Neutral Citation Number [2006] 326

THE HIGH COURT

2001 No. 7654 P

BETWEEN

CLIFFORD HONNIBALL

PLAINTIFF

AND
BRIAN CUNNINGHAM

DEFENDANT

AND
BPI PROPERTY COMPANY LIMITED
AND
BY ORDER OF THE COURT
BPI PROPERTY COMPANY LIMITED

NOTICE PARTY

Judgment of Miss Justice Laffoy delivered on 27th October, 2006.

Background in outline

1. The plaintiff is a judgment creditor of the defendant in the sum of €850,000 and costs, when taxed and ascertained, on foot of an order dated 1st May, 2003 made in this Court by Ó Caoimh J. in the substantive proceedings. The plaintiff has averred in an affidavit sworn on 3rd October, 2006 that the defendant is the sole member of BPI Property Company Limited (the Company), a limited liability company registered in the State, and that he owns the sole issued share in the Company. That averment was made by reference to the particulars filed in the Companies Registration Office on behalf of the Company. The averment has not been contradicted by the defendant, who, in an affidavit sworn on 13th October, 2006, has attested to the accuracy of matters averred to in an affidavit sworn by his solicitor, Peter Dempsey, on the same day. In para. 21 of his affidavit Mr. Dempsey averred as follows:

> "There is no liability on the part of the Notice Party for any debt to the plaintiff and no distribution on foot of the existing shareholding or sale of same. There is no basis for including the Notice Party as a Notice Party. I am instructed and believe, however, that it has been agreed to issue an additional share(s) of equal value to that presently held by Mr. Cunningham. As of the time of the instant application that issue had not been completed."

2. On 3rd October, 2006 two applications were made to the court on behalf of the plaintiff and dealt with in an order of that day as follows:

> (1) An application was made pursuant to O. 46, r. 1 of the Rules of the Superior Courts, 1986 (the Rules) for an order charging the defendant's share in the Company. In accordance with O. 46, r. 1 that application was made *ex parte*. The order made by the court on this application was that, pursuant to s. 23 of 3 & 4 Vict., c. 105, the sum of €920,833.74 (representing the judgment debt and the agreed costs) together with interest thereon stood charged on the defendant's share in the Company. It was also ordered, on the application of the plaintiff, that the Company be joined as a notice party to the proceedings.
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> (2) An application was made *ex parte* for an order appointing a receiver by way of equitable execution over such distribution as might be made in respect of the share held by the defendant in the Company or, in the alternative, over the proceeds of that share. On foot of that application the court ordered that Frank Murray, solicitor, be appointed receiver by way of equitable execution. The plaintiff's motion for the appointment of a receiver was made returnable for 6th October, 2006.

3. The order also provided that all parties should be at liberty to apply.

4. On this application the defendant seeks to have both the charging order and the appointment of the receiver discharged.

The charging order

5. In considering the nature of the jurisdiction of the court to make an order charging stocks and shares, the starting point is O. 46, r. 1 of the Rules which provides:

> "An application for an order charging stock or shares in pursuance of 3&4 Vic. c. 105 and the Common Law Procedure Amendment Act (Ireland) 1853, shall be made by motion *ex parte.* Such order shall be absolute in the first instance, but the Court may on the application of any person interested, and on such terms as to costs or otherwise as may be just, discharge or vary the same."

6. That rule is a verbatim transposition of the corresponding rule in the 1962 rules.

7. The corresponding rule of the 1905 Rules (O. XLVI, r. 1) provided as follows:

> "An order charging stocks or shares may be made by a Divisional Court or by any Judge, and the effect shall be such as is provided by the Act 3&4 Vict. c. 105, and the Common Law Procedure Amendment Act (Ireland), 1853 (16&17 Vict., c. 113). The application for such order shall be made by motion *ex parte*. Such order shall be absolute in the first instance, but the Court or a Judge may on the application of any person interested, and on such terms as to costs or otherwise as may be just, discharge or vary the same."

8. The commentary on that rule in Wylie on the *Judicature Acts (Ireland)* (1906) discloses that the procedure was changed in 1905, though the effect of the order remained the same. The commentary also discloses that ss. 23 and 24 of 3&4 Vict. c. 105, the short tile of which is the Debtors (Ireland) Act, 1840 (the Act of 1840) were repealed by the Common Law Procedure Act, 1853 (the Act of 1853), except so far as related to the jurisdiction of a Court of Equity, and by the Statute Law Revision Act, 1874 (2) so far as they are related to the Court of Exchequer. For present purposes, I am assuming that both ss. 23 and 24 of the Act of 1840 and s. 132 of the Act of 1853 are still in force and are the provisions referred to in O. 46, r. 1. In *Northern Bank v. Cooney* [1940] I.R. 207, Maguire P. stated (at p. 211) that it was common ground that both of the Acts referred to in O. XLVI, r. 1, applied in this country by virtue of Article 73 of the Constitution of the Irish Free State and Article 50 of the Constitution.

9. Section 23 of the Act of 1840, insofar as it is relevant for the present purposes, provides as follows:

> "… If any person against whom any judgment shall have been entered up in any of … [the] … superior courts at Dublin shall have any Government Stock, Funds or Annuities, or any Stock or Shares of or in any public company in Ireland (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for the Court … on the application of any judgment creditor, to order such Stock, Funds, Annuities or Shares or any of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which the judgment shall have been so recovered and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; …"

10. The procedure for obtaining a charging order is contained in s. 24 of the Act of 1840, which, insofar as is relevant for present purposes, provides:

> "… in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any Stock, Funds, Annuities or Shares hereby authorised to be charged for the benefit of the judgment creditor under an order of a Court or Judge … every order of any such Court or Judge, charging any Government Stock, Funds or Annuities, or any Stock or Shares, in any Public Company under this Act, shall be made in the first instance *ex parte* and without any notice to the judgment debtor, and shall be an order to show cause only; and such order … if any Stock or Shares of or in any Public Company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such Public Company from permitting a transfer thereof; and that if after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorised agent of such corporation, and before the same order shall be discharged or made absolute such corporation or person shall permit any such transfer to be made, then and in such case the corporation or such person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred; … and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; … and further that unless the judgment debtor shall, within a time to be mentioned in such order show to one of the said Courts, or the Judge thereof, sufficient cause to the contrary, the said order shall after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute; provided that any such Court or Judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs, upon such application, as such Court or Judge may think fit."

11. What is clear from an analysis of s. 24 is that a charging order made by the court on foot of an *ex parte* application under the power conferred by ss. 23 and 24 is not an absolute order; it is an order to show cause only. Counsel for both parties are ad idem that that is the correct interpretation of the provisions. Further, the order should stipulate a date within which the judgment debtor should show cause why the charging order should not be made. Accordingly, it would appear that in providing that the order made on foot of a motion *ex parte* shall be absolute in the first instance, O. 46, r. 1 purports to exceed the jurisdiction conferred by the statute. As regards the order made on 3rd October, 2006, it was not described in terms as an absolute order. Nonetheless, it was deficient in not providing a time limit within which the defendant should show cause. Fortunately, the fact that the application to appoint the receiver by way of equitable execution was returnable for 6th October, 2006 obviated any injustice to the defendant, because counsel for the defendant was able to inform the court on that day that it was proposed to apply to court to have the charging order discharged. He pursued that application on 17th October, 2006.

12. Section 132 of the Act of 1853, empowers the court to make an order of attachment in similar circumstances to the circumstances in which a charging order may be made under s. 24 and provides as follows:

> "If any person against whom any judgment shall be entered as aforesaid shall have any Government stocks, funds, or annuities, or any stock or shares in any public company in Ireland, whether incorporated or not, and standing in his own name and in his own right, or in the name of any person in trust for him, or any interest in the dividends, interest, or annual produce of such stocks, funds, annuities or shares, it shall be lawful for the Court or a Judge, on application of the party having recovered such judgement to make an order *ex parte* in Form No. 7 in Schedule B, to this Act annexed, to attach such stock, funds, annuities or shares; and such dividends, interest or annual produce shall be attached in the books of the Governor and Company of the Bank of Ireland or any public company, to answer the purposes of such execution and such stock, funds, annuities and shares, shall not be suffered to be transferred nor shall such dividends, interest or annual produce be paid, until such order of attachment shall be withdrawn or discharged or disposed of, and no disposition in the meantime of such debtor shall be valid or effectual as against such party recovering such judgment and obtaining such order of attachment."

13. In the specimen order set out at Form No. 7 in Schedule B to the Act of 1853, it is Government stock, not stock or shares in a public company, which is used to illustrate the form of the order, so that no assistance is to be derived from that form in determining the meaning of the expression "public company" in the section.

14. Counsel for the defendant submitted that the court had no power to make a charging order under s. 23 of the Act of 1840 because the Company is not a public company but rather is a private company limited by shares. He submitted that the term "public company" in s. 23 and in s. 132 of the Act of 1853 has a distinct meaning and it is to be distinguished from a private company.

15. The concept of a private company did not exist when either the Act of 1840 or the Act of 1853 was passed. It was introduced in the Companies Act, 1907 and continued by the Companies (Consolidation) Act, 1908 (the Act of 1908) and the Companies Act, 1963 (the Act of 1963). The definition of "private company" for the purposes of the Companies code is now to be found in s. 33(1) of the Act of 1963. That definition, which varies only slightly from the definition introduced in 1907, defines the expression as meaning a company which by its articles: (a) restricts the right to transfer its shares, (b) with specified exceptions, limits the number of its members to 50, and (c) prohibits any invitation to the public to subscribe to any of its shares or debentures. In the Companies code a definition of "public company" is now to be found in the Companies (Amendment) Act, 1983 (the Act of 1983), where that expression is defined as meaning a company which is not a private company. Counsel for the defendant submitted that the fact that s. 23 should be limited to public companies is consonant with the fact that a charging order is intended to restrain trade in a readily tradeable commodity, which shares in a public company are but shares in a private company are not. If that submission is based on the premise that all public companies are listed companies, then it is based on a false premise.

16. The meaning of the expression "any public company in England (whether incorporated or not)", which was contained in the statutory provision which applied in England and corresponded to s. 23 of the Act of 1840 (1&2 Vict. c. 110, section 14), was

considered in *MacIntyre v. Connell* 1 Sim. N.S. 225, in which judgment was delivered by *Cranworth V-C* on 1st March, 1851. At issue there was whether the Union Bank of London came within the expression. The Union Bank of London had been established by deed of settlement in 1839, so it was not incorporated. Having identified two classes of companies not incorporated to which the provision he was considering might have referred (certain banking companies which existed under a statute of George IV and a subsequent extension of that statute passed in 1833 and companies associated for trading or other purposes having letters of patent granted by the Crown), Lord Cranworth had no difficulty in deciding that the words "public company not incorporated" would be applied properly to the second class, because the names of the members and of the officers who were to sue and be sued on behalf of the company, the objects of the society and many other particulars relating to it were required to be enrolled and thereby made public. Lord Cranworth stated that he could see no real distinction between that company and a banking company acting under the statute of George IV as extended. But he went on to say (at p. 92):

> "It is true that the banking company was not a banking company carrying on its operations under the provisions of a charter or letters patent not incorporating them; but all the attributes of publicity appear to me to exist as well in the one case as in the other. The names of the members are all enrolled with their addresses, and every transfer of interest is enrolled; and the company is to sue and be sued by public officers, just in the one case as in the other; and it seems to me that, in the absence of a legal definition, I must treat the one case to be just the same as the other …"

17. Because of the "attributes of publicity" which attached to the banking partnership, Cranworth J. held that it was a public company not incorporated.

18. Apart from *Northern Bank v. Cooney* referred to earlier, in which it was held that "Government stock, funds or annuities" in s. 132 of the Act of 1853 must, after 1922, be read as if restricted in application to stock, funds or annuities of the Irish Government, it would appear that since 1922 there have been only two other reported decisions in which an order of attachment or a charging order over shares in a company was sought by a judgment creditor. Neither is of any assistance in resolving the issue as to the proper construction of "public company" in s. 23. In the earliest*, National Land Bank Limited v. O'Dea* (1926) 60 I.L.T.R. 55, it was held that a charging order might be made under O. XLVI charging stock of a limited company registered in England and carrying on business in Saorstát Éireann. Part of the reasoning which supported that decision would appear to have been the effect of s. 274 of the Act of 1908, which stipulated certain formalities which were to be complied with by a company incorporated outside the jurisdiction establishing a place of business within the jurisdiction, provisions which were replaced in 1963 by Part XI of the Act of 1963. However, the stock in issue there was stock in Arthur Guinness, Son & Co. Ltd., which I surmise was a public company listed on the London Stock Exchange in 1926. The later decision, *Munster and Leinster Bank v. O'Shea* [1934] L.J. Ir. 2, concerned Irish Government stock.

19. Therefore, unless there has been some change in the law since 1851, I see no reason for not following the decision of Lord Cranworth and construing the Act of 1840 on the basis of that what Parliament intended by the epithet "public" before "company" in s. 23 was to capture a company which had the attributes of publicity identified by Lord Cranworth. A private company limited by shares incorporated under the Act of 1963 unquestionably has such attributes of publicity. That leads to the question whether provisions of s. 5 or s. 6 of the Interpretation Act, 2005 affect the construction of s. 23.

20. Section 5 requires that where a provision is obscure or ambiguous, or where a literal interpretation would be absurd or would fail to reflect the plain intention of Parliament, the provision shall be given a construction that reflects the plain intention of Parliament where that intention can be ascertained from the Act as a whole. As regards s. 23, Lord Cranworth teased out the meaning of the corresponding provision in the statute which applied in England just slightly more than a decade after it was enacted. It seems to me that a court should be reluctant, a century and a half later, to come to a different conclusion as to what the plain intention of Parliament was. Therefore, in my view, s. 5 is of no assistance.

21. Section 6 provides as follows:

> "In construing a provision of any Act … , a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act … and other relevant matters, which have occurred since the date of the passing of the Act … , but only insofar as its text, purpose and context permit."

22. In the sphere of company law the expression "public company" has a different meaning today than it had in 1840 because of the changes in the law. But a consideration of the text, purpose and context of the Act of 1840, in my view, does not permit restricting the meaning of "public company" in that Act to the meaning ascribed to that expression in the modern company law code. The purpose of s. 23 was to give a judgment creditor whose judgment has not been satisfied security over an asset of the judgment debtor the existence of which is in the public domain. A restrictive construction which would limit the operation of s. 23 to shares in a public company as defined in the Act of 1983, in my view, would not fulfil the obvious objective of the provision.

23. It is interesting to note that there is a definition of "company" in O. 46 of the Rules in the context of the procedure provided for in rules 5 to 13 inclusive for applying for a notice to restrain a transfer of stock. For the purposes of rules 5 to 13, the expression "company" is defined in rule 5 as meaning "any body corporate (including a company, public or private) incorporated or having a register within the jurisdiction". The corresponding provision of the 1905 Rules defined the expression as "including the Governor and Company of the Bank of Ireland and any other public company, whether incorporated or not". The commentary in Wylie indicates that rules 5 to 13 of O. XLVI of the 1905 Rules superseded ss. 171 to 174 of the Chancery (Ireland) Act, 1867, that s. 171 only extended to Government stock transferable at the Bank of Ireland, and that the 1905 Rules extended the new procedure to any public company. The issue which arises here is the construction of the expression "public company" in the Act of 1840. In my view, the evolution of the definition of "company" in r. 5 of O. 46, which has a totally different provenance, is not relevant to that issue.

24. On the basis of the analysis of the relevant rules and statutory provisions, I am satisfied that the Company is a public company within the meaning of s. 23 of the Act of 1840.

25. Aside from the contention that the court did not have power to make the charging order because the Company is not a public company within the meaning of the Act of 1840, which I have rejected, the defendant supported its application for discharge of the charging order on the basis that –

> (a) the application should not have been made *ex parte*, and
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> (b) the plaintiff showed a lack of candour in making the application.

26. The Rules mandate that an application under O. 46, r. 1 be made by motion *ex parte*. The defendant questioned the constitutional

propriety of the rule having regard to the decision of the Supreme Court in *Haughey v. Moriarty* [1999] 3 I.R. 1. While, as I have indicated earlier, there is an inconsistency between the rule and the statute to which it is intended to give effect and the form of order made by the court on 3rd October, 2006 is deficient in not having mentioned a time within which the defendant could challenge it, I do not accept that a rule of court which allows a judgment creditor to pursue against a judgment debtor the type of remedy provided for in s. 23 of the Act of 1840 without giving notice to the judgment debtor is constitutionally infirm provided it contains a mechanism for the judgment debtor being heard without undue delay, as is the case under r. 1 and as occurred in this case notwithstanding the deficiency in the order. The introductory words of s. 24 of the Act of 1840 clearly indicate the legislative purpose in providing for an *ex parte* application in the first instance: to prevent the judgment debtor, as the saying goes, stealing a march on the judgment creditor by disposing of the shares. I consider that the plaintiff acted properly, and in compliance with r. 1, in bringing the application by motion *ex parte*.

27. It is well settled that a heavy duty of candour rests upon a person making an application to court *ex parte.* The principle of disclosure was considered recently in this jurisdiction by Clarke J. in two different contexts: in the context of an application to discharge a Mareva injunction in *Bambrick v. Cobley* (2005) I.E.H.C. 43; and in the context of an application to discharge an order made under s. 2 of the Proceeds of Crime Act, 1996 in *F. McK. v. D.C. & Ors.* (2006) I.E.H.C. 185. In relation to the criteria to be applied by the court in the exercise of its discretion to discharge an interim order on the ground of material non-disclosure, Clarke J. stated in the earlier case, and reiterated in the later case as follows:

> "It is therefore necessary to consider, in general terms, the general criteria which the court should apply in the exercise of such discretion. Clearly the court should have regard to all the circumstances of the case. However, the following factors appear to me to be the ones most likely to weigh heavily with the court in such circumstances:-
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> 1. The materiality of the facts not disclosed.
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> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
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> 3. The overall circumstances of the case which led to the application in the first place."

28. As to the test of materiality, having reviewed the authorities both in this jurisdiction and in the United Kingdom, Clarke J. stated as follows:

> "Taking those authorities it would seem that the test by reference to which materiality should be judged is one of whether objectively speaking the facts could reasonably be regarded as material with materiality to be construed in a reasonable and not excessive manner."

29. I respectfully agree with the views expressed by Clarke J. in those two passages.

30. The defendant's allegation of lack of candour is founded on the fact that in his affidavit in support of the *ex parte* application, the plaintiff did not make comprehensive disclosure of the various means to which he had previously resorted to secure payment of the judgment debt. The defendant placed significance on this non-disclosure on the basis that the settlement between the parties expressly contemplates enforcement of the settlement as being against a specified premises and not by enforcement processes generally. In order to determine whether that foundation stands up it is necessary to consider the order of Ó Caoimh J., which was put before the court on 3rd October, 2006.

31. The order of 1st March, 2003 ordered and adjudged that the plaintiff recover against the defendant the sum of €850,000 and the costs of the proceedings when taxed and ascertained. It went on to order that execution and registration of the judgment be stayed on three conditions which were set out, namely:

> (1) that the defendant discharge the debt by the following instalments – €50,000 on 1st August, 2003, €200,000 on 1st November, 2003, €250,000 on 1st July, 2004, €200,000 on 1st May, 2005 and the costs within one month of agreement or taxation;
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> (2) that the defendant create a mortgage over certain premises in favour of the plaintiff as security for the payment of the instalments within four weeks of the date of the order; and
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> (3) that the defendant agree not to create any charge, lien or encumbrance over those premises or otherwise deal with the same prior to the creation of the mortgage referred to at paragraph (2).

32. It was further ordered that the settlement signed by the respective parties be received and filed as part of the order and that all further proceedings be stayed save as might be necessary to execute on foot of the settlement. Liberty to apply was also provided for. The settlement signed by the parties, which is part of the order, is wholly consistent with the order itself.

33. As a matter of construction of both the settlement and the order, I am satisfied that the plaintiff is not precluded from pursuing any process of execution provided by law, in the event of the conditions of the stay on execution not being complied with and a judgment being entered. That is what has happened. Moreover, he may pursue two or more execution processes cumulatively until the debt is discharged. The evidence contained in the plaintiff's grounding affidavit which was before the court on 3rd October, 2006 was that, with the exception of the sum of €50,000 paid in August, 2003, none of the amounts agreed to be paid by the defendant (including the costs which were agreed at €120,833.74 in February, 2004) was paid. An order of *fieri facias* (*fi. fa*.) had been sent to the sheriff. No goods had been seized by the sheriff, but the *fi. fa*. was still with the sheriff. An order of this Court (Murphy J.) directing the examination of the defendant as to his assets and monies due to him is subject to appeal to the Supreme Court. The plaintiff also averred that "the defendant has not created a charge over" the premises referred to in the settlement and the order.

34. The primary allegation of non-disclosure made by the defendant against the plaintiff is the failure of the plaintiff to disclose that he had registered his judgment as a mortgage against the premises referred to in the order on 17th February, 2004. It was suggested by the defendant that this failure somehow renders the plaintiff's averment that "the defendant has not created a charge" over the premises untruthful. That is not correct. The defendant did not, within the four week period limited in the order of 1st May, 2003 or at any time, create a mortgage over the premises in question in favour of the plaintiff to secure the sums due to the plaintiff. The fact

that the plaintiff has registered a judgment mortgage over the premises merely means that the plaintiff has availed of a process of execution available to him at law and is in no way inconsistent with the plaintiff's truthful averment that the defendant did not create the mortgage he agreed to create.

35. Apart from that, in my view, the failure of the plaintiff to disclose a process of execution which he has embarked on, which, in any event the plaintiff, through his counsel, asserted was inadvertent, is immaterial when, as I have found, it is open to him to pursue any process of execution available to him at law until his debt is satisfied. The existence of the judgment mortgage is of no materiality in the context of the issue whether a charging order should be made under s. 23 of the Act of 1840.

36. The defendant has not established that the court had no power to make the charging order, nor has the defendant established any other ground on which the charging order should be discharged. As I have already stated, the defect in the order itself has not perpetrated an injustice because the defendant has been afforded the earliest opportunity to make an application for discharge of the charge. I refuse that application and I make absolute the order made on 3rd October, 2006 under s. 23 of the Act of 1840.

Receiver by way of equitable execution

37. In submitting that the appointment of a receiver by way of equitable execution was not appropriate in this case, counsel for the defendant relied on a passage from the judgment of Keane J., as he then was, in National Irish Bank Limited v. Graham [1994] 1 I.R. 215. A number of issues arose in that case, but the context in which the issue of the appointment of a receiver by way of equitable execution arose can be stated simply. The plaintiff bank had obtained judgment in default of appearance against the defendants, who were farmers, on 19th November, 1993 on foot of a summary summons. On the same day they sued out a fi. fa. The defendants owned a milking herd, over which the plaintiff bank had no security, although it did have security by way of chattel mortgage over the defendants' non-milking herd. On 8th December, 1993 the plaintiff bank sought the appointment of a receiver by way of equitable execution over all of the defendants' cattle, including the milking herd. In relation to that application, Keane J. stated as follows at p. 222:

> "Nor is this a case in which it would be appropriate to appoint a receiver by way of equitable execution over the milking herd. It is clear that the jurisdiction to appoint such a receiver is confined to cases in which a debtor enjoys an equitable interest in property which cannot be reached by legal process. The law was thus stated by Fry L.J. in *In re Shephard* (1889) 43 Ch. D. 131 at p. 138:
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> > 'A receiver was appointed by the Court of Chancery in aid of a judgment at law when the plaintiff showed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a debt'.
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> In *Holmes v. Millage* [1893] 1 Q.B. 551, Lindley L.J. said at p. 555 that:-
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> > 'The only cases of this kind in which Courts of Equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had the legal interest in it, instead of an equitable interest only … It is an old mistake to suppose that, because there is no effectual remedy at law, there must be one in equity.'
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> In the present case, the plaintiffs meet none of the requirements laid down by these decisions. The defendants are the legal owners, and not merely the owners in equity, of the milking herd. There is no impediment to the execution of the writ of *fieri facias* arising from the nature of the defendants' interest in the herd. There is in the result no ground for the appointment of a receiver by way of equitable execution."

37. The defendant's argument was that the foregoing passage is authority for the proposition that the appointment of a receiver by way of equitable execution will not be available where reliefs are available at law to the judgment creditor. The argument was developed on the basis that under the settlement the plaintiff was confined to a particular method of execution and that he had commenced that method by registering the judgment as a judgment mortgage over the premises referred to in the settlement but had not pursued that method by instituting proceedings for a well charging order and an order for sale. To digress slightly, as I have already indicated, I consider that the plaintiff was not so confined. In any event, the defendant did not give the plaintiff a mortgage over the premises in accordance with the terms of settlement. What the plaintiff has got unilaterally, a judgment mortgage, is substantially different in nature to a mortgage. Returning to the defendant's argument, it is that the registration of a judgment mortgage is a barrier to the relief sought by way of equitable execution.

38. I do not agree that the principle stated by Keane J. in *National Irish Bank Limited v. Graham* operates against the plaintiff in the manner suggested by the defendant. The principle, as I understand it, is that the court will not appoint a receiver by way of equitable execution over property of which the judgment debtor is the legal owner and which can be the subject of legal process. The facts in *National Irish Bank Limited v. Graham* illustrate that point very clearly: the defendants were the legal owners of the milking herd and there was nothing to stop the sheriff seizing the milking herd on foot of the *fi. fa*. The principle is that the equitable remedy is only available where the judgment debtor has only an equitable interest in property against which the judgment creditor seeks recourse.

39. In his affidavit sworn on 3rd October, 2006, on foot of which the court made the order of that date, the plaintiff averred that there had been a recent agreement between three named individuals to sell lands, believed to be in Ballymun, to the Company, that the Company had sub-sold on to a named third party and that the sub-sale had been completed on 29th September, 2006, whereupon the Company was paid approximately €6 million, which sum was held by a named firm of solicitors, who were acting for the Company, for the benefit of the Company. What the plaintiff asked the court to do was to appoint a receiver by way of equitable execution over the proceeds of sale of the single share which the defendant owns in the Company, should the defendant have sold that share. I have already quoted para. 21of Mr. Dempsey's affidavit in which he has averred that no distribution on foot of the existing shareholding or sale of the same is contemplated, which I take to mean that the defendant has not sold, and does not intend to sell, his existing share in the Company. Therefore, as a matter of fact, the defendant has no equitable interest in the proceeds of a share sale; rather he is the legal owner of a share which, by order of the court, was and remains, charged in favour of the plaintiff. There being no property in which the defendant enjoys merely an equitable interest, the appointment of the receiver cannot stand and is discharged.

Joinder of the notice party

40. Mr. Dempsey made the point in para. 21 of his affidavit that there was no basis for including the Company as a notice party. As I understand it there was no appearance for the notice party and the counsel and solicitor acting for the defendant were not acting for

the Company on this application. The effect of a charging order is provided for in s. 24 of the Act of 1840, which I have quoted earlier. The Company, subject to being served with notice of the making of the same, is bound by the charging order. On reflection, I consider that it was not necessary to join the Company as a notice party and I discharge so much of the order of 3rd October, 2006 as so provided. The absolute order charging the defendant's share in the Company will have to be served by the plaintiff on the Company, whereupon the Company will be bound by the charging order in the manner prescribed by law.

41. Finally, I am unclear as to the true import of the reference in para. 21 of Mr. Dempsey's affidavit to an agreement "to issue an additional share(s) of equal value to that presently held by Mr. Cunningham". That may be for another day. But I want to make it clear that nothing in this judgment shall be taken as implicitly accepting that either the defendant or the Company is entitled to engineer a situation in which the value of the defendant's existing share in the Company is diluted.

Form of Order

42. The order will vary the order made on 3rd October, 2006 by –

(a) discharging the order joining the Company as a Notice Party;

(b) declaring absolute the charging order made pursuant to s. 23; and

(c) discharging the order appointing Mr. Murray as receiver by way of equitable execution.