Neutral Citation Number: [2009] IEHC 16

THE HIGH COURT

2004 423 SP

BETWEEN

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND
JOSEPH WHITAKER

DEFENDANT

AND
BY ORDER OF THE COURT
THE SEAFIELD TRUST, CHARTERHOUSE TRUST COMPANY AND EUGENE LANTRY

NOTICE PARTIES

JUDGMENT of Mr. Justice Clarke delivered on the 21st day of January 2009

1. Introduction

1.1 This case involves an application by the plaintiff ("Ulster Bank") for a well charging order in respect of a property known as 9, Oakley Park, Clontarf, in Dublin City. The proceedings have a somewhat complicated history, necessary aspects of which I will set out in due course. However, the point has now been reached where the proceedings have gone to plenary hearing and orders for discovery have been made both against the defendant ("Mr. Whitaker") and the notice parties ("The Trustees").

1.2 The reason why Mr. Whitaker is involved in these proceedings stems from the fact that Ulster Bank obtained a money judgment against Mr. Whitaker on the 18th February, 1997, for the then sum of IR£45,055.28. Subsequently that judgment was registered as a judgment mortgage on the 4th March, 1998, in respect of what appeared to Ulster Bank to be a property owned by Mr. Whitaker, that is to say the Oakley Park property which is the subject of these proceedings. Thereafter, Ulster Bank sought, in the ordinary way, a well charging order so as to lead to a sale of the property concerned for the purposes of paying off Mr. Whittaker's debt to Ulster Bank.

1.3 In substance, Mr. Whitaker says that the property was disposed of by him to the Trustees prior to the registration of the judgment mortgage and that there is, therefore, no basis for making a well charging order because, on his case, he had no interest in the relevant property at the time when the judgment mortgage was registered. In those circumstances it is said that a well charging order would be futile.

1.4 In the light to that defence having been put forward by Mr. Whitaker (but also on the basis that Ulster Bank contended that there were certain circumstances relating to the transaction whereby Mr. Whitaker purportedly transferred the property to the trustees which may lead to an inference that Mr. Whitaker did not, thereby, divest himself of all or some of his interest in the property) the issues between Ulster Bank and Mr. Whitaker have gone to plenary hearing and orders for discovery of all relevant documents have been made against Mr. Whitaker and the Trustees. Mr. Whitaker has made discovery. The Trustees, who are based in the Isle of Man, have in effect declined to make discovery. Against that background Ulster Bank have brought an application, with which this judgment is concerned, seeking to have the assets of the Trustees in this jurisdiction sequestered by reason of what is said to be their deliberate failure to comply with the order of the court in respect of discovery. It should also be noted that while the Trustees were represented at a number of hearings before me, counsel for the Trustees appeared on the date of the hearing of this application solely for the purposes of indicating that the instructions of her solicitor (and, therefore, herself) had been withdrawn and that she was not in a position, therefore, to participate in the application. The application was, however, opposed by counsel on behalf of Mr. Whitaker.

1.5 This judgment is directed to that application. However, it is clear that some of the matters that require to be taken into consideration stem from the procedural history of the case and it is to that history that I now turn.

2. The Procedural History

2.1 As indicated earlier, these proceedings involve a claim brought by special summons, in the ordinary way, for a well charging order arising out of a money judgment followed by the registration of that money judgment as a judgment mortgage against the property. Mr. Whitaker, who is, in his original replying affidavit, described as a businessman with an address at Manchester in the United Kingdom, has asserted that, as of the date of the registration of the judgment mortgage concerned, he did not have any legal or beneficial interest in the property the subject of the proceedings. This fact was contested on behalf of the Ulster Bank. The only evidence produced concerning the purported disposal by Mr. Whitaker of his interest in the property concerned (it being accepted that he had previously owned the property) was a memorial of a Deed of Assignment dated the 6th December, 1996. Certain difficulties with the text and content of that memorial and other surrounding circumstances have lead Ulster Bank to contest whether it is truly the case that Mr. Whitaker had properly disposed of his interest in Oakley Park in such a way as to prevent the judgment mortgage concerned having any practical validity.

2.2 In the ordinary way, affidavits were exchanged between the parties and the matter came in to the court list for hearing on affidavit. Having regard to the issues which had arisen between the parties on the affidavit evidence, counsel for the Ulster Bank persuaded me that it would be appropriate to allow for the cross examination of Mr. Whitaker on his affidavit. That cross examination took place but, quite frankly, matters were not significantly clearer as a result of it. In the circumstances I was satisfied that Ulster Bank had established a *prima facie* case to the effect that Mr. Whitaker did not fully dispose of his interest in the property prior to the registration of the judgment mortgage affidavit. However, I was also satisfied that it would be impossible, without a full plenary hearing, to come to a definitive conclusion as to whether Ulster Bank's case was properly made out. Amongst the reasons which I gave, at the relevant time, for adjourning the matter to plenary hearing, was that such a course of action would afford Ulster Bank an opportunity to use whatever procedural steps that might be advised (such as discovery) to enable all relevant evidence to be before the court when the court would be required to reach a final decision on the matter.

2.3 I should also add that when the matter was before me at that time, I came to the view that it would be appropriate to afford the Trustees an opportunity of being added as notice parties to the proceedings. On the face of it the Trustees would appear to be entitled to the legal interest in the property the subject matter of the proceedings which they, presumably, hold on trust for their clients. The Trustees would appear to be professional Trustees operating in the Isle of Man who carry on the business, amongst other things, of acting as Trustees and holding property on trust for beneficiaries who are their clients. The Trustees were, therefore, contacted and initially indicated that they wished to be heard in the matter. The Trustees were, therefore, joined as notice parties.

2.4 Subsequent to the proceedings being adjourned for plenary hearing, Ulster Bank applied for orders of discovery as against both Mr. Whitaker and the Trustees. When those applications first came before the court it was suggested by counsel on behalf of the Trustees that, having regard to the duty of confidence which those Trustees owed to their clients, it would be appropriate to defer making any order for discovery as against the Trustees until such time, at least, as orders of discovery had been made against Mr. Whitaker and those orders complied with. The suggestion was based on the fact that if all material documents were forthcoming from Mr. Whitaker, it might be unnecessary to make any order against the Trustees and, in those circumstances, it might be inappropriate to require the Trustees to disclose documents which were confidential in nature unless those documents were important to the case. I agreed with that course of action. In fairness, counsel for Ulster Bank put forward no opposition to the course of action suggested at that time.

2.5 Thereafter, discovery proceeded against Mr. Whitaker. While it is unnecessary to set out the course of that discovery process in

detail, it does have to be noted that Ulster Bank were forced to bring a number of further applications for the purposes of securing proper discovery. However, that process is at an end. Again without going into detail it is fair to say that, on the basis of Mr. Whitaker's sworn affidavit evidence in the discovery process, he has very little documentation indeed available to him concerning the transaction whereby the property was purportedly sold. Against that background Ulster Bank resurrected the application for discovery as against the Trustees and an order was made in the terms sought. There is some question as to whether the order concerned was on consent or otherwise. Suffice it to say that it is not disputed but that no grounds for not making the order were put forward and, therefore, even if it is not correct to state that the order was made on consent, it is certainly true that the order was made without any opposition from the Trustees.

2.6 That order was made on 20th November, 2007. I am satisfied that solicitors acting on behalf of Ulster Bank, thereafter, bespoke a copy of that order and served it on the solicitors on record for the Trustees by letter dated 18th December, 2007. When the matter next came before me on 29th January, 2008, it was, effectively, accepted by counsel on behalf of the Trustees that it was not the intention of the Trustees to comply with the order concerned. On that basis Ulster Bank applied to the Master of this Court, under r. 3 of Order 43 of the Rules of the Superior Courts, to approve the appointment of sequestrators and to obtain consequential directions related to the security to be offered by such sequestrators and the way in which such sequestrators ought to account for any properties which they might receive. Because of my prior involvement in the matter, the Master of this Court considered it appropriate to put the case into the judge's list and to arrange to have the issue listed before me.

2.7 For various reasons outside anyone's control the application did not come to be heard until the 15th of January, 2009. As indicated earlier, on that occasion counsel for the Trustees indicated that she no longer had any instructions and took no part in the hearing. However, the application was opposed on behalf of Mr. Whitaker.

2.8 It is, therefore, appropriate to turn first to the basis on which Mr. Whitaker opposed the application.

3. <u>Mr. Whitaker's Opposition</u>

3.1 It would be fair to characterise Mr. Whitaker's opposition as being based on two points, one of a technical nature and the other of a substantive nature.

3.2 In Delaney and McGrath – *Civil Procedure in the Superior Courts* – 2nd Ed. at para. 10 – 98, the authors note that a party who believes that its opposite has not made discovery in compliance with the terms of an appropriate order has a number of options available. It is pointed out that an application for attachment can be brought but that this is rarely done in practice. While attachment would, of course, be the appropriate course of action to seek to adopt in the case of an individual party resident in the jurisdiction, there would not seem to be any reason in principle why appropriate other forms of enforcement (such as sequestration) might not also be available. Those courses of action are, of course, as the authors correctly note, rarely relied on. The reason for this being so is a matter to which it will be necessary to turn in due course. It seems clear, however, that at least at the level of principle there may be circumstances, admittedly limited, when it is appropriate to enforce an order of discovery by attachment or sequestration.

3.3 However, so far as the technical argument made on behalf of Mr. Whitaker is concerned, it is said that the order for discovery, not having had a penal endorsement on it, cannot be enforced by means of sequestration. Therefore, it is said that there is no proper jurisdiction to enforce the order by means of sequestration and that the court should not, therefore, make any order in support of sequestration such as the one sought in this application which would provide for the approval of the sequestrators and defining the terms within which they should operate.

3.4 Independent of that technical ground, counsel for Mr. Whitaker suggests that it is inappropriate, in any event, for the court to use an enforcement procedure, such as sequestration, in aid of an order for discovery particularly where, in practical terms, such enforcement would be to cause the Trustees to lose the very property which is at the heart of these proceedings in the first place. I turn to the technical issue first.

4. <u>The Technical Issue</u>

4.1 Order 41, r. 8 of the Rules of the Superior Courts requires that any order made "requiring any person to do an act thereby ordered" should state the time within which the order is to be obeyed and should contain a memorandum in the words set out in that order in the following form:-

> "If you the within named A.B. neglect to obey this judgement or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgement or order."

4.2 Such a memorandum has often in the past been referred to as a penal endorsement. The sequestration of the assets of a person for failure to obey an order is a form of enforcement. It is clear from Halsbury's *Laws of England* Vol. 9, under the heading *Civil Contempt*, that amongst the forms of enforcement that can be used, in an appropriate case, to enforce a court order which is not obeyed is an order of sequestration. It is clear from *Hampden v. Wallace* (1884) 26 Ch. D. 746, that even where it is permissible to serve an order on a solicitor (such as an order for discovery in a case such as this) the order must contain the relevant endorsement. In the circumstances I am satisfied that, in order that a party may be subject to a form of enforcement such as attachment, committal or sequestration or, indeed, a fine in lieu, arising out of a failure to comply with an order for discovery, it is, in the ordinary way, necessary that the order concerned should contain what is now described as a memorandum in the form set out in O. 41, r. 8 of the Rules of the Superior Courts.

4.3 *Prima facie*, therefore, the technical point raised by Mr. Whitaker is correct.

4.4 There are, however, two further questions that arise under this heading. Firstly it is, correctly so far as it goes, pointed out that Mr. Whitaker is not the party against whom the order is sought – that party having chosen not to participate in the application. On that basis a question is raised over what business Mr. Whitaker has in opposing the application. There is, in my view, some considerable merit in that point. However, all of the authorities make clear that orders such as sequestration or attachment and committal are only to be utilised by the court in a clear case. Therefore, whatever may be the source of the argument as to why the order should not be made, it does not seem to me to be appropriate for a court to disregard a valid point that comes to its attention in whatever way, which might cast doubt as to whether such order could properly be made on the facts of an individual case.

4.5 The second question which arises is as to whether there are circumstances in which it is appropriate for a court to consider an application for sequestration (or attachment and committal in an appropriate case) notwithstanding the absence of the relevant memorandum. The relevant jurisprudence (see for example *Churchman v. Joint Shop Stewards Committee of the Workers of the Port of London* [1972] 3 All E.R. 603 and *Husson v. Husson* [1962] 3 All E.R. 1056) seems to support the view that the court retains a discretion to allow enforcement, even where a properly endorsed order has not been served, but only in cases where the order requires abstinence from the doing of an act and where the court is satisfied that the person concerned knew of the order, either by being present when it was made or being properly notified of its terms. That exception could not apply in a case such as this where the order concerned requires the person to do something rather than to refrain from doing something.

4.6 It is, of course, the case that in the vast majority of circumstances the appropriate step to take when a party fails to comply with an order for discovery is to seek to take appropriate measures within the proceedings such as the striking out of a plaintiff's claim or a defendant's defence. Those procedural remedies can, of course, be enforced without taking the much more drastic step of seeking attachment, committal or sequestration. There is no need to include a penal endorsement in order to seek to invoke those

procedural remedies.
4.7 Where, however, unusual circumstances exist (such as arguably exist in this case) which would justify the bringing of an application such as one for sequestration, I am satisfied that it is necessary that the order sought to be enforced must contain the relevant endorsement.
4.8 It having been brought to my attention that the order in this case did not contain such an endorsement (even though that fact was not urged by the Trustees) it seems to me that it would be wrong to take the drastic step of ordering sequestration when the appropriate procedure justifying that step has not being taken. On that ground it does not seem to me appropriate to make any order that would permit sequestration of the Trustee's assets in this jurisdiction at this stage. However, this point is very much a technical one. I see no reason why Ulster Bank should not now be permitted to serve a further copy of an order for discovery with the appropriate endorsement on it. Having regard to the fact that the Trustees have had more than ample occasion to comply with the original order it does not seem to me that it would be unjust to make a second order of discovery as against the Trustees (in all terms, save as to time, the same as that already made) requiring them to comply with the terms of the original order not later than seven days from today's date. If so minded, Ulster Bank should be free to serve a copy of that further order with an appropriate endorsement. In such circumstances, any failure to comply would be amenable to enforcement by sequestration.
4.9 However, lest I be wrong in the views which I have formed concerning the technical issue, I should go on to indicate what my view would be on the substantive issue raised, not least because it may well raise its head again should Ulster Bank choose to serve a further order with a penal endorsement. I now turn to the substantive issue.

5. <u>The Substantive Issue</u>

5.1 It is clear, as was noted by the authors of Delaney and McGrath, that enforcement in the form of attachment (and by implication sequestration) will not normally be considered to be the appropriate remedy for a failure to comply with an order for discovery.
5.2 However, it is clear that a jurisdiction exists to make such an order in an appropriate case. That leads to the question of what might give rise to such an appropriate case.
5.3 It would not be either possible or appropriate to attempt an exhaustive definition of the sort of circumstances that might be sufficient to justify a court in taking what is correctly described as the drastic step of enforcing a discovery order by such means. In the ordinary way, a plaintiff who loses his chance to pursue his case because his claim is struck out by virtue of a failure to comply with a discovery order or a defendant who becomes unable to defend for like reason, will have been more than adequately punished (and their opposing party more than adequately compensated) for the failure concerned. If a plaintiff wilfully refuses to make available documents relevant to the case without just cause then he can hardly complain if the court is not prepared to hear his case. Likewise, a defendant who is similarly unwilling, can hardly complain if the court proceeds to hear the case on an uncontested basis as against him. However, there may be cases where that normal response may prove inadequate. It seems to me that this case is one such case.
5.4 As previously indicated, I have already been satisfied by Ulster Bank that there are grounds for concern as to whether the transaction relied on by Mr. Whitaker is such as was sufficient to divest him of any interest in the property concerned so that the judgment mortgage could no longer have any practical applicability. However, it will not be possible for Ulster Bank to properly make out its case at trial without having access to documents evidencing the true nature and form of the transaction concerned. Ulster Bank has not been able to obtain those documents from Mr. Whitaker because he says he does not have them. The only realistic source of such documents are the Trustees. In those circumstances, there is every risk that Ulster Bank's entitlement to properly make its case at the plenary hearing may be significantly impaired by the failure of the Trustees to make proper discovery. Furthermore, the Trustees are merely notice parties. No relief is directly sought against them, although it is clear that if the order sought is made the Trustees may become involved in the sale process. If, however, Ulster Bank is unable to make its case out against Mr. Whitaker then there could be positive consequences for the Trustees. If, hypothetically, the reason why Ulster Bank fails to make its case out against Mr. Whitaker is because it did not have access to documents which could assist that case and which documents were wrongfully not discovered by the Trustees, then it follows that the Trustees would be seen to have benefited from their own default. That is a situation which a court should not readily permit to occur. I am mindful that what I have said relating to the Trustees applies equally to the beneficiaries. However, any adverse consequences for the beneficiaries could easily be prevented if those beneficiaries procured that the Trustees complied with their discovery obligations.
5.5 I am, therefore, satisfied that a party is entitled to urge upon a court that the normal remedy for a failure to comply with discovery (that is a procedural remedy such as striking out proceedings, defences and the like) would not be an adequate remedy in all the circumstances of the case in point. Where that is established, it is appropriate for the court to consider whether the more drastic remedy of attachment and committal or, in an appropriate case, sequestration may be appropriate.
5.6 Were it not for the technical deficiency concerning the penal endorsement in this case, I am satisfied that this would have been an appropriate case in which the court should consider the drastic remedy sought.
5.7 I should also note that the position attributed to the Trustees was to the effect they could not comply with the order for discovery because of their obligations to their clients under the relevant confidentially regime operative in the Isle of Man. It is not for me to take or express any view on that confidentially regime. However, it has to be noted that if Trustees (professional or otherwise) hold themselves out as being willing to take the legal interest in property situated in this jurisdiction, then such trustees necessarily submit themselves to any connected laws of this jurisdiction, including the procedural laws of the courts concerning disputes relating to that property. The Trustees were not forced to become the legal owners of property situated in this jurisdiction. They would appear to have done so as part of their business. However, in doing so, they must, necessarily, submit themselves to the laws of this jurisdiction concerning the property. They are, therefore, bound to comply with procedural orders made in proceedings relating to the property concerned and cannot, in my view, use any duty of confidence which they may owe under Isle of Man law to their clients, as a legitimate excuse for avoiding their obligations. If such professional Trustees wish to do business in Ireland and to hold Irish property on trust then they must comply with Irish law. If they are either unwilling or, by reason of applicable Isle of Man law, unable to comply with their obligations to the Irish Courts in respect of such a property then they should refrain from becoming professionally involved in holding property in Ireland as Trustees.
5.8 There is no doubt but that sequestration of the assets of the Trustees would be a most severe remedy. Given the view earlier expressed that there is a technical deficiency in the manner in which this application has become before the court, it would be wrong of me to express any concluded view as to whether it would be appropriate to make an order of sequestration on the facts of this case. I have, however, set out my view to the effect that where the legitimate interests of a party in a position such as Ulster Bank require that they be actually able to obtain documents on discovery and where no lesser form of procedural order would adequately protect the legitimate interests of such a party, sequestration is open and should be seriously considered by the court where no other remedy would be adequate.
5.9 I would postpone any further consideration of the issue until such time as a procedurally correct application was before the court.

6. <u>Conclusion</u>

6.1 It seems to me that I should, therefore, adjourn this matter until such time as Ulster Bank have had an opportunity to serve the new order of discovery, properly endorsed, to which I have referred earlier and to have notified the Trustees of the fact that an application for the sequestration of their assets in the jurisdiction by virtue of their failure to comply with such new order (on the assumption that they maintain their current position) will be moved.
6.2 I will hear counsel as to the appropriate date for the adjournment.