

# NEARLY, BUT NOT QUITE - PARTITION ACTIONS IN THE WAKE OF ARTICLE 48 OF THE PROPERTY (NI) ORDER 1997

*Heather Conway, Lecturer in Law, The Queen's University of Belfast*

## INTRODUCTION

In the cases of *Northern Bank Ltd v Haggerty*<sup>1</sup> and *Robin Rainey t/a R McA Rainey & Sons v Weatherup and Weatherup*<sup>2</sup>, chargees and creditors with an order charging land under the Judgments Enforcement (NI) Order 1981 were confronted with the spectre of being unable to enforce their security, where that security was restricted to an undivided share of land. In such cases, the principle in *Tubman v Johnston*<sup>3</sup> prevents an incumbrancer of an undivided share of land from exercising his normal power of sale: since the court cannot make an order for possession against the co-owner whose share is not subject to the incumbrance, the incumbrancer cannot obtain an order for possession to facilitate sale. The proper procedure is for the incumbrancer to bring an action under the Partition Acts 1868 and 1876, seeking an order for sale of the property, not just the share over which his security extends. It is well-established that the *locus standi* test for bringing an action under the Partition Acts requires that the plaintiff has a legal or an equitable estate or interest in possession in the subject property.<sup>4</sup> As both Master Ellison and Campbell J (as he then was) explained in *Haggerty*, a chargee did not have *locus standi* to maintain a partition action because the creation of a charge, unlike a mortgage, does not involve any transfer of estate from the borrower to the chargee.<sup>5</sup> Since an order charging land has the like effect as a charge on land created by a debtor in favour of a creditor<sup>6</sup>, creditors with an order charging an undivided share of land also lacked the necessary standing to proceed under the Partition Acts.

The practical consequences of this lacuna being more than disturbing for lending institutions, the legislature intervened in an attempt to alleviate the situation. However, despite the best efforts of the Parliamentary draftsmen, it is suggested that article 48 of the Property (NI) Order 1997 does not entirely succeed in its aims. This article illustrates that the difficulties encountered by creditors with an order charging an undivided share of land have not been wholly eradicated by article 48 and that creditors may still be unable to enforce their security in one particular situation. In addition to this, it highlights another problem which (rather

---

<sup>1</sup> [1995] NI 211.

<sup>2</sup> High Court (NI), unreported, 13 December 1996.

<sup>3</sup> [1981] NI 53 and see *Albany Home Loans Ltd v Massey* [1997] 2 All ER 609.

<sup>4</sup> *Evans v Bagshaw* (1870) 5 Ch App 340 and *Daniell's Chancery Practice* (8th edn, 1914) pp 1170-1. See further *Northern Bank Ltd v Haggerty* [1995] NI 211, pp 216-7, *Northern Bank Ltd v Adams*, High Court (NI), unreported, 1 February 1996, pp 14-15 and *Fraser Homes Ltd v Fraser Houses (NI) Ltd* [1998] NI 214, p 218.

<sup>5</sup> Instead, the chargee merely has certain rights over the property for the purpose of enforcing his security.

<sup>6</sup> 1981 Order, art 49.

surprisingly) has not yet been raised in Northern Ireland, but which may be lurking in the background as a trap to befall an unwary equitable mortgagee of an undivided share of land.

## I. ARTICLE 48 OF THE PROPERTY (NI) ORDER 1997 AND CREDITORS WITH AN ORDER CHARGING LAND

Article 48 of the Property (NI) Order 1997 provides that:

“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...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.”

Accordingly, chargees and creditors with an order charging land now have *locus standi* for the purposes of bringing an action under the Partition Acts. This avoids the consequences of the decision in *Tubman v Johnston* and allows the respective lenders to seek an order for sale as a means of enforcing their security. However, it appears that two specific problems still confront creditors with an order charging land in these circumstances.

### 1. Prospective Application

The first such problem derives from the recent case of *Ulster Bank Ltd v Carter*.<sup>7</sup> The plaintiff Bank wished to enforce an order charging the debtor's undivided share of a matrimonial home which he and his wife owned as joint tenants. This order was made in July 1997. Several months later, the Bank brought an action for sale of the premises under the Partition Acts in accordance with article 48 of the 1997 Order. However, Girvan J held that the Bank was not entitled to an order for sale because article 48 does not apply to orders charging land which were created before 1 September 1997, the date on which this provision came into force.<sup>8</sup> He referred to *L'Office Cherifien Des Phosphates v Yamashita-Shinnihō Steamship Co Ltd*<sup>9</sup> in which the House of Lords held that a statute should not be construed retrospectively if the consequences of doing so were so unfair that Parliament could not have intended such a construction. Applying this test to article 48 of the 1997 Order, Girvan J asserted that a retrospective interpretation would prejudice those co-owners whose interests were not subject to the creditor's security since these interests were “materially affected” by the enactment of article 48.<sup>10</sup>

The learned judge observed that, whereas a non-debtor co-owner was secure in his/her possession of co-owned property prior to the legislative changes introduced by article 48, that person could now be required to yield up possession of the property to facilitate sale under the Partition Acts at the request of a judgment creditor whose security affects the interest of the other co-owner. Girvan J was of the opinion that the interests of such persons are thus prejudiced if an order charging land is

---

<sup>7</sup> High Court (NI), unreported, 29 January 1999.

<sup>8</sup> Property (1997 Order) (Commencement No 1) Order (NI) 1997.

<sup>9</sup> [1994] 1 AC 486, and in particular to the views expressed by Lord Mustill at p 525 approving the judgment of Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, p 724.

<sup>10</sup> At p 10 judgment.

*made* against the interest of the debtor: it is creation of the security which results in the creditor acquiring *locus standi* to maintain a partition action, which ultimately leads to sale of the property. Girvan J stated that, after article 48 came into force, the possibility of a creditor enforcing his security under the Partition Acts and the impact this would have on a non-debtor co-owner were relevant factors for the Enforcement of Judgments Office to take into account in deciding whether to make an order charging the other co-owner's interest. However, this would not have occurred in respect of orders charging land which were made before the commencement date of article 48 since there was no prospect of the creditor bringing a partition action at this time:

“[I]t is clear that a pre-commencement date charge (...a “non-partitioning charge”) differs from a post-commencement date charge (...a “partitioning charge”). In deciding whether to make a charge the [Enforcement of Judgments] Office has to exercise a discretion taking into account all relevant considerations. The impact of such an order on immediately affected third parties must be a relevant consideration. What the Office must or may take into account in deciding whether to make a non-partitioning charge will in some and perhaps in the majority of cases differ from what should or might be taken into account in deciding whether to make a partitioning charge”.<sup>11</sup>

Girvan J suggested that, in the wake of article 48, a non-debtor co-owner should be notified of a proposal to make an order charging land affecting the interest of the other co-owner<sup>12</sup>, and that the former should be given an opportunity to make representations to the Enforcement of Judgments Office.<sup>13</sup> This would not have been the practice prior to 1 September 1997.

If article 48 only applies to orders charging land created after 1 September 1997, it follows that creditors with an order charging land created before this date do not have *locus standi* to maintain an action under the Partition Acts. However, Girvan J suggested that this problem could be overcome by the creditor submitting an application to the Enforcement of Judgments Office to make a new order charging the land.<sup>14</sup> In other words, the prospective interpretation of article 48 in *Ulster Bank Ltd v Carter* is essentially inconvenient for creditors in this situation, as opposed to creating a substantive obstacle to the creditor enforcing his security under the Partition Acts.

---

—

<sup>11</sup> *Ibid*, p 12.

<sup>12</sup> Endorsing the judgment of Carswell LCJ in *Hallmark Furniture Ltd v Collins* [1998] NI 4, p 8.

<sup>13</sup> For example, that the debtor has other resources available to discharge the debt, or that there was an agreement or understanding between the parties that the premises should not be sold or disposed of for a period-; High Court (NI), unreported, 29 January 1999, p 16. Girvan J also suggested that, as regards matrimonial property, the rights and interests of a spouse would be matters which the Enforcement of Judgments Office would have to consider in deciding whether an order affecting the other spouse's interest would be appropriate - *ibid*.

<sup>14</sup> *Ibid*, p 9. Alternatively, Girvan J suggested that the creditor could consider other methods of enforcement including proceedings against the debtor under the Insolvency (NI) Order 1989.

## 2. Creditors with an Order Charging an Undivided Share of Matrimonial Home

However, the second problem which arises in this context creates serious difficulties for creditors proceeding under the Partition Acts in one particular situation. It is suggested that article 48 of the 1997 Order does nothing to improve the position of creditors with an order charging an undivided share of a matrimonial home. While a creditor in these circumstances now has the requisite standing to maintain a partition action, the court might nevertheless refuse to order sale because of the Family Law (Miscellaneous Provisions) (NI) Order 1984.<sup>15</sup>

### The Family Law (Miscellaneous Provisions) (NI) Order 1984

Where a husband and wife are co-owners of a matrimonial home at law or in equity, each has a right to occupy the property.<sup>16</sup> The Family Law (Miscellaneous Provisions) (NI) Order 1984 confers “rights of occupation” in the matrimonial home on a spouse with no proprietary interest in the property.<sup>17</sup> Under article 5(1) these rights of occupation are a “matrimonial charge” on the estate of the owner-spouse, having the same priority as an equitable interest. Where a matrimonial charge is a charge on a legal estate, it may be registered in the Land Registry or Registry of Deeds under article 6 of the 1984 Order<sup>18</sup> and will be binding on a subsequent “purchaser” of the matrimonial home. In other words, registration of this charge is essential in order to take priority over a purchaser.

The 1984 Order does not confer rights of occupation on a spouse with legal title - his or her legal estate is good against a purchaser and takes priority irrespective of whether the purchaser had notice of it.<sup>19</sup> However, article 4(12) of the 1984 Order does confer statutory rights of occupation on a spouse with a mere equitable interest in a matrimonial home.<sup>20</sup> This allows a spouse with an equitable interest to fortify his or her position

---

<sup>15</sup> The relevant provisions are contained in Part II of the 1984 Order. Although these provisions will be re-enacted in the Family Homes and Domestic Violence (NI) Order 1998, this Order has not yet been brought into force. Therefore it is convenient throughout this article to refer to the current practice under the 1984 Order, whilst noting the corresponding provisions of the 1998 Order. In any event, the practical consequences of both the 1984 Order and the 1998 Order as regards partition actions involving creditors with an order charging an undivided share of a matrimonial home are exactly the same.

<sup>16</sup> It being a fundamental attribute of ownership that an owner of land has a right to occupy that land.

<sup>17</sup> 1984 Order, art 4(1). Corresponding provisions are contained in arts 4(1) and (2) of the 1998 Order, although the term “matrimonial home rights” replaces that of “rights of occupation”.

<sup>18</sup> 1998 Order, art 6.

<sup>19</sup> This is not altered by the 1998 Order.

<sup>20</sup> The relevant part of art 4(12) reads: “Without prejudice to any rights which arise by virtue of an equitable estate, a spouse who has only such an estate shall be treated for the purpose of determining whether he or she has rights of occupation, as not being entitled to occupy by virtue of that estate...” To similar effect is art 4(9) of the 1998 Order.

against a purchaser by registering a matrimonial charge in order to avoid having to rely on the doctrine of notice as a means of protection.<sup>21</sup>

### The 1984 Order and Mortgagees and Chargees

The implications of the 1984 Order for lending institutions whose security consists of an undivided share of a matrimonial home are dependent on the nature of the security held. Should the security take the form of a mortgage or a charge, the 1984 Order has few practical consequences for the security holder notwithstanding that the definition of “purchaser” in article 3(1) of the Order includes a mortgagee or a chargee.<sup>22</sup> Take as an example a matrimonial home in the sole name of a husband, where his wife has acquired an equitable interest in the property under a resulting or a constructive trust.<sup>23</sup> If the husband creates a mortgage or a charge on the property and the lender takes his security subject to the wife’s prior equitable interest, the lender will have to bring an action for sale under the Partition Acts in the event of default by the husband. The provisions of the 1984 Order aside, the lender would almost certainly succeed in a partition action.<sup>24</sup> However, the 1984 Order envisages the wife’s matrimonial charge having priority over a mortgage or a charge by virtue of registration of this matrimonial charge prior to the creation of the security.<sup>25</sup> If the lender takes his security subject to the wife’s matrimonial

---

<sup>21</sup> The first legislation conferring statutory rights of occupation in the matrimonial home was introduced in England in the form of the Matrimonial Homes Act 1967. However, as originally enacted, the 1967 Act did not confer rights of occupation on a spouse with a beneficial interest in the matrimonial home. Such rights were not introduced until 1970, and appear to have been prompted by *Gurasz v Gurasz* [1969] 3 All ER 822 in which the Court of Appeal held that the 1967 Act only conferred rights of occupation on a spouse with no proprietary interest in the matrimonial home. The anomalous situation developed whereby a spouse with no proprietary interest could register his or her matrimonial charge under the 1967 Act in order to be protected against a subsequent purchaser, yet, because the 1967 Act did not confer rights of occupation on a spouse with an equitable interest, that spouse had nothing to register under the Act and his or her equitable interest could be defeated by a *bona fide* purchaser for value without notice. The relevant legislation in England is now contained in the Family Law Act 1996.

<sup>22</sup> 1998 Order, art 2(2).

<sup>23</sup> This example is employed solely for convenience - the same principles apply where title to the matrimonial home is in the sole name of the wife but the husband has acquired an equitable interest in the property.

<sup>24</sup> See for example, *Ulster Bank v Shanks* [1982] NI 143, *Northern Bank Ltd v Beattie* [1982] NIJB and *Ulster Bank Ltd v Carter*, High Court (NI), unreported, 29 January 1999. Although Master Ellison in *Northern Bank Ltd v Adams*, High Court (NI), unreported, 1 February 1996 refused to make an order for sale under the Partition Acts at the request of a mortgagee of a matrimonial home, this decision has been criticised - see Wallace, “Mortgages and Charges”, *Third Annual Review of Property Law* (1996) 7, pp 20-22. The court may, however, impose a stay or suspension on an order for sale under the Partition Acts-Property (NI) Order 1997, art 49.

<sup>25</sup> Article 6(3) of the 1984 Order provides that: “A matrimonial charge shall be void against a purchaser of an estate affected by the charge, unless the charge is registered before the purchaser....(b) takes as security for the payment of a sum of money - (i) the deposit of documents of title in pursuance of section 50 of the Land Registration Act (Northern Ireland) 1970, or (ii) in the case of unregistered

charge, it might be argued that the court should not order sale of the matrimonial home under the Partition Acts. To allow a mortgagee or chargee to obtain an order for sale in these circumstances would defeat the purpose of the 1984 Order by denying the wife the protection it confers on her where she has registered her matrimonial charge.

However, this particular situation is unlikely to arise in practice for two reasons. In the first place, it requires the wife to have taken the positive step of registering her matrimonial charge which in turn presupposes that she is aware of the protection afforded by the 1984 Order. Secondly, if the lender discovers that the wife has registered a matrimonial charge on the property, she will almost certainly be required to sign a postponement form as a pre-condition to the grant of the mortgage or charge.<sup>26</sup> Accordingly, the wife must have registered her matrimonial charge *and* the lender must have failed to secure his position by means of a postponement form before the wife can resist an order for sale under the Partition Acts. The likelihood of the court refusing to order sale in these circumstances because of the provisions of the 1984 Order must therefore be regarded as a theoretical as opposed to a practical possibility.

### **The 1984 Order and Creditors with an Order Charging Land**

However, where the security takes the form of an order charging land under the 1981 Order there is a very real possibility of the court refusing to make an order for sale under the Partition Acts. Article 3(1) of the 1984 Order specifically defines a “purchaser” as any person “who, *for valuable consideration*, takes an estate in land.”<sup>27</sup> In the case of *In the Matter of Folio 3540 Co Tyrone*<sup>28</sup> Murray LJ held that the making of an order charging land is *not* a transaction for valuable consideration. This finding has serious practical consequences for a creditor with an order charging an undivided share of a matrimonial home. Returning to the above example, where a wife has a mere equitable interest in a matrimonial home, registration of her matrimonial charge under the 1984 Order is essential in order for her to take priority over a mortgagee or chargee of her husband’s interest and perhaps resist an action for sale under the Partition Acts by the former. However, where a creditor has an order charging the husband’s interest in the matrimonial home, it seems that the wife does not even have to register her matrimonial charge to take priority over the creditor, since the latter is not a “purchaser” for the purposes of the 1984 Order. The creditor takes his security subject to the wife’s matrimonial charge, irrespective of registration. Consequently, it might be argued that the court should not make an order for sale under the Partition Acts in these circumstances since the creditor’s security is necessarily subject to the wife’s matrimonial charge under the 1984 Order.

It follows that the 1984 Order may enable a spouse with an equitable interest in a matrimonial home to resist an action for sale under the Partition Acts brought by a creditor with an order charging the interest of the other spouse. Similar observations may be made in respect of a spouse with no proprietary interest in a matrimonial home. Where there is an order charging land against the other spouse in these circumstances, the

---

land, the deposit of title deeds in relation to that estate.” Identical provisions are contained in art 6(3) of the 1998 Order.

<sup>26</sup> See *Woolwich Building Society plc v Dickman* [1996] 3 All ER 204.

<sup>27</sup> Emphasis added, and see art 2(2) of the 1998 Order

<sup>28</sup> [1991] NI 273.

creditor may exercise his normal power of sale<sup>29</sup> since his security is not restricted to an undivided share of land. However, since the spouse with no proprietary interest has statutory rights of occupation giving rise to a matrimonial charge under the 1984 Order, the court might refuse to order sale of the property as the creditor's security is subject to this matrimonial charge, registered or not.

This raises the question of whether a spouse with a legal estate in a matrimonial home may also resist an action for sale under the Partition Acts brought by a creditor with an order charging the estate of the other spouse. At a cursory glance, this question might be answered in the negative - since the 1984 Order does not confer statutory rights of occupation on spouses who are co-owners at law, the spouse whose interest is not subject to the creditor's security does not have a matrimonial charge on the property which might persuade the court to refuse an order for sale under the Partition Acts. However, the policy of the 1984 Order may be relevant in this context. If, as suggested above, both a spouse with no proprietary interest in a matrimonial home and a spouse with an equitable interest in a matrimonial home may be able to resist an action for sale by a creditor in these circumstances because of the protection conferred on them by the 1984 Order, it would produce a strange result if a spouse with a legal estate could not do so. Where a spouse with a legal estate opposes a request for sale of the matrimonial home under the Partition Acts by a creditor, the court might refuse to order sale by analogy to the policy of the 1984 Order and the protection which it gives to spouses with no legal estate in such property.

Support for this proposition may be found in *Northern Bank Ltd v Haggerty*. After dismissing the Bank's action for sale on the basis that, as a creditor with an order charging land, it lacked the necessary standing to maintain a partition action, both Master Ellison and Campbell J went on to consider a number of other submissions which had been put forward by the respective parties. Counsel for the wife argued that a spouse without legal title was protected against a judgment creditor by virtue of her matrimonial charge under the 1984 Order. Counsel submitted that, when enacting the 1984 Order, the legislature could not have intended to place a spouse with a legal estate in a matrimonial home in a worse position than a spouse without such an estate. Delivering the judgment at first instance, Master Ellison doubted whether an order for sale under the Partition Acts should be made in such cases:

“[I]t seems to me that a wife who has no proprietary interest in the matrimonial home, and who accordingly enjoys the benefit of a matrimonial charge under Article 5 of the [1984 Order] may well find herself in a position to resist an action for possession to enforce an order charging land registered against the home after her matrimonial charge came into being. Furthermore, since the existence of a matrimonial charge is not dependent on its registration, and since Article 6 of the 1984 Order...only deals with priority vis-à-vis a “purchaser of an estate”...it seems to me that...a spouse without a proprietary interest need not even register her matrimonial charge to have standing to resist eviction on the application of a creditor with an order charging land registered against the entire estate in the matrimonial home. If this view of the law is correct, and if the Bank's arguments about standing for partition were also correct, a wife without any proprietary interest in the property would seem to be in a

---

<sup>29</sup> See art 52 of the Judgments Enforcement (NI) Order 1981.

much stronger position than one who owns a [share]...in the home to resist eviction on foot of an order charging land against her husband's interest. In my view, that would be a very anomalous result indeed".<sup>30</sup>

While Master Ellison did not mention that the 1984 Order also confers protection on a spouse with a mere equitable interest in a matrimonial home, he nevertheless recognised the divergence in practice which might arise by virtue of the 1984 Order between a spouse with no proprietary interest in a matrimonial home and a spouse with a legal estate when resisting an action for sale by a creditor with an order charging land. The fact that the 1984 Order extends to spouses with a mere equitable interest would surely have reinforced his opposition to an order for sale being made in such cases. On appeal, Campbell J expressed tacit support for this proposition, describing counsel's submission as a "persuasive argument" which tended to confirm his conclusion that a judgment creditor of an undivided share of land could not maintain a partition action.<sup>31</sup>

Although raised as a theoretical issue in *Haggerty*, the question of whether a creditor with an order charging an undivided share of a matrimonial home can obtain an order for sale under the Partition Acts has become a substantive issue since article 48 of the 1997 Order came into force. However, the recent case of *Ulster Bank Ltd v Carter*<sup>32</sup> provides further support for the proposition that the provisions of the 1984 Order are likely to be relevant in these circumstances. Girvan J had to consider whether a spouse with legal title could resist an action for sale by a creditor with an order charging the other spouse's share of the matrimonial home in light of article 48. The learned judge referred to the views expressed by Campbell J in *Haggerty*, and continued:

"[T]he position of spouses raises special considerations and problems which are not fully or clearly addressed by the provisions of the 1997 Order...The spouse of a debtor may be faced by a charge affecting the property which effectively undermines his or her right to occupy the premises. Parliament has clearly sought to protect the interests of spouses without a legal interest in premises by the 1984 Order and it is unfortunate that the legislature has either overlooked spouses with a legal joint interest or accidentally or deliberately deprived them of the protection conferred on spouses without a title. It is unlikely that this was a deliberate policy since it produces an absurd and unjust result. In balancing the interests of the creditor against a debtor spouse as against the interests of the non-debtor spouse with a joint interest it is not inevitably the case that justice or fairness demands that the scale should come down in favour of the creditor".<sup>33</sup>

In other words, the court might refuse to order sale of a matrimonial home here because, if the non-debtor spouse had no legal title, he or she would be protected by the 1984 Order and to decide otherwise would prejudice a spouse with legal title. However, having determined the case by reference to the commencement date of article 48, Girvan J did not find it necessary to express a final opinion on this particular issue.

---

<sup>30</sup> High Court (NI), unreported, 23 March 1994, pp 18-19.

<sup>31</sup> [1995] NI 211, p 217.

<sup>32</sup> High Court, unreported, 29 January 1999.

<sup>33</sup> *Ibid*, p 9.



### Effect on the Court's Jurisdiction under the Partition Acts

It appears that the court's jurisdiction to order sale of a matrimonial home under the Partition Acts at the request of a creditor with an order charging land may be qualified by the 1984 Order, irrespective of whether the spouse opposing sale has a legal or an equitable estate in the property. The jurisdiction to order sale in lieu of partition is conferred by sections 3 and 4 of the Partition Act 1868.<sup>34</sup> Section 4 applies where the plaintiff is interested to the extent of a moiety or more in the property<sup>35</sup> and states that the court "shall" order sale unless those who object can establish "good reason to the contrary." The relevant authorities suggest that "good reason" for refusing sale under section 4 is confined to those situations in which the action is vexatious<sup>36</sup> or where there are serious objections to an order for sale being made.<sup>37</sup> Moreover, instances of the court refusing to

---

<sup>34</sup> Although this jurisdiction is also conferred by section 5 of the 1868 Act, section 5 is seldom relied on in practice, especially where a partition action is brought by an incumbrancer of an undivided share of land. Section 5 applies where the plaintiff is interested in less than half of the property (and therefore cannot proceed under section 4) but is unable to establish a reason for sale being more beneficial than partition as required by section 3 - see *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528 and *Pitt v Jones* (1880) 5 App Cas 651. Where the subject-matter of a partition action is a matrimonial home, an incumbrancer will usually have little difficulty establishing that sale is more beneficial than partition under section 3.

<sup>35</sup> Not where the plaintiff is entitled to at least half of the realisable monetary value of the property as suggested by Master Ellison in *Northern Bank Ltd v Adams*, High Court (NI), unreported, 1 February 1996. Section 4 of the 1868 Act refers to a request for sale being made by "the party or parties interested...to the extent of one moiety or upwards in the property to which the suit relates" (emphasis added), and see the criticisms of Master Ellison's interpretation of section 4 in Wallace, *op cit*, pp 20-22.

<sup>36</sup> For example, in *Saxton v Bartley* (1879) LJ Ch 519 the court refused to order sale under section 4 upon it being established that the action was instituted through vindictive motives. See further *Rayner v Rayner* [1956] 3 DLR (2d) 522 and *Schnytzer v Wielunski* [1978] VR 418.

<sup>37</sup> In *Porter v Lopes* (1877) 7 Ch D 358, pp 363-364 Jessel MR stated: "There are reasons which will strike one at once against a sale. Property may be of a peculiar description so as not to be actually saleable, or, at the time the sale is asked for, may be temporarily very much depreciated in value...There are cases where the nature of the property is such that you could not sell it. There are various properties of such a nature; thus, where the property is so attached to some other property, or such a mere dependence on another property as to be almost valueless except in connection with that property, though of very great value in connection with it...Again you may have very peculiar rights, which cannot be properly divided, attached to property - manorial rights, and rights to game..., which could not be properly severed from the land or well sold. All these are objections to the sale, and I think those are the chief objections the Court has to consider." However, instances of the courts actually refusing to order sale under section 4 by virtue of any of these factors are difficult to find. On the contrary, both Monroe J in *Re Whitwell's Estate* (1887) LR Ir 45 and McWilliam J in the more recent case of *CH v DGO'D* (1978) 114 ILTR 9 were of the opinion that a temporary depreciation in value did not constitute "good reason to the contrary." However, McWilliam J did suggest that where the disputed land was owned by one family and the conduct of one or more of the

order sale where physical partition of the property in question is impracticable are difficult to find.<sup>38</sup> However, if a creditor with an order charging a half share or more<sup>39</sup> in a matrimonial home brings an action for sale under section 4, the court might regard the policy of the 1984 Order as “good reason” for refusing to order sale even though partition of the property would be impracticable.<sup>40</sup> Section 3 of the 1868 Act applies where the plaintiff is interested in less than a moiety of the property and can show some reason<sup>41</sup> why sale is “more beneficial” for all<sup>42</sup> the parties interested than partition, in which case the court “may, if it thinks fit” order sale of the property. Where there is an order charging less than a half share of a matrimonial home and the creditor brings an action for sale under section 3, sale of the property will usually be more beneficial for the relevant parties than physical partition. However, the court may refuse to order sale under section 3 because of the policy of the 1984 Order.

If the court does refuse to order sale of a matrimonial home in these circumstances, this raises the question of whether it must then order

---

—

family members was intended to deter outsiders from bidding at the sale thus causing a depreciation in value, this might be considered good reason for refusing to order sale - *ibid*, p 14.

<sup>38</sup> The courts have traditionally regarded the feasibility of physical partition as being an important factor in deciding whether “good reason to the contrary” exists - see for example, *Rowe v Gray* (1877) 5 Ch D 263 and *Re Moore, Moore v Moore* [1952] NZLR 273. In *Northern Bank Ltd v Beattie* [1982] NIJB, pp 23-24 Murray J (as he then was) suggested that the court could not refuse to order sale under the Partition Acts where physical partition of the disputed property was impractical. See, however, fn 40, *post*.

<sup>39</sup> To date there is no authority on the practical application of article 48 of the 1997 Order. One practical difficulty which may arise is in deciding under which section of the 1868 Act the chargee or creditor should proceed, since his security is for a specific sum as opposed to a specific estate in the property - see the comments of Campbell J in *Northern Bank Ltd v Haggerty* [1995] NI 211, p 217 and see further Mee, “Partition and Sale of the Family Home” (1993) 15 *DULJ* 78, p 86. However, it is submitted that the determining factor in these cases must be the fractional share of the borrower over which the security extends. Even though a chargee or a creditor with an order charging land does not have an estate in the property, the partition action derives from his security over the estate of the defaulting borrower.

<sup>40</sup> See the comments of Master Ellison at first instance in *Northern Bank Ltd v Haggerty* High Court (NI), unreported, 23 March 1994, pp 19-20. While this suggestion is contrary to Murray J’s comments in *Northern Bank Ltd v Beattie* [1982] NIJB (see fn 38, *ante*), the arguments for refusing to order sale because of the protection conferred by the 1984 Order might outweigh the otherwise strong presumption in favour of ordering sale because partition is impracticable in this one particular situation. In this limited sense, “good reason to the contrary” under section 4 may indeed be wider today as suggested by the judiciary in *Haggerty* (*ibid*, and [1995] NI 211, p 217) and by Master Ellison in the subsequent case of *Northern Bank Ltd v Adams*, High Court (NI), unreported, 1 February 1996, pp 12-13.

<sup>41</sup> The reasons specified in section 3 are the nature of the property in question, the number of parties interested in the property, the absence or disability of some of those parties or any other circumstance which renders it more beneficial for the parties to have a sale of the property than physical partition.

<sup>42</sup> *Corporation of Huddersfield v Jacomb* [1874] WN 80.

partition of the property.<sup>43</sup> The prevailing view in Northern Ireland appears to be that the court must usually make an order for *either* partition *or* sale in a partition action.<sup>44</sup> However, if the court refuses to make an order for sale of a matrimonial home at the request of a creditor with an order charging land, it is unlikely to order partition of the property. Apart from the fact that the plaintiff in these circumstances will almost certainly not want an order for partition since this will not assist in the effective realisation of his security, there is a fundamental obstacle to partition of a matrimonial home. Partition of a single dwelling house is likely to be a material change of use requiring planning permission under article 11(3)(a) of the Planning (NI) Order 1991. If the planning authority has indicated that planning permission would be refused or no inquiries have been made as to whether permission is likely to be granted, the court could, in theory, still order partition of a matrimonial home upon refusing to order sale.<sup>45</sup> However, this is very unlikely to occur in practice as the court will invariably be reluctant to make an order for partition where it is within the power of a third party (in this context, the planning authority) to prevent the order from being carried out- the court will not usually make an order which is futile.<sup>46</sup> Thus, even if the court does refuse to order sale

---

<sup>43</sup> Joint tenants and tenants in common of land in Ireland were first granted a right to compel partition at common law by An Act for Jointtenants 1542. This statutory jurisdiction was superseded by an equitable jurisdiction to partition, and prior to the enactment of the Partition Act 1868, all partition actions were brought in and determined by the Court of Chancery. However, because the equitable jurisdiction was derived from the statutory jurisdiction, the Court of Chancery also regarded a decree for partition as a matter of right - see, for example, *Warner v Baynes* (1750) Amb 589 and *Turner v Morgan* (1803) 8 Ves 143. Since the 1868 Act empowered the court to order sale in lieu of partition, the practice developed whereby sale and partition were regarded as alternatives, so that the automatic consequence of refusing sale was an order for partition - see Walker, *The Partition Acts 1868 and 1876* (2nd edn, 1882) pp 14-15. In *Pitt v Jones* (1880) 5 App Cas 651, p 661 Lord Watson remarked: "Before the passing of the Partition Act the Respondents would have had an absolute right to a decree of partition; and it appears to me that the leading purpose of the Act, as disclosed in sects. 3, 4, and 5, was to enable the Court to substitute, in certain cases, sale and distribution for division, which was the only remedy previously competent."

<sup>44</sup> See the comments of Murray J in *Northern Bank Ltd v Beattie* [1982] NIJB, pp 23-24 and cited with approval by Girvan J in *Glass v McManus* [1996] NI 401. Although Master Ellison in *Northern Bank Ltd v Adams*, High Court (NI), unreported, 1 February 1996 suggested that the court may refuse both partition and sale by analogy to the practice under section 30 of the Law of Property Act 1925 and article 309 of the Insolvency (NI) Order 1989, these provisions are not relevant when considering the nature of the court's jurisdiction under the Partition Acts - see Wallace, *op cit*, pp 22-24

<sup>45</sup> Since making an order for partition and carrying the order into effect are separate matters - see the comments of Lord Porter delivering the advice of the Privy Council in *Patel v Premabhai* [1954] AC 35, pp 47-8. Similar views were expressed by Deane J in *Squire v Rogers* (1979) 39 FLR 106, p 119.

<sup>46</sup> The consent of a third party to carrying out an order for partition may be required in two other situations- namely, where the lands have been acquired under the Land Purchase Acts and cannot be partitioned without the prior consent of the Department of Finance, and where the lands in question comprise leasehold property and partition would be in breach of one of the covenants in

of a matrimonial home in these circumstances, it might also refuse to order partition, leaving a judgment creditor of an undivided share of such property without any practical means of realising his security.

To summarise, while article 48 of the 1997 Order improves the position of creditors with an order charging land in cases such as *Rainey & Sons v Weatherup* where the property in question comprised agricultural land, it may provide little assistance to creditors in the situation which arguably occurs most often in practice - namely where a creditor has an order charging an undivided share of a matrimonial home. Although the creditor in the latter situation now has *locus standi* to bring a partition action, article 48 may not improve his position in view of the protection which the 1984 Order confers on a spouse with an equitable interest in a matrimonial home who resists an action for sale under the Partition Acts and the implications this may also have for a spouse with a legal estate in a similar situation. It remains to be seen whether the courts in Northern Ireland will regard the 1984 Order as encroaching upon the jurisdiction to order sale under the Partition Acts in these circumstances. However, if the courts do adopt this approach, creditors like the plaintiff in *Northern Bank Ltd v Haggerty* may still be unable to obtain an order for sale. While a creditor with an order charging an undivided share of a matrimonial home is now over the *locus standi* hurdle, he may not be any closer to realising his security.

## II. PARTITION ACTIONS AND EQUITABLE MORTGAGEES

Problems may also arise where an equitable mortgagee of an undivided share of land wishes to enforce his security by means of an order for sale under the Partition Acts. To reiterate, the *locus standi* test in partition actions requires that the plaintiff has a legal or equitable estate or interest in possession. Where the security takes the form of a legal mortgage of an undivided share of land the position is relatively straightforward. The mortgagor's estate in the property is conveyed to the mortgagee who has, by virtue of this estate, a right to possession.<sup>47</sup> Accordingly, a legal mortgagee may maintain a partition action since he has a legal estate in possession.<sup>48</sup> Where the mortgage is an equitable one, the position is more

---

the lease. For example, in *North v Guinan* (1829) Beat 342 Hart LC refused to partition a house held under a lease which contained a covenant prohibiting waste, remarking that: "A series of decisions has settled, that a commission of partition is due of common right to every tenant in common, however minute his share...The partition of the house must re-model and re-construct the fabric of the building, and it would throw some discredit on the jurisdiction of the Court, if the landlord, disliking the alterations, should, in defiance of the decree, enter for the waste committed, and turn both parties, with the Court and its decree, out of doors" - *ibid*, pp 344-5. It could be argued that the court has discretion to refuse partition in these three particular situations if the order would be futile - see the comments of Campbell J (as he then was) in *Fraser Homes Ltd v Fraser Houses (NI) Ltd* [1998] NI 214, p 218. These three situations aside, however, it is submitted that the court cannot refuse to order partition if it refuses to order sale under the Partition Acts in accordance with the practice discussed at fn 43, *ante*.

<sup>47</sup> See the comments of Harman J in *Four-Maids Ltd v Dudley Marshall Properties Ltd* [1957] Ch 317, p 320.

<sup>48</sup> This is implicit in Murray J's judgment in *Ulster Bank Ltd v Shanks* [1981] NI 143, pp 150-1. See further *Northern Bank Ltd v Beattie* [1982] NIJB. This is not

complicated. Although he has no estate vested in him<sup>49</sup>, an equitable mortgagee does have an equitable interest in the mortgaged property<sup>50</sup> and accordingly satisfies the first criterion of the *locus standi* test under the Partition Acts. However, problems arise in respect of the second criterion of this test. There is a lack of consensus as to whether an equitable mortgagee has a right to possession by virtue of his interest in the mortgaged property. A number of authorities have answered this question in the negative, taking the view that an equitable mortgagee has no right to possession at law because he does not have a legal estate in the property.<sup>51</sup> In contrast, other authorities appear to favour the view that an equitable mortgagee is nevertheless entitled to possession in equity:

“It is generally said that an equitable mortgagee has no right to take possession. Certainly he has none at law, for he has no legal estate. But in equity he should be entitled to the same rights as if he had a legal mortgage, and there would seem to be no reason why he should not take possession under the doctrine in *Walsh v Lonsdale*<sup>52</sup>, for the basis of an equitable mortgage is the creation of the relationship of mortgagor and mortgagee forthwith, rather than a mere contract for a future mortgage”.<sup>53</sup>

Thus, whether an equitable mortgagee has *locus standi* to bring a partition action depends on which line of authorities is followed. If those authorities which take the view that an equitable mortgage confers an entitlement to possession are correct, then an equitable mortgagee would have the necessary standing to proceed under the Partition Acts. However, if the alternative view is correct, this would have serious implications for equitable mortgagees of an undivided share of land. The principle in *Tubman v Johnston*<sup>54</sup> prevents a mortgagee of an undivided share of land from exercising his normal power of sale. Whereas a legal mortgagee may avail of the jurisdiction under the Partition Acts in these circumstances, this alternative would not be available to an equitable mortgagee because the latter would not have the necessary standing to maintain a partition action. An equitable mortgagee of an undivided share of land would therefore be left without an effective means of realising his security.

---

altered by the fact that, in most instances, the mortgagee will elect not to enforce his right to possession and will allow the mortgagor to remain in occupation so long as the latter is not in default- the mortgagee's right to possession is merely suspended during this time.

<sup>49</sup> See Fisher and Lightwood, *Law of Mortgage* (8th edn, 1969) p 315 and Wylie, *Irish Land Law* (3rd edn, 1997) p 733.

<sup>50</sup> Wylie, *op cit*, p 372.

<sup>51</sup> See, for example, 32 *Halsbury's Laws of England* (4th edn, 1982) p 309 and Gray, *Elements of Land Law* (2nd edn, 1993) pp 990-1. See further *Barclay's Bank Ltd v Bird* [1954] Ch 274, *Patel v Bank of India*, Court of Appeal, unreported, 26 November 1997 and *Bank of Credit and Commerce International SA v BRS Kumar Bros Ltd* [1994] 1 BCLC 211.

<sup>52</sup> (1882) 21 Ch D 9.

<sup>53</sup> Megarry and Wade, *The Law of Real Property* (5th edn, 1984) pp 951-2. The authors cite a number of cases supporting this proposition including *Ex parte Bignold* (1834) 4 Deac & Ch 259, *Trichborne v Weir* (1892) 67 LT 735, *Antrim County Land, Building and Investment Co Ltd v Stewart* [1904] 2 IR 357 and *Spencer v Mason* (1931) 75 SJ 295. Similar views are expressed in Fisher and Lightwood, *op cit*, p 315 and Wylie, *op cit*, p 733.

<sup>54</sup> [1981] NI 53.

One possible solution to this problem is to say that article 48 of the 1997 Order extends to equitable mortgagees. Although the 1997 Order does not define a “charge” as including an equitable mortgage<sup>55</sup>, Walker C in *Shea v Moore*<sup>56</sup> stated that: “...every charge is not an equitable mortgage, though every equitable mortgage is a charge”.<sup>57</sup>

An equitable mortgagee might therefore be regarded as an “owner of a charge” for the purposes of article 48 of the 1997 Order, and would accordingly have *locus standi* to bring an action for sale under the Partition Acts. One possible difficulty with this approach is that it may be straining the language of article 48 somewhat to suggest that a charge by implication includes an equitable mortgage in the absence of a specific statutory direction to this effect in the 1997 Order. Although a “mortgage” under the 1997 Order includes a “charge” and the terms “mortgagor” and “mortgagee” are to be construed accordingly<sup>58</sup>, this does not necessarily mean that an equitable mortgage is a charge for the purposes of the 1997 Order. Thus, article 48 of the 1997 Order may not provide any assistance to equitable mortgagees of an undivided share of land.

It appears that this difficulty has not yet been raised in Northern Ireland. Indeed a number of early cases have expressly decided that an equitable mortgagee *does* have *locus standi* to maintain a partition action. For example, Bacon VC in *Davenport v King*<sup>59</sup> described both legal and equitable mortgagees as “persons interested” for the purposes of the Partition Acts, while in *Hill v Maunsell-Eyre*<sup>60</sup> Overend J remarked:

“A tenant in common has by law a right to a decree for partition and, subject to the provisions of the Partition Acts, to a sale in lieu thereof..., and in my opinion a mortgagee of an undivided share has the same right although he may not have the legal estate in the mortgaged premises”.

More recently, similar views have been expressed in *Northern Bank Ltd v Beattie*<sup>61</sup>, *Northern Bank Ltd v Haggerty*<sup>62</sup> and in *Northern Bank Ltd v Adams*.<sup>63</sup> However, given the apparent conflict over whether an equitable mortgage confers a right to possession on the mortgagee, serious doubts must exist as to whether such a course of action is in fact available to an equitable mortgagee of an undivided share of land. One possible means of allaying these doubts is by legislative intervention in the form of a simple

---

<sup>55</sup> There is no statutory definition of a “charge” given in the 1997 Order.

<sup>56</sup> [1894] 1 IR 158, p 168.

<sup>57</sup> See further *Matthews v Gooday* (1861) 31 LJ Ch 282. For a recent discussion of the nature of equitable mortgages, see *United Bank of Kuwait v Sahib* [1996] 3 All ER 215.

<sup>58</sup> 1997 Order, art 2(1).

<sup>59</sup> (1883) WR 911.

<sup>60</sup> [1944] IR 499, p 505.

<sup>61</sup> [1982] NIJB, endorsing the decisions in *Davenport v King* and *Hill v Maunsell-Eyre*.

<sup>62</sup> [1995] NI 211.

<sup>63</sup> High Court (NI), unreported, 1 February 1996. Master Ellison appears to have had no difficulty in accepting that the plaintiff Bank as owner of an equitable mortgage satisfied the *locus standi* test: “The *locus standi* test is governed by the principle that the plaintiff must be entitled to a legal or equitable estate in possession...In the instant case the plaintiff bank, having an equitable second mortgage by deed, is entitled in equity to an estate in possession”- pp 14-15.

statutory provision to the effect that equitable mortgagees do have *locus standi* to bring an action under the Partition Acts.

### CONCLUSION

The issue of whether lending institutions may enforce their security where it is restricted to an undivided share of land is one of obvious practical importance. It is not disputed that article 48 of the Property (NI) Order 1997 improves the law insofar as it grants chargees of an undivided share of land and creditors with an order charging an undivided share of land *locus standi* under the Partition Acts. However, to describe article 48 as a panacea in this area would be optimistic to say the least. Since article 48 is not a retrospective provision, it does not grant *locus standi* to creditors with an order charging land created before 1 September 1997. More fundamental problems arise where this particular type of security relates to a matrimonial home. Assuming that the creditor does have standing to bring a partition action, it is doubtful whether the court will order sale in these circumstances due to the effect of the Family Law (Miscellaneous Provisions) (NI) Order 1984. That aside, equitable mortgagees of an undivided share of land are confronted with a more fundamental problem as they may not satisfy the *locus standi* test for bringing an action under the Partition Acts. The consequences of this are potentially much more far-reaching than those experienced by a creditor with an order charging land - while the latter might encounter problems where his security relates to an undivided share of a *matrimonial home*, an equitable mortgagee would be unable to rely on the Partition Acts to realise his security in *any case* in which it was restricted to an undivided share of land.

The outlook in the aftermath of article 48 of the 1997 Order has improved but remains less than trouble-free. Although one of the problems which previously confounded lending institutions whose security was restricted to an undivided share of land has been remedied, difficulties clearly persist. In the absence of further legislative intervention, the enforcement of orders charging an undivided share of a matrimonial home and equitable mortgages of an undivided share of land may yet frustrate unwary lenders.