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Judgment Mortgages, Co-ownership and Registered Land

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Consider the situation where a judgment mortgage has been registered against the interest of one co-owner of a piece of real property (for example, against the interest of one of the spouses in a jointly–owned family home).[1] Can this judgment mortgage be enforced by means of a sale of the property in question? This important practical question hinges on the jurisdiction to order a sale under the Partition Acts of 1868 and 1876, which in turn is dependent on the ancient law of partition. This article seeks to highlight an unexpected problem which arises in relation to registered land.

Introduction

Because a judgment mortgage over registered land takes the form of a registered charge, a judgment "mortgagee" of registered land is not technically a co-owner of the land (as he or she would be in relation to unregistered land). Thus, the holder of a judgment mortgage over jointly-owned registered land is not in a position to seek a partition and, therefore, cannot seek a sale in lieu of partition under the Partition Acts. This means that the judgment mortgagee will be deprived of any effective remedy and will be left only with the unrealistic option of seeking a sale of the share of the ownership covered by the judgment mortgage.[2] As will be discussed in due course, this problem has recently been recognised by the Northern Irish courts and reforming legislation has been passed. The purpose of this article is to emphasise the need for similar legislation in this jurisdiction. It will be helpful to begin with a brief examination of the partition and sale jurisdiction before moving on to discuss in detail the problem which arises in the context of registered land.

Partition and Sale[3]

By a statute of 1542 (now repealed),[4] joint tenants and tenants in common were given the right to compel a physical partition of the land subject to the co-ownership. This statutory jurisdiction was gradually supplanted in practice by a parallel jurisdiction which developed in the courts of equity. Both the common law courts and, in later times, the courts of equity regarded each co-owner as having a right to partition regardless of the difficulty or inconvenience of making a physical division into the required number of shares. For

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[1] The family home situation raises a number of special issues which are not discussed in detail in this article. For analysis of these questions, see Mee, "Partition and Sale of the Family Home"(1993) 15 D.U.L.J. (n.s.) 78. Note that some of the arguments in the present article were rehearsed in this earlier piece.

[2] The problem appears also to affect the holder of an ordinary registered charge over one co-owner's share in registered land. See below, n. 22 and accompanying text.

[3] See generally: Babington, *Osborne's County Court Practice in Ireland in Equity and Probate* (2nd ed., 1910) Chapter IX; Wylie, *Irish Land Law* (3rd ed., 1997) pp. 442–445; Mee, above, n. 1.

[4] See generally Conway "The Repeal of an Act for Jointenants 1542 and the Jurisdiction to Order Partition or Sale under the Partition Acts 1868 and 1876" (1997) 19 D.U.L.J. (n.s.) 1.

example, in the famous case of *Turner v. Morgan*[5] a dwelling–house was divided into two portions, leaving the plaintiff with no staircase or toilet. The law was put on a more rational footing with the passing of the Partition Acts of 1868 and 1876. These statutes allow the court, in certain circumstances, to order a sale of the property instead of partition and to divide the proceeds among the co-owners according to their respective shares. Section 3 of the 1868 Act allows the court to order a sale if it appears "more beneficial for the parties interested than a division of the property between or among them." Under section 4, if those pressing for a sale are "interested … to the extent of one moiety or upwards in the property," the Court must order a sale unless "it sees good reason to the contrary."[6]

Judgment Mortgages and Registered Land

It was established in the nineteenth century that a mortgagee of a co-owner's share in unregistered land has a right to seek a sale in lieu of partition.[7] The justification appears to be that since the legal estate is vested in the mortgagee, thereby giving him or her the theoretical right to possession, the right to partition should also reside in him or her.[8] The result is that a judgment mortgagee of *unregistered* land, in whom the estate of the judgment debtor vests,[9] is perfectly entitled to rely on the Partition Acts.

However, a technical problem arises in relation to registered land. Unlike a legal mortgagee of unregistered land (in whom the title to the land in question is vested), the owner of a

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[5] (1803) 8 Ves J 143.

[6] Although Denham J. took a contrary view in *First National v. Ring* [1992] 1 I.R. 375, it is clear in principle that a sale under the Partition Acts is strictly an alternative to a physical partition. In the absence of some special factor (*e.g*. the applicability of the Family Home Protection Act 1976), it is not open to the court to refuse both a sale and a physical partition. See Mee, above n. 1, pp. 81-82. Recent case law has reaffirmed this as the position in Northern Ireland: see *Glass v. McManus* [1996] N.I. 401; *Fraser Homes Ltd v. Fraser Houses (N.I.) Ltd* Northern Ireland Chancery Division, June 5, 1998 (to be reported at [1998] N.I. 214). The same view has been taken at the highest level in New Zealand (*Fleming v. Hargreaves* [1976] 1 N.Z.L.R. 123 (N.Z. Court of Appeal)) and in Australia (*Bray v. Bray* (1926) 38 C.L.R. 543 (High Court of Australia)). *cf*. Article 49 of the Property (Northern Ireland) Order, 1997, which now empowers a Northern Irish court to impose conditions or a stay or suspension on an order for partition or sale. See the discussion of this provision: below, n. 40.

[7] *Davenport v. King* (1883) 49 L.T. (N.S.) 92. (cf. *Farrell v. Donnelly* [1913] 1 I.R. 50 in relation to judgment mortgagees). This view of the law substantially improves the value of a security over one co-owner's share, which would not be very marketable in itself. The right to partition and sale in lieu arises in a mortgagee simply by virtue of his or her interest in the property, irrespective of any default on the part of the mortgagor or even of whether the loan has fallen due. This leads to the strange result that a mortgagee of a moiety is entitled to a sale unless "good reason to the contrary" is demonstrated, and could therefore be in a better position than a mortgagee of the whole property, whose right to sell will be regulated by the Conveyancing Acts 1881-1911 or by the terms of any express power of sale. The cases appear to assume that the mortgagee who forces a sale in lieu of partition should be entitled to immediate repayment of his or her loan from the share of the proceeds distributed to the mortgagor. It is not clear why, in the absence of any contractual stipulation in the mortgage, this should be so, given that this method of "enforcement" requires no default by the mortgagor.

[8] However, it is difficult to understand the ruling of Overend J. in *Hill v. Maunsell-Eyre* [1944] I.R. 499 that, in addition to the mortgagee of one co-owner's share (in whom the legal estate vests), the right to partition and sale is also enjoyed by the mortgagor and by any subsequent mortgagee (neither of whom possesses the legal estate). This seems contrary to previous authority (*Sinclair v. James* [1894] 3 Ch. 554) and leads to the curious result that the fractions of ownership recognised for the purposes of s.4 of the 1868 Act need no longer add up to one. The inability to choose whether it is the mortgagor or the mortgagee who should have the right to partition seems to be due to the schizophrenic nature of the concept of a mortgage, which takes the form of an outright transfer to the mortgagee, but is treated, for the most part, as giving him or her a mere security interest.

[9] s.7 Judgment Mortgage (Ireland) Act 1850.

charge over registered land does not become the owner of the land.[10] Writing in 1986 in the Northern Irish context, Wallace[11] suggested that it is "far from clear" that the right to maintain an action for partition is enjoyed by such a person, who is a mere chargeant of a share in the property.[12] Given that a charge of itself gives no right to possession,[13] it is certainly difficult to see why it should carry with it the right to a physical partition of the property. If a registered chargeant has no right to partition, then logically he or she cannot rely on the statutory jurisdiction to seek a sale in lieu. Wallace concluded that this would constitute a serious deficiency in the law.[14] His views have recently been accepted in the Northern Irish case of *Northern Bank Ltd v. Haggerty*,[15] where Campbell J. held that a person holding the equivalent in Northern Irish law of a judgment mortgage[16] over one co-owner's share in registered land was not entitled to a sale of the whole of the property.[17] While his decision was based in part on the wording of the relevant Northern Irish legislation,[18] Campbell J. also held expressly that the right to partition or a sale in lieu was not available to the holder of a registered charge.[19]

At first glance, a possible solution to the difficulty in the Republic of Ireland lies in section 62(6) of the Registration of Title Act 1964 which provides, in part, that a registered owner of a charge "shall for the purpose of enforcing his charge have all the rights and powers of a mortgagee under a mortgage by deed".[20] It could be argued that the right to partition (or a

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[10] Instead, the charge constitutes a registered burden on the land. It has been held that the registration of a judgment mortgage over unregistered land has the effect of severing a joint tenancy: *McIlroy v. Edgar* (1881) 7 L.R. Ir. 521; *Provincial Bank v. Tallon* [1938] I.R. 361. *cf. Containercare v. Wycherley* [1982] I.R. 143. On the other hand, it appears that a judgment mortgage over registered land, because it is a mere burden, does not have the effect of severance: see McAllister, *Registration of Title in Ireland* (1973) p. 210. This could lead to anomalous results if one of the spouses were to die before the judgment mortgage was enforced. The problem has recently been addressed in Northern Ireland by Article 50 of the Property (Northern Ireland) Order, 1997, which provides that the creation of a charge causes (and has always caused) a severance. See Wylie, above, n. 3, pp. 440–441.

[11] Wallace, "Mortgagees and Possession" (1986) 37 N.I.L.Q. 336.

[12] *ibid*. p. 358.

[13] It was held in *Northern Bank v. Devlin* [1924] 1 I.R. 90 that a registered chargeant had no estate in, or grant of title to, the land and therefore was not entitled to possession. (cf. *Gale v. First National Building Society* [1987] I.L.R.M. 30). It is now provided in s.62(7) of the Registration of Title Act 1964 (re–enacting an older provision) that a registered chargeant may apply to court in a summary manner for an order for possession when repayment of the principal money has become due. See McAllister, above n. 10, p. 194 and Wylie above, n. 3, p. 733.

[14] Above, n. 11, p. 358.

[15] Northern Ireland Chancery Division, February 8, 1995 (full transcript on Lexis; to be reported at [1995] N.I. 211).

[16] A charge under Article 46 of the Judgments Enforcement (Northern Ireland) Order 1981.

[17] See also the somewhat surprising case of *Rainey t/a R McA Rainey & Sons v Weatherup,* Northern Ireland Chancery Division, unreported, December 13, 1996 (full transcript on Lexis) where Master Ellison reached the same conclusion notwithstanding the fact that (by coincidence) the creditor held a separate judgment mortgage over each of the two co-owners' shares in certain registered land.

[18] Article 45 of the Judgments Enforcement (Northern Ireland) Order 1981 states that "[a] money judgment shall be enforceable against land only in accordance with Article 46 and 52". Article 52 provides that the owner of a charge under the Order has, for the purpose of enforcing his charge, "the powers of sale of a mortgagee by deed, within the meaning of the Conveyancing Acts 1881 to 1911." Campbell J. held (p. 12 of the Lexis transcript) that "Partition (and sale in lieu thereof which is dependent upon a right of partition) is a remedy which is distinct from the power of sale of a mortgagee under a mortgage by deed and as it is not provided for in Arts 46 to 52 it is not available to the owner of a charge under the 1981 Order."

[19] See pp. 16-17 of the Lexis transcript.

[20] The subsection continues "including the power to sell the estate or interest which is subject to the charge." This cannot justify a sale of the whole of the property since the estates of the other co-owners are not subject to the charge. Earlier in the sub-section, it is provided that "the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts." This has the effect of incorporating the implied powers of

sale in lieu) is one of the "rights and powers of a mortgagee by deed," and therefore could be exercised by a registered chargeant "for the purpose of enforcing his charge." However, perhaps the better view is that the "rights and powers" envisaged by the subsection are confined to those (such as those implied by the Conveyancing Acts mentioned earlier in the subsection) which allow the "enforcement" of a mortgage[21] and do not include the right to partition and sale which arises automatically by virtue of the mortgagee's status of co-owner and does not depend on whether there has been any default on the part of the mortgagor.[22]

In any case, a closer inspection reveals that the position of a judgment mortgagee over registered land is different to that of the holder of an ordinary registered charge. Under section 71(4) of the Registration of Title Act 1964, a judgment creditor has none of the remedies of a mortgagee by deed and has only "such rights and remedies for the enforcement of the charge as may be conferred on him by order of the court."[23] It follows that judgment mortgagees, who are mere registered chargeants and yet cannot argue under section 62(6) that they have the rights of mortgagees by deed, have no entitlement to invoke the provisions of the Partition Acts. There is no indication in section 71(4) as to the principles upon which the court should act in deciding what powers of enforcement to allow. In the absence of a specific statutory foundation (which would have been provided by the Partition Acts), it is submitted that it would not be legitimate to order a sale of the entire property, rather than simply of the co-owner's share affected by the judgment mortgage, because this would interfere with the third–party property rights of the other co-owner.[24] Therefore, a judgment mortgagee of one co-owner's share in registered property appears to have no right to a sale of the property as a whole and may be confined to the unsatisfactory remedy of a sale of the share in question.

The above argument, although apparently convincing, has yet to be tested in the courts of this jurisdiction. When the enforceability of a judgment mortgage over jointly-owned registered land fell to be considered in *First National v. Ring*[25] the problem under consideration was unfortunately not drawn to the court's attention. Denham J.'s judgment in the case proceeded on the basis of a misconception that a judgment mortgage over registered land operates in the same manner as one over unregistered land. The learned judge stated that the interest of the

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enforcement in those Acts, which do not include the power to sell more than the share subject to the mortgage, *cf*. Wylie, above, n. 3, p. 723.

[21] See Wylie, above, n. 3, p. 733 n. 146, arguing (in a different context) that the "rights and powers" referred to in s.62(6) "are confined to matters within s.19 of the [Conveyancing Act 1881]".

[22] *cf*. above, n. 7. The implication of the argument in the text is that no effective remedy would be available to a lender who, outside the judgment mortgage context, holds an ordinary registered charge over one co-owner's share in a jointly-owned property. While one presumes that lenders would not frequently choose to accept such security, the situation may well arise against the will of the lender. It may happen that the signature of one of the co-owners has been forged or that, while the security was created by the sole legal owner, the lender is deemed to be bound by the rights of an equitable owner in actual occupation of the land. See Wallace, above, n.11, p. 351 and the facts of *O'Keeffe v. Russell and Allied Irish Banks plc* [1994] I.L.R.M. 137 (Supreme Court).

[23] See generally, Fitzgerald, *Land Registry Practice* (2nd ed., 1995) Chap. 8; McAllister, above, n. 10, p. 204 *et seq*.

[24] Naturally, a sale of the entire property might enable a higher price to be achieved for the share affected by the judgment mortgage. However, one could imagine a case where a property owned by X, and affected by a judgment mortgage, might fetch a better price if sold together with a neighbouring field belonging to Y. In this case the court would surely not be entitled to make an order interfering with Y's rights. Why, assuming that the Partition Acts are not applicable, should the matter be different if the third party is a co-owner?

[25] [1992] 1 I.R. 375.

debtor was "vested" in the judgment mortgagee.[26] It is arguable that this was once the law[27] but now under section 69(1)(i) of the Registration of Title Act 1964 a judgment mortgage is merely a registrable burden on the land and is to be enforced on the basis of the relevant provisions of the Registration of Title Act 1964.

Since the problem was completely overlooked in *Ring,* that authority would not appear to preclude the point being raised in the future. Legislative intervention therefore seems necessary to prevent an arbitrary inconsistency between the law governing registered and unregistered land. Interestingly, legislation has recently been enacted in Northern Ireland to deal with the problem. The next section considers the possible lessons to be drawn from the Northern Irish experience.

Reform

When the problem under discussion was identified in the Northern Irish case of *Northern Bank v. Haggerty*[28] reform followed swiftly in the shape of Article 48 of the Property (Northern Ireland) Order, 1997. Article 48 provides that the holder of a charge or the Northern Irish equivalent of a judgment mortgage[29] over land in co-ownership "may make a request under the Partition Act 1868 and the Partition Act 1876 … for an order for partition, or for sale and distribution in lieu of partition, and shall be treated as a party interested for the purposes of those Acts".[30]

This simple provision provides a useful model for possible reform in this jurisdiction. It is noteworthy that the Northern Irish provision assumes that the way forward is to bring the position in relation to registered land in line with that governing unregistered land rather than vice versa. Although the point is not a simple one, this may be correct as a matter of principle. While there are certain anomalies in the operation of the partition and sale jurisdiction in this context,[31] it would probably be too restrictive to deny the holder of a security over co-owned land the right to a sale in lieu of partition.

However, while the Northern Irish provision appears to be acceptable in principle, there are certain problems at the level of detail. First, the wording appears to assume that the right to seek a physical partition derives from the Partition Acts. However, as was pointed out earlier, this right originated in a statute of 1542 and now appears to be based on an equitable jurisdiction developed subsequent to the statute. No entitlement to seek a physical partition is given by the Partition Acts, which in fact assume the prior existence of a partition jurisdiction. Therefore, it is strange that Article 48 purports to confer on the holder of a charge the right to make a request "under the Partition Act 1868 and the Partition Act 1876 … for an order for partition." This inaccuracy leaves in some doubt the success of the attempt to confer on the holder of a charge the right to seek a physical partition (although

[26] [1992] 1 I.R. 375 at 381.
[27] See McAllister, above, n. 10, p. 212.
[28] Above, n. 15. See text following n. 14, above.
[29] A charge under Article 46 of the Judgments Enforcement (Northern Ireland) Order 1981.
[30] Article 48 reads in full: "The owner of a charge (including a charge under Article 46 of the Judgments Enforcement (Northern Ireland) Order 1981) on land in co-ownership (that is to say, held jointly or in undivided shares) may make a request under the Partition Act 1868 and the Partition Act 1876 (in this Article and Article 49 'the Partition Acts') for an order for partition, or for sale and distribution in lieu of partition, and shall be treated as a party interested for the purposes of those Acts."
[31] See above, n. 7. It appears that these anomalies could only be addressed in the context of a full overhaul of the partition and sale jurisdiction (which would be welcome but does not appear likely).

matters are clearer in relation to the far more important right to seek a sale in lieu of partition).

One's second quibble with the wording of Article 48 is that it merely states that the holder of a charge is to be treated "as a party interested" for the purposes of the Partition Acts. The Article does not address the extent of the interest of the holder of a charge. This appears to leave unresolved a problem raised by Campbell J. in *Northern Bank v. Haggerty*[32]: because a charge is for a specific sum of money and gives no entitlement to a particular fraction of the ownership in the property concerned, the holder of a charge (even over a moiety of the ownership of the property) cannot claim to be "interested … to the extent of one moiety or upwards in the property" so as to qualify for preferential treatment under section 4 of the Partition Act 1868.[33] In order to place the holder of a charge over registered land in the same position as a mortgagee over unregistered land, it seems necessary to spell out that a chargeant is interested to the extent of the fraction of ownership covered by his or her charge.

Finally, it is important that any legislation in this jurisdiction which extends the enforceability of judgment mortgages should not overlook the special problems that arise in the context of the family home.[34] It has long been a source of concern that section 3 of the Family Home Partition Act 1976 does not prevent the imposition of a judgment mortgage on a family home.[35] When reforming the law to allow judgment mortgages to be enforced more readily against co-owned registered land, it is submitted that the legislature should take the opportunity to strengthen the protection of all family homes from judgment mortgages. The most obvious approach would be to amend the Family Home Partition Act 1976 to allow a spouse to veto the imposition of a judgment mortgage on his or her spouse's interest in the family home. A more sophisticated reform would allow the imposition of a judgment mortgage on a family home, as at present, but would require the prior written consent of the spouse unaffected by the judgment mortgage to any attempt to enforce the judgment mortgage by means of a sale in lieu of partition (or a physical partition).[36] The judgment mortgagee could then apply to the court to have the spouse's consent dispensed with under section 4 of the 1976 Act and this application could be considered by the court in the light of the matters mentioned in section 4 (including the alternative accommodation available to the non-consenting spouse). This type of reform would bring consistency to the law, given that section 61(5) of the Bankruptcy Act 1988 already allows the court a discretion to postpone an order for sale of a family home in the bankruptcy context.[37]

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[32] Above, n. 15, p 17 of the Lexis transcript. The problem had earlier been raised by the present author, above n. 1, p 86 n. 49.

[33] See text to n. 6, above.

[34] See generally, Mee, above, n. 1.

[35] See *Containercare v. Wycherley* [1982] I.R. 143 and *Murray v. Diamond* [1982] I.L.R.M. 113. Admittedly, Denham J. took the view in *First National v. Ring* [1992] 1 I.R. 375 that the court has a discretion to refuse, on the grounds of hardship, an application by a judgment mortgagee for a sale in lieu of partition of a co-owned family home. However, with all due respect, it is submitted that Denham J.'s judgment in *Ring* proceeded on the basis of a misapprehension of the nature of the partition and sale jurisdiction and does not establish a reliable precedent. See above, n. 6.

[36] It can, in fact, be argued that a somewhat similar position already prevails under the present Family Home Protection Act. For detailed discussion of this argument, see Mee, above, n. 1, pp. 90-93.

[37] s.61(5) requires the court to have regard to "the interests of the creditors and of the spouse and dependents of the bankrupt as well as to all the circumstances of the case." It is provided in s.61(4) that "no disposition of property of a bankrupt, arranging debtor or person dying insolvent, which comprises a family home within the meaning of the Family Home Protection Act 1976, shall be made without the prior sanction of the Court, and

Conclusion

Attention has been drawn in this article to the surprising possibility that, in relation to registered land, a judgment mortgagee[38] of a share in co-owned property may have no right to rely on the Partition Acts and therefore no right to force a sale of the entire property. It has been pointed out that simple reforming legislation was recently passed in Northern Ireland following the highlighting of the problem in the Northern Irish case of *Northern Bank v. Haggerty*.[39] Subject to some reservations as to the details of its wording, the Northern Irish legislation has been welcomed as a useful model for our legislature.[40] However, it was suggested that, in reforming the law on the enforceability of judgment mortgages, the opportunity should be taken to provide some degree of protection for the family home.

Although the problem discussed in this article has yet to arise in a case from this jurisdiction, recent developments in Northern Ireland provide us with a chance to learn, painlessly, from a difficulty experienced elsewhere. Is it too much to hope that this opportunity will be seized?

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any disposition made without such sanction shall be void." *cf. Rubotham (Official Assignee) v. Duddy* unreported, High Court, May 1, 1996; *Official Assignee v. Young* [1996] Irish Family Law Reports 209.

[38] Or, in fact, the holder of an ordinary registered charge. See above, n. 22.

[39] Above, n.15.

[40] No comment has been made thus far in this article on Article 49 of the Property (Northern Ireland) Order, 1997 which allows the court to impose conditions or a stay or suspension on an order for a sale in lieu of partition. It is unclear whether this type of provision should be adopted in this jurisdiction. While it would make sense to allow the court the powers referred to in Article 49 in the context of the enforcement of a judgment mortgage, it is arguable that undesirable uncertainty would be created by the extension of these powers beyond this context. (A suggestion has already been made as to how the special problem of the family home might be addressed: see text to and following n. 34, above).