

**APPROVED
NO REDACTION NEEDED**



**THE COURT OF APPEAL
CIVIL**

Appeal Number: 2023/93

**Haughton J.
Pilkington J.
Allen J.**

Neutral Citation Number [2023] IECA 163

BETWEEN

SEACONVIEW DESIGNATED ACTIVITY COMPANY

PLAINTIFF/APPELLANT

AND

LIAM FAHEY

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 23rd day of June, 2023

Introduction

1. This is an undefended appeal against the refusal by the High Court (Simons J.) of an undefended motion by the plaintiff/appellant for an order approving the sale of property in Douglas, County Cork, over which the appellant had previously secured a well charging order and an order for sale.

The well charging order and order for sale

2. By a facility letter dated 23rd March, 2011 from Ulster Bank Ireland Limited (*“Ulster Bank”*) to the defendant/respondent, Mr. Liam Fahey (*“Mr. Fahey”*) and accepted by Mr. Fahey on 24th March, 2011 Ulster Bank offered to refinance debts amounting in total to €4.55 million. The facility letter stipulated for security over a number of properties, including a first legal mortgage or charge over *“Unit Numbers 1, 2 and 3 at Ardfallen Mall, Douglas, Cork”* which the letter suggested was already held.
3. By deed of mortgage and charge dated 28th February, 2013 made between Mr. Fahey and Ulster Bank, Mr. Fahey mortgaged to Ulster Bank the property described as *“ALL THAT AND THOSE the ground floor only of premises now known as Unit 1, Ardfallen Retail Park, Douglas, Cork, Unit 2, Ardfallen Retail Park, Douglas, Cork, and Unit 3, Ardfallen Retail Park, Douglas, Cork, being part of the property comprised in an Indenture of Conveyance dated 17th June, 1999”* and made between Charles O’Sullivan and others as vendors and Gerard Paul and Mr. Fahey as purchasers *“and comprising the ground floor only”*, which three units were subject to leases in favour of identified tenants.
4. Mr. Fahey failed to meet his commitments to Ulster Bank and by letter dated 19th June, 2013 Ulster Bank demanded repayment of the total sum of €4,294,114.33.
5. By deed of conveyance and assignment dated 5th December, 2017 made between Ulster Bank and the appellant, Ulster Bank granted, conveyed, assigned, transferred and assured to the appellant the properties described in the schedule to that deed. What was described in the affidavit of Mr. Karl Smith, a director of the appellant, grounding the special summons as the deed of conveyance and assignment dated 5th December, 2017 by which Ulster Bank conveyed and assigned all of its right, title and interest in the mortgage and the properties at Units 1, 2 and 3 Ardfallen Mall, Douglas, was a copy and – as usual – a redacted copy. The schedule, insofar as it is unredacted, identifies a deed of mortgage and

charge dated 28th February, 2013 of a property identified as The Creche, Ardfallen Retail Park, Douglas, County Cork, the parties to which are identified as Paul Ger and Ulster Bank.

6. The properties at Ardfallen Mall comprise a terrace of two storey over basement buildings. I pause here to say that no one has said unequivocally that Ardfallen Mall is one and the same as Ardfallen Retail Park but by reference to the list of title documents to which I will come, it appears to be.

7. According to a sales brochure produced in 2022 for the purpose of the sale of the three units, one is occupied by a food retailer, one by a pharmacy, and one by a bookmaker. Units 1 and 2 are described as including a basement. The three are described as part of *“the landmark Ardfallen Mall commercial development, also home to a series of medical consulting suites and a large creche, which do not form part of the offering.”*

8. By deed dated 19th December, 2017 made between the appellant and Mr. Kieran Wallace, Mr. Wallace was appointed as receiver of the property of Mr. Fahey at Units 1, 2 and 3 Ardfallen Retail Park. That deed recited that Mr. Fahey had issued a deed of charge to Ulster Bank dated 28th February, 2013, whose interest was then vested in the appellant, and described the property in precisely the same terms as it had been described in the schedule to the mortgage, that is, the ground floor only of premises known as Units 1, 2 and 3, Ardfallen Retail Park, part of the property comprised in the conveyance of 17th June, 1999, and subject to leases in favour of the tenants identified in the deed of mortgage of 28th February, 2013. It also recited the previous appointment of receivers by Ulster Bank on 15th July, 2013 and the discharge and replacement of one of those receivers on 24th February, 2014. By the deed of 19th December, 2017 Mr. Wallace was appointed in substitution for the previous receivers.

9. In his affidavit grounding the special summons, Mr. Smith referred to and exhibited the Ulster Bank facility letter of 23rd March, 2011 and the deed of mortgage and charge dated 28th February, 2013 and deposed that:-

“... As appears therefrom the deed of mortgage and charge erroneously described the security interest as extending to ‘ALL THAT AND THOSE the ground floor only of premises now known as Unit 1, Ardfallen Retail Park, Douglas, Cork, Unit 2, Ardfallen Retail Park, Douglas, Cork, and Unit 3, Ardfallen Retail Park, Douglas, Cork, being part of the property comprised in an Indenture of Conveyance dated 17th June, 1999’. ... As appears from the description of the secured property in the deed of Mortgage and Charge dated 28th February, 2013, the description of the security is erroneously limited to the ground floor only of Units 1, 2 and 3 Ardfallen Retail Park, Douglas, Cork. In fact, and as is clear from the facility letter dated 23rd March, 2011, it was the agreed intention of the parties, that the security provided by the Defendant would extend to the entirety of Units 1, 2 and 3 Ardfallen Retail Park, Douglas, Cork i.e. that it would include the basements and not be limited to the ground floors only.”

10. I pause here to say that if there was an error in the description of the property in the deed of mortgage and charge it was not apparent from the description of the property in the deed of mortgage and charge, which was quite clear. The error relied upon was the error in the description of the property which the facility letter stipulates was to be security for the borrowings. Moreover, it seems to me that the proposition that it was the common intention that the security would extend to the entirety of what were two storey over basement buildings is inconsistent with the proposition that it included the ground floor and basement.

11. By special summons issued on 1st June, 2018 the appellant claimed a declaration that under and by virtue of the facility letter Mr. Fahey’s interest in the ground floor and basement of each of the units stood well-charged with repayment of the sum of €3,290,645.81 then due, as well as continuing interest, and an order for sale of the property in default of payment. Mr. Fahey did not appear and by order made on 18th November, 2019 the High Court (Eager J.)

made the orders sought. Specifically, the order was that in default of payment within three months the properties should be sold at such time and place and subject to such conditions as should be settled by the court and that there should be an account and inquiry into incumbrances.

12. The premise of the High Court proceedings was that the appellant was then entitled to enforce its security, said to have been freely given, over – it was then said – the entirety of Units 1, 2 and 3 Ardfallen Mall, and the orders sought were sought to that end. I should say that it was not apparent from the affidavit of Mr. Smith on which the special summons was grounded that the buildings comprised more than the ground floor and basements but the property was described in the schedule to the order as the ground floor and basement of each of the three units.

13. The orders sought by the special summons, and made, included an order that “*if necessary*” an unidentified receiver be appointed but the grounding affidavit did not specify why the appointment of a receiver might be necessary. All the appearances are that Mr. Wallace had been collecting the rents from the units from the time of his appointment on 19th December, 2017, in succession to his predecessors who had been appointed by Ulster Bank in 2013 and 2014. If the fact that the legal mortgage excluded the basements was then perceived to be an impediment to the sale of the properties it does not appear to have been seen as an impediment to the appointment of a receiver under the same mortgage or the collection of the rents in respect of the basements.

The sale of the property

14. Having obtained the order of 19th November, 2019 the appellant did virtually nothing with it. The affidavit of Ms. Ruth Quinn (also a director of the appellant) sworn on 15th

March, 2023 to ground the application to the High Court which is the subject of this appeal shows that on 9th September, 2020 an advertisement was placed for incumbrancers.

Presumably the appellant had previously given notice to proceed, but Ms. Quinn did not say so.

15. Ms. Quinn commenced by recalling the order of 19th November, 2019 and the appointment of the successive receivers. She then deposed that the units, excepting the basement of Unit 3, had been and continued to be occupied by commercial tenants and that the receiver was in receipt of all rents arising, the unspecified net amount of which had been credited to Mr. Fahey's continuing indebtedness, which as of 3rd March, 2023 was said to amount to €6,278,974.94.

16. I cannot forebear to say that I was rather surprised by the suggestion that the indebtedness, which had reduced from €4,294,114.33 on 19th June, 2013 to €3,290,645.81 on 10th May, 2018 had almost doubled by 3rd March, 2023 to €6,278,974.94, notwithstanding the receipt of rents which – according to the estate agent's brochure – amounted in 2020 to €269,672 per annum. The facility letter provided for an interest rate on the three facilities of the bank's cost of funds plus margins of 1.25%, 1.30% and 2.30%. The facility letter stipulated for other security in addition to the three units in Ardfallen Mall, the realisation of which may have accounted for or contributed to the reduction in the indebtedness between 2013 and 2018, and I do not overlook the fact that the figure of €269,672 is a gross figure, or that the rents may have increased between 2018 and 2020, but the figure of €6,278,974.94 looks high. However, on close scrutiny, what Ms. Quinn says is that *“As of 3 March 2023, the principal sum due as found by the Court remains unpaid together with further indebtedness amounting in total to €6,278,974.94.”* (Emphasis added.)

17. At the hearing of the appeal, Mr. Ralston S.C., for the appellant, confirmed that the figure of €6,278,974.94 was the amount of Mr. Fahey's total indebtedness and was not

comparable to the figure of €3,290,645.81 plus continuing interest declared to be well-charged and that there was no evidence of the amount secured by the equitable mortgage.

18. In any event, Ms. Quinn deposed that the receiver did not have occupation of the basement of Unit 3. Rather, she said, that basement was believed – she did not say by whom – to be in occupation of an unidentified person connected in an unspecified way with Mr. Fahey. This, she suggested, was contrary to the provisions of the order of 19th November, 2019 concerning delivery up and possession. The order of 19th November, 2019 did – unusually – include an order for possession but it was an order requiring the defendant – that is Mr. Fahey – forthwith on service of the order, to deliver up possession to the plaintiff or to some person authorised in writing in that behalf. Ms. Quinn did not say that the order for possession had been served and did not suggest how whoever it was was in possession of the basement of Unit 3 might have been bound by the order. No less, Ms. Quinn did not explain how the fact that the basement was in the possession of the unidentified third party might justify a complaint that the receiver – as opposed to the appellant, in whose favour the order for possession was made – did not have possession. On the face of the deed of appointment of the receiver, the appointment was limited to the ground floor only.

19. Ms. Quinn explained that the reason why the application for well charging relief was necessary was the erroneous description in the deed of mortgage, which provided for the appointment of a receiver. She deposed that the High Court had declared Mr. Fahey's indebtedness well-charged against "*the entirety*" of the property. She deposed that Mr. Fahey had failed to cooperate with the sale of the property or to address his indebtedness, and she went on to refer to the advertisement for incumbrancers on 9th September, 2020 and to a hearing before the examiner on 15th October, 2020.

20. "*Thereafter,*" said Ms. Quinn:-

“... it would, in the usual way, be the plaintiff’s solicitor’s duty to send the papers to court conveyancing counsel to prepare an opinion on title and to draft particulars and conditions of sale. However, in circumstances in which the plaintiff intended to rely upon its contractual rights to sell under the deed of charge in respect of the property described in that deed, it was only in respect of the basements of Units 1 and 2 which the plaintiff required to rely on the order made herein. The plaintiff, therefore, through the receiver, proceeded to offer Unit 1, comprising ground floor and basement, Unit 2, comprising ground floor and basement and Unit 3 comprising ground floor, Ardfallen Retail Park Douglas, Cork for sale by way of an open tender process conducted by Cohalan Downing, Estate Agents.”

21. With no disrespect, this makes no sense. If the reason why the well charging relief was necessary was that the appellant could not otherwise realise its security, I cannot see how the well charging order and order for sale could have entitled the appellant or the receiver to sell or absolved the appellant or its solicitor from the acknowledged duty to send the papers to court counsel, or to have the court determine the mode of sale.

22. The receiver, says Ms. Quinn, on the instructions of the appellant, determined that it was not commercially practicable to sell the basements of Units 1 and 2 separately to the ground floor units in the context of a court supervised public auction in circumstances in which – she says – it is doubtful that the vendor would have been able to provide good marketable title in the absence of a means of entry to the basements. Equally, she said, it was not commercially practicable to apportion value to the basements of Units 1 and 2 from the entirety of the sale.

23. I can see that it might have been difficult to sell the basements separately to the ground floors but no one ever contemplated that the basements would be sold separately. They were, after all – as the estate agent’s brochure shows – the subject of commercial leases

for twenty five years from 2003 with about six years to run. In any event, whatever commercial difficulties might have been identified in the sale of the properties cannot have resolved the legal difficulty that the appellant had no power of sale over the basements.

24. “Accordingly,” said Ms. Quinn, “*the receiver on the instructions of the plaintiff proceeded by way of open offer process following a professional marketing campaign conducted by Cohalan Downing, Estate Agents, referred to above*” and following the acceptance of the highest tender on 3rd October, 2022 a contract for sale of the property came into being.

The contract for sale

25. The contract for sale of the properties identified the vendor as “*Liam Fahey acting by and through Kieran Wallace, KPMG (Receiver).*” It provides that the acceptance of a tender in the manner stated should create a valid and binding contract on the purchaser and the vendor but goes on to exclude any personal liability on the part of the receiver. It provides for a deed of assurance by the appellant and that the purchaser conclusively accepts that the appellant has the requisite power and authority to assure the subject property freed and discharged of the mortgage “*in accordance with its statutory powers and in accordance with the mortgage and on foot of the well charging order as issued by the High Court.*”

26. The contract provides that the title to the property shall consist of the documents set out in the documents schedule and that no objection, requisition or enquiry shall be raised in relation thereto. It provides for the conclusive acceptance by the purchaser of the appointment of the receiver and precludes any objection, requisition or enquiry in relation to the appointment. It binds the purchaser to accept the replies to objections and requisitions on title furnished with the contract and precludes any further objection or requisition. As is the

usual if not invariable practice in the case of sales by receivers, the special conditions exclude any warranty in respect of development, roads and services, the condition of the property, easements, environmental, identity and all the rest. In the vernacular, the property was offered for sale warts and all and the purchaser signed the contract on that basis.

27. Ms. Quinn deposed that a tender offer was made by Holdren Properties Limited and a deposit of 10% paid on 8th September, 2022, which was accepted by the receiver on 3rd October, 2022. Peculiarly, Ms. Quinn does not give direct evidence of the price but says that it is in excess of the guide price of €2.6 million determined – she does not say by whom – in advance of the tender process. She does, however, exhibit the tender documents which shows the price as €2.995 million.

28. Ms. Quinn deposed that the purchaser was anxious to complete the purchase at the earliest possible opportunity *“but by reason of the unusual circumstances of this case is concerned to see an order of this Honourable Court, fixing the mode of sale by private treaty.”*

29. At para. 20 she deposed that:-

“The purchase price achieved does not exceed the defendant’s total indebtedness to the plaintiff which as of 3 March 2023 is the sum of €6,278,974.94, comprising the sum found due and other indebtedness also secured by the deed of charge. In those circumstances the plaintiff will account to the defendant for all sums realised from the sale in reduction of that debt.”

30. I just pause there for a moment. The mortgage includes a covenant to pay all sums due but does not extend to the basements. The appellant’s security over the basements, as declared by the order of 18th November, 2019, is an equitable mortgage to secure payment of the monies advanced on foot the facility letter of 23rd March, 2011. And the order sought and obtained by the appellant was an order, in default of payment within three months of the sum

of €3,290,645.81 and continuing interest on that sum, for the sale of the ground floor and basement of all three units.

The High Court application

31. The substance of what the appellant wants, it seems to me, is an order retrospectively sanctioning the sale by tender of the ground floors of Units 1, 2 and 3 and the basements of Units 1 and 2 for €2.995 million, but the orders sought by the notice of motion are:-

- “1. An order further to the order of this Honourable Court made the 18th day of November 2019 providing for the sale of part of the property the subject of the facility letter of 23rd March 2011 out of court or in the alternative fixing the mode of sale of part as being by private treaty contract dated 3rd October 2022.*
- 2. An order permitting the sale proceeds to be retained by the plaintiff in circumstances where no party has claimed any prior or subsequent incumbrance and the best price obtained does not exceed the debt of the defendant found to be due by this Honourable Court.”*

32. The appellant’s motion was heard by the High Court (Simons J.) on 17th April, 2023 and a written judgment delivered on 24th April, 2023 [2023] IEHC 191. The High Court judge did not get embroiled in the granular detail but refused the application for the reasons that:-

- (1) It was not possible for the court to be satisfied on the limited evidence put before it that the price achieved by the tender process was the best price that could be got.
- (2) The conditions of sale had not been considered, still less settled, by conveyancing counsel.

- (3) The fact that a well charging order had been obtained did not address the question of good marketable title.
- (4) It would not, in any event, be appropriate to sanction the retention of the purchase monies by the appellant because the question of whether there are other incumbrances is a matter to be dealt with by the Examiner's Office after completion of the sale.

The appeal

33. By notice of appeal dated 27th April, 2023 the appellant appealed against the judgment and order of the High Court on thirteen grounds.

34. The first ground of appeal is that the High Court erred in fact and in law in determining that it was not appropriate to seek directions of the court as to the mode of sale subsequent to the execution of contracts for sale. The judge did observe that it was not appropriate that a plaintiff should present the High Court with a *fait accompli* whereby a court order is sought to rescue a sale which is in danger of not closing, but – as was acknowledged by counsel at the hearing of the appeal – he did not refuse the application on that basis. Moreover, counsel acknowledged that the judge was right to say that approval should have been sought in advance of the sale.

35. The remaining grounds can conveniently be grouped into three broad but overlapping categories of (1) price, (2) title, and (3) incumbrances.

36. The second ground is that the judge erred in fact and in law finding that it was not possible to be satisfied that the price achieved by the tender process was the best price that could be achieved. This, it seems to me, is linked to the third ground, which is that the judge erred in fact and in law in determining that it was not possible for the court to be satisfied that

the sale could proceed absent the conditions of sale being settled by conveyancing counsel. The tenth ground of appeal is that the judge misdirected himself in law and in fact in failing to have regard to the fact that there are no other incumbrancers. The grounds of appeal did not challenge the judge's finding that the making of the well charging order and order for sale did not address the question of good marketable title.

37. The appellant's notice of motion dated 16th April, 2023 did not identify the power invoked but the application was moved under O. 51, r. 3 of the Rules of the Superior Courts, which provides that:-

“3. In all cases where a sale (including a sale directed under section 94(2) of the Land and Conveyancing Law Reform Act 2009), mortgage, partition, or exchange is ordered, the Court shall have power, in addition to the powers already existing, with a view to avoiding expenses or delay, or for other good reason, to authorise the same to be carried out, either by laying tenders before the Court for its sanction or altogether out of Court, any moneys produced thereby being paid into Court or to trustees, or otherwise dealt with as the Court may order. Provided always that the Court shall not authorise the same to be carried out altogether out of Court unless and until satisfied by such evidence as it shall deem sufficient, that all persons interested in the estate to be sold, mortgaged, partitioned, or exchanged, are before the Court, or are bound by the order for sale, mortgage, partition, or exchange.

38. At the hearing of the appeal, Mr. Ralston drew the courts attention to the preface to *Dobbs, Practice of the Courts of Chancery* (1847) and to three nineteenth century cases, *Willis v. Willis* (1888) 38 W.R. 7, *Wood v. Gregory* (1889) 43 Ch. D. 82 and *Re Stedman* (1888) 58 L.T. (n.s.).709, the substance of which is that a sale out of court may be ordered where the court is satisfied that all persons interested are parties to the action.

39. This is reflected in para. 440 of Vol. 34 of the third edition of *Halsbury*, to which we were referred, to the effect that:-

“440. ... Proceedings altogether out of court are not to be authorised until the judge is satisfied by such evidence as he deems sufficient that all persons interested in the land to be sold are before the court or are bound by the order for sale, and every order authorising such proceedings must be prefaced by a declaration that the judge is so satisfied and a statement of the evidence upon which such a declaration is made.”

40. Counsel for the appellant in their written submissions referred to O. 51 of the 1905 Rules, which was in substantially the same terms as the present rules, save that it provided that every order authorising a sale out of court should be prefaced by a declaration that the judge was satisfied that all parties interested were before the court and a statement of the evidence upon which such declaration was made: which requirement, incidentally, was omitted from the 1962 rules. However, while the rule as to the form of an order for sale out of court has been modified, the substantive requirement remains that before authorising a sale out of court, the court must be satisfied by evidence that all persons interested in the estate to be sold are before the court.

41. Counsel also referred the court to the decisions of the High Court in *Allied Irish Banks v. Dormer* [2009] IEHC 586 and *Allied Irish Banks v. Vickers* [2009] IEHC 587, which confirms that the right of a puisne incumbrancer under O. 51, r. 8 to apply to take over carriage of an order for sale, is limited to an incumbrancer who has already proved. For completeness, I think, counsel identified the judgment of the Supreme Court in *Ulster Bank Investment Bank Limited v. Rockrohan Estates Limited* [2015] IESC 17 in which Charlton J. outlined the procedures consequent to an order for sale to achieve a sale of the property.

42. At the hearing of the appeal, counsel emphasised the discretionary nature of the jurisdiction conferred by O. 51, r. 3. He pointed to the fact that the appellant had had done a good deal of work to achieve a valuable sale which, he said, was hanging by a thread. The approval of the sale, he argued, would avoid expense and delay and the price achieved affected absolutely nobody other than the appellant and Mr. Fahey who, although served with the summons and given notice of the later application and of the appeal, had taken no part in the proceedings.

43. The difficulty with the impassioned argument on behalf of the appellant that the High Court in the exercise of its wide discretion ought to have sanctioned the proposed sale out of court is that it fails to address the requirement that the discretion must be engaged before it is exercised. If expressed as a proviso, the substance of O. 51, r. 3 is to create a requirement that the court, before contemplating a sale out of court, must be satisfied that all persons interested in the estate to be sold are before the court, or are bound by the order sought. The fact is that the appellant had not engaged with this requirement. It has not even been asserted, still less has there been any attempt to demonstrate by evidence, that all persons interested are before the court. If not in terms, that seems to me to have been the substance of the judge's conclusion at paras. 18 and 19, where he said that:-

“18. The second reason for refusing the application is that the conditions of sale have not even been considered by, still less settled by, conveyancing counsel. This is a case where there have already been difficulties in relation to the conveyancing history of the land. Indeed, the very reason it became necessary to seek a well charging order had been that the description of the property as per the terms of the legal mortgage is supposedly incorrect. Having regard to this unhappy history, this is a case where the involvement of conveyancing counsel is of especial importance because of possible concerns in relation to good marketable title.

19. For completeness, it should be observed that the fact that a well charging order has been obtained does not address the question of good marketable title. The well charging proceedings merely address the position as between the plaintiff, as the holder of an equitable interest, and the defendant inter se. The proceedings address the (supposed) discrepancy between the terms of the legal mortgage and what is said to have been the actual intention of the parties in relation to the extent of the property to be charged by the legal mortgage.”

44. The requirement, as counsel put it, is that before sanctioning a sale out of court, the court must be satisfied that the order “*affects absolutely nobody else.*” This can be met only by cogent evidence and not merely by submission.

45. As I observed at the outset, the judge did not engage with the granular detail of the evidence offered in support of the application. In my view, he was entitled to approach the application on that basis. By reference to the history of the proceedings by itself, there had been problems with the title. The making of the well charging order did not address the question of good marketable title and without the inquiry previously ordered by the High Court or evidence of good title, it could not be ascertained whether all persons interested were before the court. Moreover, as I will come to, the adequacy of the price achieved was inextricably bound to the question of title and the terms and conditions on which the property had been offered for sale.

Analysis

46. The evidence was that the receiver determined that it was not practicable to sell the basements separately to the ground floor and that “*accordingly*” the receiver, on the instructions of the appellant, proceeded by open offer tender process. But, as I have said, it

was not contemplated by the court order for sale that the basements would be sold separately. No less, in the identification of what was thought to be a practical solution, sight appears to have been lost of the fact that the problem was a legal problem, requiring a legal solution. Moreover, it seems to me that the choice of mode of sale simply does not follow from the fact that the basements could not be sold separately. The alternatives to a sale by tender that immediately spring to mind are a sale by public auction and a sale by private treaty. Or, the units might have been sold separately, whether as investments or to the sitting tenants. There was no evidence that consideration was given by anyone to any alternative mode of sale or, indeed, that the mode of sale or marketing campaign were decided upon on the advice of the estate agent.

47. I pause here to say that the fifth ground of appeal was that the judge misdirected himself in law and in fact in failing to have due regard to the fact that the lands were publicly advertised for sale, and the sixth ground also made reference to a publicly advertised sales campaign. However, there was no evidence of public advertisement. The evidence of Ms. Quinn was that the contract had been entered at the end of a “*professional marketing campaign.*” If the property was publicly advertised, Ms. Quinn did not say so.

48. As to the title, it seems to me to be self-evident that a property with a good title is likely to achieve a better price than a property with a bad or a problematic title. In practical terms, a property with good and marketable title might be bankable while a property without good title would not. Distressed sales attract bargain hunters. Receiver sales attract cash buyers. The property, as I have said, was offered for sale warts and all. If, theoretically, there was good title, I can think of no reason why that would not be proved.

49. It was suggested in the course of argument that it was an objection by the purchaser’s bank or the purchaser’s bank’s solicitors which had prompted the High Court application. If

it can be inferred from this that the purchaser was not a cash buyer, it by no means follows that other potential purchasers were not put off by the conditions of sale.

50. I referred earlier to the description of the property in the deed of mortgage and in the deed of appointment of Mr. Wallace, in which it was described first of all as comprising the ground floor only and secondly, as part of the property comprised in a deed of conveyance of 17th June, 1999 made between Charles O’Sullivan and others as vendors and Gerard Paul and Mr. Fahey as purchasers “*and comprising the ground floor only*”. On the face of it, the description suggested that the property had been bought by both Mr. Fahey and Mr. Paul in 1999 and it was not evident how Mr. Fahey, alone, came to be mortgaging it to Ulster Bank. Moreover, the description of the property as that comprised in the 1999 conveyance and as comprising the ground floor only to my mind tended, at least, to suggest that that was all they had then acquired. When the question was asked of counsel whether description of the property in the deed of mortgage suggested that the conveyance in 1999 might have been limited to the ground floor only, counsel did not think so, but could definitively not say so because it was, he said – quite correctly – part of the title.

51. The first of the title documents listed in the documents schedule to the contract for the sale of the property for which the appellant sought the sanction of the High Court is “*Plain copy Deed of Partition dated 28 February 2013 between (1) Liam Fahey and (2) Gerard Paul*”. The second title document is the conveyance of 17th June, 1999 from Charles O’Sullivan and others to Gerard Paul and Liam Fahey. It seems to me that without sight of the 1999 conveyance, what was conveyed to Messrs. Fahey and Paul is a matter of pure speculation. Without sight of the deed of partition, it is impossible to say how whatever they had bought in 1999 was partitioned.

52. Included in the list of security documents in the documents schedule is a “*Copy Deed of Conveyance and Assignment dated 23rd October, 2015 between (1) Ulster Bank Ireland*

Limited, (2) Ulster Bank Limited, (3) UB SIG(ROI) Limited and (4) Seaconview Limited.”

Not altogether surprisingly, I see no reference to the deed of conveyance and assignment between Ulster Bank DAC and Seaconview DAC relied on by Mr. Smith in his affidavit sworn on 9th July, 2018 in support of his averment that the appellant then and thereby acquired all of the estate, right, title and interest of Ulster Bank in Units 1, 2 and 3 but which on its face refers to a mortgage by Mr. Paul Ger to Ulster Bank of the creche.

53. On 19th May, 2023 a further affidavit was filed on behalf of the appellant, in this court, which was an affidavit of Ms. Sandra Egan of Holmes O’Malley Sexton LLP, solicitors. Ms. Egan drew to the court’s attention to the fact that after the appellant’s motion had been heard but before judgment was delivered, the purchaser of the properties issued a vendor and purchaser summons seeking a declaration that it was not bound to complete the purchase. This, she suggested, precisely demonstrated the issues which have arisen in this case, which gave rise to the application to sell the property out of court. It was, said Ms. Egan, the intention that title to the two basements – which had shrunk to two “*small basements*” – would be made by way of the well charging order.

54. The proposition that a well charging order might make title is misconceived. A well charging order is an order well charging the interest of the defendant in property with payment of a secured debt. It relates to whatever interest the defendant has in the property and is not premised on any determination of what that interest is.

55. Ms. Egan deposed that since the High Court judgment she had had further searches carried out and enquiries made concerning the status of the property and confirmed that no further or other incumbrances had been registered since the 2020 advertisement for incumbrancers. In effect, Ms. Egan assumed the role assigned by the court to the Examiner’s Office. While it was suggested in the course of the hearing that there was some difficulty in

obtaining a certificate from the Examiner of the outcome of the inquiry as to incumbrances, there was no evidence of this.

56. At para. 6 of her affidavit, Ms. Egan deposed that:-

“6. I say and believe in relation to the learned Trial Judge’s observation concerning the settling of conditions of sale by Court Counsel it is difficult to see how that might affect the sale or the sale price in circumstances where the title to the property as disclosed in the Contract is a good and marketable title. I say no objection other than to the mode of sale has been raised by the Purchasers. I further say in relation to the price obtained the Plaintiff was at all times advised by a licensed selling agent and that sale by tender was the most appropriate method of sale and I understand that by reason of the recent rises in interest rates it would be by no means certain that the same price would be achieved should the sale fall through.”

57. I will break this down. As to the assertion that the title as disclosed by the contract is good and marketable title, there was no evidence of that put before the High Court. More to the point, with no disrespect, it is just not true. Leaving to one side the question as to the description of the properties in the 1999 conveyance to Messrs. Fahey and Paul, at the very minimum, the contract was made by a receiver whose appointment did not extend to the basements and provides for an assurance by the appellant who has no power to sell the basements. Since Ms. Egan’s declared difficulty in understanding what the judge had to say about the sale price was premised on the existence good and marketable title, I infer that she does understand the relevance to price of the quality of the title. As to the averment that the purchaser has raised no objection other than to the mode of sale, the fact is that the contract expressly precluded any such other objection. And I do not understand the appellant to necessarily accept that the purchaser was entitled to object to the mode of sale.

58. The fourth ground of appeal is that the High Court judge erred in failing to have due regard to the fact that the plaintiff had obtained professional advice from a reputable independent estate agent that the optimal sales process for the lands was a public sale by tender. But there was no evidence of that before the High Court. If Ms. Egan’s evidence of the advice of the licensed estate agent as to the mode of sale by tender is relevant, there was no such evidence before the High Court. The judge cannot have erred in failing to have regard to something of which there was no evidence.

59. The fifth ground of appeal is that the judge failed to have due regard to the fact that the lands were publicly advertised for sale. But there was no evidence of that, either. The evidence was that the property was offered for sale *“by way of an open tender process conducted by Cohalan Downing, Estate Agents ... following a professional marketing campaign conducted by Cohalan Downing, Estate Agents, referred to above.”* If there was a public advertisement, Ms. Quinn did not say so.

60. The sixth ground of appeal is that the judge failed to have due regard to the fact that the price achieved was significantly in excess of the guide price following a publicly advertised sales campaign by a reputable firm of commercial real estate agents. I have dealt with the advertisement point. It seems to me that the materiality – if any – of the fact that the price achieved exceeded the guide price depends on the purpose and accuracy of the guide price. If the price was struck below what the properties were expected to achieve in order to achieve what they achieved, there is nothing in the argument. If the process realised more than was expected, this tends to suggest that the guide price was an underestimate. In either case, the price was necessarily tied back to the mode of sale and conditions of sale which, by the order of 18th November, 2019, were to have been fixed by the court.

61. The seventh and eight grounds of appeal are that the judge erred in failing to have due regard to *“the commercial impracticability of selling the basements (by public auction)*

separately to the ground floor units, and of ascribing value of the proceeds to the basements separately to the ground floor units.” As to the separate sale of the basements, as I have already observed, it was never suggested that the basements might be sold separately and the order of 18th November, 2019 is for the sale of the ground floor and basements. As to the apportionment of the proceeds of sale, I cannot see the insuperable difficulty – if it was necessary – in assessing what the value of Units 1 and 2 might be, with and without the basements. However, in circumstances in which the ground floors and basements were let together, I do not immediately see how the question arose.

62. The ninth ground of appeal is that the judge erred in failing to have due regard to the fact that the outstanding debt exceeds the sale price and the guide price. I have said all that I think needs to be said about the guide price. As to the “*outstanding debt*,” there was no evidence of what that the relevant outstanding debt is. The amount declared by the order of 18th November, 2019 to be well charged on the properties was €3,290,645.81 and continuing interest from 10th May, 2018. The premise of the well charging order was that the plaintiff was entitled to an equitable mortgage of the basements to secure the borrowings the subject of the facility letter of 23rd March, 2011 and not all sums due. It is true that the appellant had a legal mortgage over the ground floors to secure all sums due but the premise of the criticism of the judge is that the total amount of Mr. Fahey’s indebtedness exceeded the price at which the appellant wished to sell the security. Counsel acknowledged that two figures are simply not comparable. It follows that the criticism of the judge is unfounded.

63. The tenth and eleventh grounds of appeal are that the judge erred in failing to have regard to the fact that there are no other incumbrancers [who would be] affected by the making of the orders sought and in contemplating the possibility that other incumbrancers might come forward. The order of 18th November, 2019 directed that an account and enquiry be taken in the Examiner’s Office of all incumbrances, subsequent as well as prior to and

contemporaneous with the appellant's demand, and an inquiry into the respective priorities of all such demands as should be proved. While there was evidence of an advertisement for incumbrances to which there had been no response, there was no unambiguous evidence that the inquiry ordered by the court had been undertaken and none at all that it had been completed. In her affidavit filed in this court on 19th May, 2023, Ms. Egan sought to plug the gap identified by the judge in the lapse of time between the advertisement for incumbrances and the appellant's application to retain the proceeds of the proposed sale. It seems to me that the appellant, by seeking to plug the gap identified by the judge, at least implicitly acknowledges that it was a gap and that it is inconsistent that the appellant should seek to complain that the judge identified a gap that needed to be plugged.

64. The twelfth ground of appeal is that the judge erred in failing to have due regard to the likely significant saving of cost, time and reduction in uncertainty by proceeding with the sale by private treaty as opposed to commencing a new sale process by public auction. I will break this down. The order of 18th November, 2019 directed the sale of the properties at such time and in such place and subject to such conditions of sale as should be settled by the court. For the reasons given, the judge declined to give retrospective benediction to a contract made following a process which was engaged in without the approval of the court. In declining to approve of the proposed sale the court did not direct that the property be sold by public auction.

65. In principle, whatever about time, the proposition that a sale in a manner and on conditions other than those proposed might save cost and uncertainty is based on an assumption that the proposed sale had achieved the best price obtainable – which would bring us back to the beginning. That apart, the proposition that a later sale in accordance with the directions of the court might not achieve as good a price as that for which sanction was

sought is no answer to the point correctly made by the judge that the well charging order did not address the question of title.

Conclusion

66. The onus was on the appellant to satisfy the High Court, in the first instance, that all persons interested in the property were before the court. Absent evidence of what the title was, the judge could not have been so satisfied. If I am correct in understanding the judge's expressed concern as directed to this question, I would affirm his judgment. If I am wrong, I would uphold his decision on this alternative ground.

67. While the judge was not obliged to examine the evidence in granular detail, such an examination shows that his expressed concern as to the title was justified.

68. If only on the basis that there was no evidence of title, the judge was entitled to have taken the view that the price achieved by the tender process was the best that could be got.

69. For these reasons I have concluded that the appeal must be dismissed.

70. As the appeal was unopposed, I would make no order as to costs.

71. As this judgment is being delivered electronically, Haughton and Pilkington JJ. have authorised me to say that they agree with it.