (at p. 20 of her judgment).

4. She refused to order sale of the Donegal premises as she considered that on the authority of the judgment of Finlay Geoghegan J. in *Irwin v. Deasy (No. 1)* [2004] IEHC 104, [2004] 4 IR 1, and her own judgment in *Irwin v. Deasy (No. 2)* [2006] IEHC 25, [2011] 2 IR 752, Trinity, not being a co-owner, lacked standing to seek an order for partition, and therefore relief by way of sale in lieu of partition.

5. Three appeals were initially lodged against the orders of Laffoy J. The appeal against the refusal of Laffoy J. to make an order for sale of the premises in Donegal has now been abandoned.

6. Mrs. and Mr. Kenny have each lodged an appeal in identical form, and the primary argument on the appeal was made by counsel on behalf of Mrs. Kenny. Mr. Kenny, who is unrepresented, filed written submissions and made some oral submissions.

7. The two premises were held by Mr. and Mrs. Kenny as joint tenants, and it is agreed that they are equally beneficially entitled in each. As a result of the registration of the judgment mortgage on the premises at Dartry the joint tenancy has been severed and they now hold that premises as tenants-in-common. As the Donegal house and lands are held under a registered title, the registration of the judgment mortgage did not sever the joint tenancy.

8. The appeal concerns whether Laffoy J. correctly exercised the jurisdiction to order sale in lieu of partition of the Dartry premises, but some consideration is required regarding whether a change in the factual circumstances might justify this Court coming to a different view. That question involves an analysis of the nature of the remedy of partition and sale in lieu, and whether what is engaged is an equitable remedy.

9. The appeal is concerned with the law before the commencement of the Land and Conveyancing Law Reform Act 2009 (“the Act of 2009”), by ss. 31 and 117(2)(c) of which a court has a discretion on a judgment mortgage suit to make such other order relating to the land “as appears to the court to be just and equitable in the circumstances of the case”. The jurisdiction before that legislative intervention would seem to be more narrow, as will be discussed more fully below.

10. This Court in *Irwin v. Deasy* [2011] IESC 15, [2011] 2 IR 752 at para. 11 seems to have considered that s. 31 of the Act of 2009 did not apply to judgment mortgages created before that Act came into force, but that has been doubted in paragraph 8.151 of the 2nd edition of Heather Conway’s authoritative text *Co-ownership of Land: Partition Actions and Remedies*, published by Bloomsbury in 2012 (the first edition, published in 2000, was drawn on in the judgment of Laffoy J. in the High Court in *Irwin v. Deasy* at para. 19 *et seq.* and *passim*). Given that the Partition Acts were repealed by the Act of 2009, and because unlike in s. 30(4) there is no legislative exclusion of retrospective application of s. 31, it is at least arguable that section 31 applies to all judgment mortgage suits, at least those commenced

after the coming into operation of that Act in 2010. The point was not specifically argued before Laffoy J. in the present case, nor directly on this appeal, although counsel for Trinity and for Mrs. Kenny both relied in argument on case law under the Act of 2009.

11. I express no firm view in the present appeal on this point because it seem to me that the factors on which Laffoy J. relied are not in substance different from those that have been considered in *post-2009* authorities. The question will be considered more fully below in regard to the range of remedies available in this appeal, and recent case law under the Act of 2009.

The factual background

12. Mrs. Kenny is now 87 and her husband 88. They were ten years younger when Laffoy J. made the order for sale, and the mortgage suit was issued twelve years ago. Mr. Kenny was gravely unwell and unable to pursue the appeal for some years, the appeal unfortunately was delayed by reasons of historic delays in this Court before the establishment of the Court of Appeal, and this appeal is one of the last “heritage” appeals which falls for hearing.

13. The couple has lived for 25 years or thereabouts in the house in Dartry. Four of their five children reside in Dublin, and they say this house is suitable for their current needs as they need at least three bedrooms to facilitate nursing or care support in the house. Both of them have medical problems. Mrs. Kenny is from the Philippines and has lived in Ireland for more than 60 years, for most of that time within the Dartry area. She has no other relatives in Ireland. Their income seems to be the non-contributory State Old Age Pension.

14. The premises in Dartry is held subject to a legal mortgage created in 2001 by way of “equity release”. The purpose of this secured loan was never explained, and that purpose is not directly in play in the case, but what is relevant is that the Bank of Ireland mortgage which has priority over the judgment mortgages, is not being serviced, and the security agreement provides for repayment of capital and accrued interest on the sale of the premises

or the death of the last surviving owner. Interest continues to accrue and be capitalised in the current amount of approximately €22,000 per year. This secured debt has practically doubled since Laffoy J. delivered her judgment mortgage and now stands at close to €800,000.

15. The decision of Laffoy J. was given in the light of evidence in affidavits sworn in 2008. The valuation of the family home then was €1.5 million and that of Donegal between €220,000 and €250,000. The amount secured by the legal mortgage on Dartry was then approximately €480,000.

16. In the submissions filed by Mrs. Kenny she has updated a number of figures, and also proposes a calculation for the costs of sale and certain other costs which she argues would be an inevitable incidence of an order for sale. No application was made to adduce further evidence, nor was this evidence ever put on affidavit. In an early case management counsel for Trinity agreed that, without prejudice to its argument that this Court was engaged in an appeal of the decision of Laffoy J. and was not concerned at all with up-to-date figures, up-to-date figures could be adduced but merely for the purpose of argument. At the last case management hearing, counsel agreed that, as the valuations have changed very little, if at all, since 2008, the matter of principle is unlikely to be changed by any dispute regarding the valuations.

17. While counsel for Trinity is correct that there is no admissible fresh evidence, there would be a certain lack of basic fairness were the Court to determine the appeal on 2008 facts alone if these were materially different. Further, that the amount secured by the legal mortgage and the ages of Mrs. and Mr. Kenny have changed over the ten years since the decision of Laffoy J. was inevitable and cannot be controversial or unexpected. These facts are not new facts in the true sense but can be extrapolated from the facts before Laffoy J. Further, for the reasons that will later appear, the other factual matters sought to be advanced on behalf of Mrs. Kenny are not material to the conclusions to which I come, and I return

later to the way in which I consider that these changed circumstances might inform the approach of the Court to the appeal and to any consequential orders that may be made.

18. In the circumstances I propose dealing with the appeal on the basis that the premises at Dartry and the holiday home in Donegal have broadly the same value as they had in 2010 and that the two material facts which differ are that Mrs. and Mr. Kenny are now in advanced old age and the legal mortgage now secures an amount of close to €800,000.

The issues not in the appeals

19. The parties adopted a sensible position at case management with the result that the issues in the appeals have now been refined.

20. First, counsel for Mrs. Kenny does not now make the argument that the well-charging orders ought not to have been made either in respect of Dartry or Donegal. This ground of appeal can be taken now to be abandoned.

21. Second, Mrs. Kenny does not now make an argument that s. 3(1) of the Family Home Protection Act 1976 means that a judgment mortgage could not be registered, whether on registered or unregistered land, without the prior consent of the other spouse. This matter was decided by Carroll J. in *Containercare Ltd. v. Wycherley* [1982] I.R. 143, has stood the test of time, and the point is not now being raised and does not fall for consideration.

22. Third, it is accepted by Mrs. Kenny that the registration of the judgment mortgage on the Dartry premises, which is unregistered land, had the effect of severing the joint tenancy so that both she and Mr. Kenny hold the Dartry premises as tenants-in-common, in equal undivided shares.

23. Fourth, it is accepted that because the title to Donegal is registered, as a result of the decision of this Court in *Judge Mahon v. Lawlor (Administrator Ad Litem of the Estate of Liam Lawlor)* [2010] IESC 58, [2011] 1 IR 311, the registration of a judgment mortgage on jointly owned registered land does not sever the joint tenancy. The practical effect for the purpose of the present appeal is that the lands in Donegal are still held by Mrs. and Mr.

Kenny as joint tenants, and that Mrs. Kenny would, if she survived her husband, take the premises by right of survivorship and freed from the judgment mortgages. Trinity argues that any delay in the sale of Dartry would have the effect that it could be left without remedy should Mr. Kenny predecease his wife, as its security on Donegal would be lost.

24. Fifth, it is accepted that the burden lies on the appellants to show cause why the premises in Dartry should not be sold: Laffoy J., albeit *obiter*, in *Irwin v. Deasy*, at para. 28, and Dunne J. in *Drillfix v. Savage* [2009] IEHC 546, at pp. 6 and 7, noted that on an application under the Partition Act the onus was on a defendant meeting such a claim to satisfy the court that a good reason existed for not ordering a sale.

The issue which does arise in the appeal: sale in lieu of partition

25. Trinity's application for sale is made pursuant to the statutory power contained in the Partition Acts 1868 and 1876. Laffoy J. in *Irwin v. Deasy* analyses the history of the remedy from paras. 22 *et seq* of her judgment and concludes that, because a judgment mortgagee of registered land did not by statute take an assurance of any legal or equitable interest, but is to be treated as the owner of a charge, the judgment mortgagee is not a co-owner, could not therefore seek partition, and therefore could not meet the statutory pre-condition to seek sale in lieu.

26. The title to the premises at Dartry is unregistered leasehold and the difficulties with enforcement of a judgment mortgage against one co-owner only as identified in the case law and in particular in the judgments of the High Court and Supreme Court in *Irwin v Deasy*, do not arise, with the effect that there is no jurisdictional difficulty in the making of an order for sale in lieu of partition in respect of Dartry.

27. It is useful to briefly set out the state of the law before the Act of 2009 as the nature of the jurisdiction exercised by Laffoy J. falls for consideration in the appeals.

The history of the jurisdiction to order sale in lieu

28. Trinity's application is for sale in lieu of partition, and describing it thus immediately identifies the true source of the jurisdiction, and if it can be said that partition is not available, then the statutory power cannot be exercised. This is because while s. 3 and s. 4 of the 1868 Act permitted the sale of property and distribution of the proceeds, the power of the court was linked to the power to order partition, and provides for the making of an order for sale in lieu of partition. Section 3 enables a court to order sale in a partition suit but only where the remedy of partition was available, and where sale "would be more beneficial for the parties interested than a division". At the time that Act was passed the Act for Jointenants of 1542 (33 Henry VIII, C.10) permitted partition on the application of joint tenant or tenant-in-common.

29. The judgment mortgagee of unregistered land has a legal estate in that land, because by s. 7 of the Judgment Mortgage (Ireland) Act 1850 the registration of the judgment mortgage effects an assurance of the legal estate or interest in the land.

30. Trinity seeks relief under s. 4 as the owner of the moiety interest of Mr. Kenny by reason of the registration of the judgment mortgage. Section 4 of the 1868 Act provides that in a suit for partition a party or parties interested to the extent of one moiety or upwards request a sale and distribution of proceeds instead of physical partition, and the section is stated in the imperative:

"... the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

31. However, the writ of partition was abolished by the Real Property Limitation Act 1833, and the jurisdiction to order partition then became exercisable only by the Courts of Chancery, and that equitable jurisdiction is considered to have survived even after the 1542 Act was repealed by the Statute Law Revision (Pre-Union Statutes) Act 1962. The equitable

jurisdiction has by virtue of the Supreme Court of Judicature Act (Ireland) 1877 become exercisable in all courts, but the nature of the jurisdiction remains one in equity.

32. Because Trinity became the owner of Mr. Kenny's moiety interest in Dartry by the registration of a judgment mortgage, it is entitled to be treated as the co-owner for the purposes of that equitable jurisdiction and thus has standing to seek partition and *ipso facto* sale in lieu: see *Farrell v. Donnelly* [1913] 1 I.R. 50.

Nature of the jurisdiction: discretion?

33. Whether the remedy of sale in lieu of partition is truly discretionary was doubted in the early authorities, and it has been considered that the power must be seen as binary, so that sale is an alternative to partition and the claimant has a right to either partition or sale, and is not to be left without remedy. By way of illustration, the often-quoted decision in *Pemberton v. Barnes* (1871) L.R. 6 Ch. App. 685 was a suit of a co-owner for partition of a 3,600-acre estate. Malins VC at first instance considered that the decision to order sale was left "entirely to the discretion of the court" to be exercised in the light of "all the surrounding circumstances", including the nature of the property and the interests and wishes of the parties. That approach was reversed on appeal, Hatherley L.C. holding that s. 4 "makes it imperative on the Court, in a certain state of circumstances, to order a sale, unless it sees good reason to the contrary" (p. 693), what he later described as "real plain good cause".

34. Finnegan J. at para. 34 of *Irwin v. Deasy* noted the "imperative" form of s. 4 and quoted *Pemberton v. Barnes*, albeit without an analysis of the nature of the discretionary power.

35. Murphy J. in *O'D v. O'D* (Unreported, High Court, 18th November, 1983) did not take such a narrow view of the jurisdiction and held that the co-owner was not as of right entitled to either sale or partition, and that the court is not without discretion (p. 6). He regarded the jurisdiction as part of the "inherent equitable jurisdiction" of the court, and concluded that the loss of the "statutory veto" of a spouse under the Act of 1976 was a good

reason to refuse sale, as regard was to be had to the duty of the court not to dispense with the consent of a spouse to a sale “without taking into account all the relevant circumstances” including those set out in s. 4(2) of that Act.

36. That was also the view of McWilliam J. in *C.H. v D.G.O'D.* [1978] 1 IR 194, where he considered that while a temporary depreciation in value was not in itself a good reason to refuse sale, it might be sufficient if the depreciation in value arose by reason of behaviour of a family member intended to deter potential purchasers.

37. In *B.M. v. A.M.* (Unreported, High Court, Peart J., 3rd April, 2003) sale was refused on the suit of an estranged wife because her husband would be rendered homeless while she had alternative accommodation and where, because of his age, he would not be in a position to rehouse himself.

38. In *Drillfix v. Savage* Dunne J. followed the authority of Denham J. in *First National Building Society v. Ring* [1992] 1 IR 375 that the mere fact that the proceeds of sale would not meet the debt was not a reason why the courts would refuse to grant a sale. She considered that the question was the broad one of whether there was a good reason not to direct a sale of the jointly held home of the debtor and her sister, and she noted, at pp. 6 and 7 of her judgment, the relevant matters as:

- (a) that the premises had been the home of the sisters for over 30 years;
- (b) that the sister of the debtor was an “innocent” party and had no part in the debt and had limited means;
- (c) that both co-owners were approaching retirement and had made an offer to make monthly repayment in reduction of the indebtedness;
- (d) that they had tried but failed to obtain alternative funds to pay the debt; and
- (e) that the effect of ordering sale would be to render the “innocent” sister homeless.

39. Dunne J. found herself unable to form a view regarding the feasibility of a sale of the property, in particular, in the light of the then prevailing economic climate in 2009, when the property market was particularly low. She did make a well charging order and directed the furnishing of further information, including the costs of a sale, the likely net proceeds that would be available to meet the debt, whether the distribution of the proceeds of sale might be sufficient to deal with the interests of the second defendant, and whether alternative loan finance could be obtained. Dunne J. adjourned the matter and no later judgment is available to elucidate the consequences of her order. What is relevant, however, is that she considered the practical financial circumstances to be of importance and the question of the feasibility of alternative financing and the appropriate means to respect the interests of the non-debtor co-owner were key factors in her conclusion.

40. Keane J. in *Quinns of Baltinglass Ltd v. Smith* [2017] IEHC 461 was dealing with a commercial or non-family home folio and held that the defendant had not discharged the onus of establishing that there was good reason why the land should not be sold.

41. Dunne J. in *Drillfix Ltd v. Savage* considered that to sell a principal private residence and thereby render the non-debtor co-owner homeless might itself constitute good reason. The old and authoritative judgment of Denham J. in the High Court in *First National Building Society v. Ring* came to the same decision. However, both of those cases were decided partially on the basis that there was not sufficient evidence before the court to make an order for sale, and Laffoy J. expressly held in the present case that she did have enough evidence that the sale of the family home would yield for Mrs. Kenny sufficient to buy alternative and suitable accommodation. Therefore the point that Mrs. Kenny might be rendered homeless did not succeed, and has come back for further argument in the present case for the reasons I will explain below.

42. The Act of 2009 seems to afford a wider range of statutory remedies, but the statutory power may still be constrained by the fact that while the list in s. 31(2) is not exhaustive the

broad power contained in s. 31(2)(f) is to make a just and equitable order “relating to the land”. While the court may under that section make an order with conditions, such as a stay on sale on condition that instalment payments are made, as was done in *Flynn v. Crean* [2019] IEHC 51 or may dismiss the application without order, as in *Muintir Skibbereen v. Crowley* [2016] 2 IR 665 the discretionary exercise must have regard to the interest of the owners and where relevant a creditor, but the remedies may not be so broad as to permit orders which cannot be said in some way to relate to the land, and in any order the interest of the parties are to be assessed and balanced.

43. The conclusion I draw from these, admittedly somewhat sparse, authorities is that, while the remedy is equitable and thus must be seen as flexible in nature, the rights of a mortgagee cannot always give way to the convenience or wishes of the co-owner, and, at least under the Act of 1868 and the equitable jurisdiction that existed before 2009, the imperative nature of the jurisdiction under s. 4 seems to make it difficult to refuse outright an order for either sale or partition, if the co-owner does not offer to purchase the share of the claimant under s. 5.

44. The other conclusion I draw is that as the jurisdiction to order partition is equitable, and as the making of an order for sale in lieu is directly linked to the availability of partition, the jurisdiction to order sale involves the exercise of equitable discretion and gives a court the flexibility of the equitable remedy, made in the light of the facts and in the interests of achieving a just result and one which recognises the rights of the parties.

The nature of the judgment mortgage

45. It is useful to briefly consider the nature of the interest that Trinity holds now in the Dartry lands before further considering the factors that engaged Laffoy J. when she ordered sale.

46. The judgment mortgage has sometimes been described as a “process of execution”, see Kenny J., delivering the judgment of this Court in *Tempany v. Hynes* [1976] I.R. 101 at p. 117:

“A judgment mortgage is a process of execution and the judgment mortgagee is not a purchaser for valuable consideration: *Eyre v. McDowell* (1861) 9 H.L. Cas. 619.”

47. That description is well established in the authorities: *Containercare v. Wycherley* and see also *Murray v. Diamond* [1982] ILRM 113, *Re Murphy and McCormack* [1930] I.R. 322 and *Re Strong* [1940] I.R. 382, *ACC Bank Plc v. Markham* [2005] IEHC 437, [2007] 3 IR 533 and the recent decision of Allen J. in *A.D.M. Mersey v. Bergin* [2020] IEHC 3.

48. This does not however mean that the judgement creditor who has registered a judgment mortgage does not have a valuable interest or entitlement to protect.

49. In the case of unregistered land, under s. 7 of the Judgment Mortgage (Ireland) Act 1850 the registration of a judgment mortgage operates to transfer to the judgment creditor the estate and interest of the debtor in that land. In practical terms this means that the judgment creditor by registering a judgment mortgage against one debtor who co-owns unregistered land takes the interest of that co-owner, in the same way as a mortgage of unregistered land is effected by an assurance of the interest of the mortgagor subject to the equity of redemption (and in the case of leasehold land by sub-demise rather than conveyance, but nonetheless by an assurance of title).

50. To that extent the description of the judgement mortgagee as a “volunteer” may be misleading, if by that is meant that the judgement mortgage is not itself a valuable asset or property interest. It is incorrect to say that in all cases a judgement mortgagee is to give way to the interests of the non-debtor spouse or co-owner if that proposition is derived from the general description of the judgement mortgagee as a volunteer. That description is useful for the purposes of assessing the priority that a judgement mortgage can be said to enjoy over other equities even those of which the mortgagee had no notice or over subsequent

mortgages or a *lis pendens*. See for example *AS v. GS* [1994] 1 I.R. 407 *per* Geoghegan J. but it does not mean that a judgment mortgagee does not have a valuable interest entitled to protection.

51. In the present case the judgement creditor is to be treated as having taken by way of mortgage the interest of Mr. Kenny in the lands, subject only to his equity of redemption.

52. Thus in considering whether good reason exists to refuse an order for sale, even when premises the subject of a mortgage suit are the principal private residence of a family, or as here, an elderly husband and wife, the interest of the judgement creditor is one that is entitled to be recognised and protected at law. This factor was recognised by Hogan J. at para. 26 of *Muintir Skibbereen v. Crowley*, but the facts there pointed inexorably to the likelihood that the families would be left homeless and Hogan J. considered it would be wrong to grant the order for sale.

Factors that are relevant

53. What is before the Court now is the net issue of whether the High Court was correct that there is “good reason to the contrary” that an order for sale should be made, and what discretionary factors fall for consideration in the making of an order for sale.

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

- (1) Whether the “innocent” i.e. non-debtor co-owner might be rendered homeless as a result of the sale: *Drillfix Ltd v. Savage*, *First National Building Society v. Ring*, *Muintir Skibbereen v. Crowley*;
- (2) As a corollary, whether the proceeds of sale available to the non-debtor co-owner might be enough to accommodate that person or both owners following a sale; this was the primary determining factor in the decision of Laffoy J. in the present case;

- (3) While it must be a factor, the fact that the sale would not provide sufficient funds to discharge the judgment creditors debt is not in itself a factor that would be determinative: *Flynn v. Crean, Drillfix v. Savage*;
- (4) Whether the non-debtor co-owner got value for the loan or other debt: *Muintir Skibbereen v. Crowley, Drillfix v. Savage*;
- (5) The court will look at the living arrangements of a non-debtor co-owner, be that a spouse, a civil partner, a parent, sibling or child, and whether the order for sale might lead to hardship: *O'D v. O'D, Drillfix v. Savage*;
- (6) The age and means of the parties could be material, and it would seem relevant to take into the account the ages of both the debtor and non-debtor co-owner as the justice of the case requires.
- (7) An offer to make a payment in reduction of a liability would be a factor: *Drillfix v. Savage, Flynn v. Crean*;
- (8) The likely financial consequences of the making of an order for sale are relevant and perhaps sometimes even central to the discretionary exercise. It was central to Laffoy J. who considered that Mrs. Kenny's share of the net proceeds of sale, after the discharge of the legal joint mortgage and the costs of sale, would be sufficient to enable Mrs. Kenny to acquire suitable alternative accommodation.

The Family Home (Protections) Act 1976

55. The provisions of s.4 of the Act of 1976 were regarded by Denham J. in *First National Building Society v. Ring* and by Murphy J. in *O'D v. O'D* as offering a relevant discretionary factor under the pre-2009 jurisdiction. Hogan J. at para 29 of his judgment in *Muintir Skibbereen v. Crowley* referred with approval to that approach and noted that section 4 “reflected a fundamental policy choice” of the Oireachtas to reflect constitutional values in Article 40.5 (inviolability of the dwelling) and Article 41 (protection of family life). In

that case he was persuaded that an order for sale would leave the non-debtor spouses without a home, and declined to order sale.

56. Counsel for Mrs. Kenny did not pursue the argument initially advanced that section 4 of the Act of 1976 constrained the jurisdiction of a court to order sale in lieu of partition of a “family home” within the meaning of that Act. Because I consider that the established parameters of the discretion under the Act of 1868 permit the making of an order that will not deprive Mrs. Kenny, or indeed her husband, of their home, and because I consider that the discretion of the court may engage a consideration the living arrangements of a non-debtor co-owner who is not a spouse, I do not propose to further engage the constitutional issue mentioned, but not further developed, by Hogan J. in *Muintir Skibbereen v. Crowley*.

57. The most material factors in the present case are that Mrs. and Mr. Kenny are of advanced age, their children had moved out of their shared home, Mrs. Kenny is not a party to the judgment debt, but at the time of the High Court judgment there would have been sufficient funds to purchase alternative accommodation on a sale.

Good reason for the High Court to order a sale?

58. Trinity has a right by statute to seek to enforce its judgment mortgage in the Dartry lands by an application for sale in lieu of partition, and the judgment mortgagee is entitled to be treated as a co-owner of the legal estate for this purpose, albeit that the interest of the judgment mortgagee is subject to the equity of redemption.

59. There is no doubt equally that Mrs. Kenny as a co-owner has both a legal and equitable interest in the land, and her property and personal rights will be affected by an order for sale. This is so even though she is a stranger to the liability of her husband, she is not a debtor to Trinity, and her interest in the premises at Dartry is not burdened with the judgment mortgage.

60. It seems to me on the basis of the factors that I have outlined above, and those Laffoy J. herself identified, that she did not err in the exercise of her discretion and her order is

unimpeachable. The circumstances were very different from those in *Drillfix v. Savage* and *First National Building Society v. Ring*, and even, post 2009, in *Muintir Skibbereen v. Crowley*, and she did not lack sufficient details of the likely result of sale. The evidence and her finding was that there would after a sale be sufficient funds to purchase suitable alternative accommodation, and the disruption was not likely to be so severe as to tip the balance against a sale.

The approach on appeal

61. But the circumstances have changed, and the first matter to be considered is whether this Court may review an order made in the exercise of a discretionary power and the correct approach on appeal.

62. The approach favoured by MacMenamin J. in *Lismore Builders Ltd (in Receivership) v. Bank of Ireland Finance Ltd.* [2013] IESC 6 was that while an appellate court will afford “great deference” to the views of the trial judge, an appellate court is untrammelled by any *a priori* rule that would restrict the scope of an appeal, and the court is not limited to interfering with a decision of a lower court only in those cases where an error of principle was disclosed.

63. That approach has been followed recently in the decision of the Court of Appeal *per* Irvine J. in *Lawless v. Aer Lingus Group plc* [2016] IECA 235, where she sounded a note of caution as follows:

“However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application *de novo* in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing.”

64. The law was recently reviewed in *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327 by Collins J.

65. In the light of that jurisprudence I consider that this Court may come to a different conclusion to Laffoy J., even if she did not make any error of principle.

Application to the facts

66. For the reasons I more fully explain below the facts of the present appeal permit a just solution which avoids the loss of the family home.

67. Taking as a starting point that the premises at Dartry is valued at €1.5 million, after estimated costs of sale of say €40,000, and the discharge of the legal mortgage (€800,000 or thereabouts), Mr. Kenny's share would be wholly absorbed by the amount due on the judgment mortgage. Mrs. Kenny makes various arguments, not supported by evidence, that her own legal costs and those awarded against her in the High Court by Laffoy J. would amount to another €100,000 and that the cost of alternative accommodation for her would have to include moving costs, stamp duty etc. These figures are largely unvouched but it seems that Mrs. Kenny will not have much more than €300,000 from the sale.

68. But perhaps more fundamentally, Mrs. and Mr. Kenny are now at such an advanced age that to require them to move would generate more than the "disruption" envisaged by Laffoy J. In my view the consequence of making an order for sale with immediate effect would be oppressive having regard to their ages, and in the light of the fact that they have lived in the Dartry area and in their home for 25 years, and have their support services, family and friends nearby. Mrs. and Mr. Kenny cannot be expected to vacate their home now at the suit of Trinity.

69. Trinity has no meaningful way of enforcing its security on Donegal, and the interest on the first legal mortgage on Dartry continues to accrue and be capitalised at an alarming rate. At present figures the secured debt will have risen to close to €900,000 in three years. There is a real risk that on sale the share of Mr. Kenny in the proceeds will not be sufficient to discharge the judgment mortgage debt, and that risk increases exponentially over time.

70. Mr. and Mrs. Kenny continue to have the liability of the Bank of Ireland mortgage on Dartry. Were Mr. Kenny to live for another ten years it might be that the sale of Dartry would not realise enough to pay Trinity's judgment. However, I am not convinced that it is unfair to Trinity to refuse sale on the ground that the sums owed on the legal mortgage are increasing, as the Trinity judgment mortgage was always held subject to the Bank of Ireland legal mortgage, and Trinity could not have at any time achieved priority over that security.

71. I must have regard to the fact that the couple have not taken steps to sell Donegal in the ten years since the judgment of Laffoy J. when the interest on the judgment mortgage has continued to accumulate.

72. There is no realistic possibility that this couple use the property in Donegal, and, even if they do, they use it as a holiday home only. The alternative is that Mrs. and Mr. Kenny live in Donegal, which might at this stage, having regard to their age and frail health, be unrealistic, and arguably unfair, particularly as most of their children and grandchildren live in the Dublin area.

73. I also bear in mind that a refusal to make an order for sale in this Court is final and that the passing of time could leave Trinity entirely without remedy. Such a result would not be just and while the relief sought is equitable and discretionary, the refusal of a sale now leaves Trinity at considerable risk.

A stay on the order for sale

74. The judgments of this Court in *Okunade v. Minister for Justice and Others* [2012] IESC 49, [2012] 3 IR 152 and *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd.* [2019] IESC 65, and *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42, whilst they may offer a useful starting point as to the correct approach of an appellate court to the grant of a stay, were concerned with the problems inherent in the grant of an interlocutory order in the light of the uncertainty as to the likely outcome at trial.

Nonetheless the approach in those cases favoured the making of orders which were just in the circumstances, even if that meant a recalibration of the discretionary factors engaged.

75. Where litigation has concluded a stay is often granted in ease of the parties, but the factors engaged are quite different from those in *Okunade v. Minister for Justice* and *Merck Sharp v. Clonmel Healthcare* and *Krikke v. Barranafaddock* as the respective rights of the parties have been determined. A court may in that context grant a stay for the purpose of relieving against the harshness of making an immediate order, and where the court is exercising an equitable jurisdiction, that factor may favour a stay. Equally the court must protect the interest of the successful party. See for example the analysis of Collins J. in *Permanent TSB v. Skoczylas* [2020] IECA 152, who pointed out that a stay in those circumstances would often be measured in days or weeks.

76. Having regard to the nature of the order sought in the proceedings, and without deciding whether the power now exercised is that under s. 4 of the 1868 Act or s.31 of the Act of 2009, my view is that this Court should affirm the order for sale, thus protecting the interest of Trinity, but stay the operation of that sale upon conditions which protect the interests of Mrs. and Mr. Kenny and relieve the harshness of an immediate order for sale. I propose then that the appeal be dismissed, and the order for sale be affirmed but with the grant of a stay with the following conditions.

Conditional order

77. The just way to approach the present appeal therefore is to dismiss the appeal against the order for sale of Dartry, but to now place a stay on the sale subject to the condition that the property in Donegal is placed on the market for sale within 6 months of the date of this judgment, and the entire proceeds of sale, after the discharge of the costs of sale, be paid to Trinity in part discharge of its debt. The stay shall then operate until the sale of the premises at Dartry or the death of the last to survive of Mrs. Kenny and Mr. Kenny, whichever is later, and allowing a reasonable time for a personal representative to sell thereafter.

78. That condition does require that Mrs. Kenny should contribute her half share in the proceeds of sale of Donegal towards the debt to Trinity, and she should be given credit for that payment by an increase in the value of her equity in Dartry, so that on any sale or other disposition of the premises, that amount is to be credited to her interest. That way she retains the benefit of the value of her interest in Donegal but now attached to the premises in Dartry.

79. It may be more fair to allocate a percentage share rather than a monetary amount to Mrs. Kenny but I am not in a position to calculate that share. Mrs. Kenny will be given liberty to apply to the High Court to fix the percentage of her equity in the light of evidence as to the proceeds of sale of Donegal and the agreed value (or in the absence of agreement, the median value) of the Dartry premises at the date of sale of Donegal. By that formula she will gain the benefit of any increase in the value of the Dartry premises.

80. The benefit of the stay is that Mr. and Mrs. Kenny retain the right to continue to reside in Dartry but Trinity will obtain a substantial sum of money from the sale of Donegal. This has the additional benefit that the ongoing interest on the judgment debt is reduced.

81. The benefit of a sale of Donegal from the point of view of Trinity is that Trinity avoids the risk of the entire loss of its security in Donegal were Mr. Kenny to predecease his wife who would take the property entirely free from the judgment mortgage as a result of *Judge Mahon v. Lawlor*. When pressed, counsel accepted that Trinity may not have any legal route available to it to pursue relief on foot of the judgment mortgage, and no means by which it can now register a fresh judgment mortgage, as the judgments are themselves statute barred or close to being statute barred.

82. A fair balance of justice is thus achieved between the parties: Mr. and Mrs. Kenny gain the advantage that they continue to live in the house where they say they want to live, and in the area where they say their lives are lived. Trinity obtains payment of a substantial sum and avoids the risk of the loss of its security in Donegal, and even of some of the value in Dartry.

83. Because of the risk that Mr. Kenny may pre-decease his wife and before the Donegal house is sold, the stay is also to be conditional on the parties taking steps to sever the joint tenancy in the two Donegal folios within 3 months of the date of this judgment. By that means the risk that the title difficulties, which were alluded to in argument, might delay a sale would not prejudice Trinity. These seem to be capable of remedy at the instance of Mrs. and Mr. Kenny, and I have regard to the fact that no steps seem to have been taken by them to remedy those defects, if such they be.

84. The children of the couple shall have liberty to purchase the premises in Donegal should they choose, and at a price agreed between the parties.

85. All other orders regarding the sale should be remitted to the High Court, which may extend the time for sale for cause shown.

Separate argument of Mr. Kenny

86. Mr. Kenny makes the argument that he will not consent to the sale of the premises at Dartry and that he will exercise his right of veto should an order for sale be made. I agree with Laffoy J. that this argument is premature, and I would, as she did, leave it for further consideration.

87. The premises in Donegal is not a “family home” of the spouses within the meaning of s. 2 of the 1976 Act. As I do not propose to, nor does this Court have the power to, order sale of Donegal, Mrs. and Mr. Kenny have the choice now to take steps jointly to sell that premises in satisfaction of the conditions of the proposed stay.

88. I would therefore dismiss the appeal, but grant a stay on the order for sale on the conditions outlined above.