

THE HIGH COURT

[2006 No. 380 Sp.]

BETWEEN

DOVEBID NETHERLANDS BV

PLAINTIFF

AND

WILLIAM PHELAN TRADING AS THE PHELAN PARTNERSHIP AND WILLIAM PHELAN TRADING AS THE PHELAN PARTNERSHIP AND
DENISE O'BYRNE

DEFENDANTS

Judgment of Ms. Justice Dunne delivered on the 23rd day of April 2007

1. The plaintiff herein seeks a declaration that a judgment mortgage registered by the plaintiff on 1st December 2005, over the interest of the first named defendant in certain lands and premises stands well charged over the interest of the first named defendant in the said lands and premises. Judgment was obtained by the plaintiff herein against the first named defendant on 19th August 2005, in the sum of €124,301 together with interest thereon from 19th November 2001. In the grounding affidavit of Kirk Dove sworn herein on 25th October 2006, it is averred that the plaintiff converted the judgment into a judgment mortgage on 1st December 2005, against the interest of the first named defendant in "the lands and premises at 49, Mountainview Road, Ranelagh in the city of Dublin," by lodging an office copy of a judgment mortgage affidavit.

2. Issue is taken with two aspects of the affidavit sworn to register the judgment as a mortgage on 4th November 2005. At para 5 of the affidavit it is stated:

"That the name of the defendant in the said judgment is William Phelan and that the address of the defendant at the time that the said judgment was so obtained was 49, Mountainview Road, Ranelagh, Dublin 6 and at present is also 49, Mountainview Road, Ranelagh, Dublin 6.

3. I further say that to the best of my knowledge and belief the said William Phelan, the defendant is at the time of swearing this affidavit seized or possessed at law or in equity, or has disposing power which he may without the assent of any other person exercise for his own benefit, over certain lands tenements hereditaments and premises hereinafter mentioned, that is to say ALL THAT AND THOSE the lands and premises commonly known as 49, Mountainview Road, Ranelagh, Dublin 6 in the city of Dublin."

4. Counsel on behalf of the second named defendant has argued that the plaintiff is not entitled to have a declaration that the judgment mortgage is well charged on the basis that the affidavit to register the judgment as a mortgage (judgment mortgage affidavit) does not comply with the provisions of s. 6 of the Judgment Mortgage (Ireland) Act 1850, in respect of two matters, namely that the affidavit must specify "the County and Barony or the Town or County of a City and Parish or the Town and Parish" in which the land is situated and the second point relates to the requirement contained in the Judgment Mortgage (Ireland) Act 1850 that the "usual or last known place of abode" of the defendant to whom the judgment relates must be stated in the judgment mortgage affidavit.

5. In the oral submissions made herein it was conceded by counsel on behalf of the plaintiff that the judgment mortgage affidavit did not comply with the requirements of the provisions of the Judgment Mortgage (Ireland) Act 1850, in these two respects. It was argued that the non-compliance of the judgment mortgage affidavit was not fatal to the application to have the judgment mortgage well charged. Accordingly the issue to be determined at this point is whether non-compliance with the strict requirements of the Judgment Mortgage (Ireland) Act 1850, is fatal to the plaintiff's application for a declaration that the judgment mortgage herein is well charged on the first named defendant's interest in the said lands and premises.

6. In the course of argument herein I was furnished with helpful submissions in writing from the plaintiff and the second named defendant. I also had the benefit of oral argument.

7. Section 6 of the Judgments (Ireland) Act 1850, requires that an affidavit to register a judgment mortgage shall state, *inter alia*

"the name or title of the cause or matter, and the court in which such judgment ... has been entered up ... and the usual or last known place of abode and the title trade or profession of the plaintiff (if there be such, and of the defendant or person whose estate is intended to be effected by the registration, as hereinafter mentioned ... and such affidavit shall specify the County and Barony, or the Town or County of a City, and Parish or the Town and Parish in which the lands to which the affidavit relates are situate."

8. In considering the manner in which s. 6 has been interpreted it is useful to refer to a passage from Wylie's *Irish Land Law*, 3rd Ed. at para. 13.168:

"The procedure laid down by statute governing the affidavit must be followed with precision, otherwise the registration may be invalid and no mortgage on the land will be created. However, over the years the Irish Courts have fluctuated in their views as to the effect of non-compliance strictly with the requirements of the Act, in particular with respect to the contents of the affidavit necessary for registration. The better view is that the courts will now give the statute a purposive interpretation and will not allow non-compliance with the strict requirements to invalidate a judgment mortgage unless this would defeat one of the purposes of the Act, e.g. by rendering it impossible to identify clearly the parties or the lands effected. It appears also that the insertion of material in addition to the statutory requirements, though unnecessary and, perhaps even inaccurate, will not invalidate the registration, provided the statutory requirements are met."

9. In the course of argument a line of authority was opened to me which exemplifies the point being made by Wylie in that passage. Counsel for the second named defendant placed particular reliance on the decision of the High Court in the case of *Allied Irish Banks plc v. Griffin* (Unreported, 16th December 1991.) In that case the description of the defendant given in the judgment mortgage affidavit was that she was a "widow". In her affidavit in the proceedings the defendant stated that her title, trade or profession was not that of a widow but that of a farmer. This was conceded by the plaintiff in those proceedings. It is interesting to note that in that case Denham J. had referred to the judgment of Costello J. in the case of *IBC v. O'Hara* (Unreported) which was then under appeal to the Supreme Court. That case dealt with a description of lands and therefore Denham J. was of the view that it did not overrule the authorities in relation of the description of a person. Having referred to a number of cases where a strict interpretation was applied in relation to the description of the title, trade or profession she stated at p. 8 of her judgement:

"The law under s. 6 Judgment Mortgage Act 1850, has been clearly interpreted by cases of the High Court as requiring the description of a person in their trade or profession if they have one. This was not done here.

The words 'widow, widower, married woman, married man, spinster or bachelor' state marital status, and where a person is a farmer are not a title, trade or profession as required by the Act. To have described the defendant, who at the requisite time was a farmer as a widow was a mis-description. Thus the affidavit is valid."

10. She then refused the application.

11. In the *IBC v. O'Hara* case, (Unreported, Supreme Court, 7th April 1992) Finlay C.J. was quite trenchant in his consideration of the issue that arose in that case. At p. 4 of his judgment he made the following comment:

"The requirement of justice would, undoubtedly, be that the appeal should be dismissed and the plaintiff entitled to realise the security which they seek to have declared well charged. The issue for the court may, under certain circumstances, conceivably therefore be as to whether if the judgment mortgage affidavit failed strictly to comply with the terms of s. 6 of the Act of 1850, justice must, in this particular instance, be subordinated to the strict requirements of the law."

12. Having considered at length the judgment of Costello J. in that case and the reliance by Costello J. on the decision in the case of *Thorpe v. Brown* (1867) Law Reports English and Irish Appeal Cases, Volume 2 and having accepted that the approach taken was the appropriate approach, he quoted a passage from the judgment of Chelmsford L.C. at p. 232 in the *Thorpe* case as follows:

"It appears to me, my Lords, as I have already stated, that the original affidavit in this case was sufficient. We have to look to what the object and intention of the legislature were in requiring that there should be these particulars describing the judgment debtor with his place of abode. It was clearly for the purpose of identification. It was not that there should be an exact description of the very place where he was residing so that any person might resort to him there and ascertain any particulars. It was for the purpose of distinguishing him from all other persons and leaving no doubt whatever as to the identity of person against whom the judgment which was to be a charge upon the lands have been obtained."

13. Having reviewed the *Thorpe v. Brown* decision and a number of other decisions Finlay CJ concluded:

"On this basis I am satisfied that even if the case fell to be decided in accordance with this question and principle, that the decision of Costello J. was correct and that this is certainly a case in which it would be quite unreal and, therefore, unjust to declare the entry of the judgment mortgage as invalid by reason of the absence of the name of the Parish, having regard to all the other identifications that are so clearly set out in the judgment mortgage affidavit."

14. In his judgment concurring with that of the Chief Justice, McCarthy J. in the same case briefly commented on the issue of non-compliance as follows:

"In construing a statute, and in particular the effect, if any, of non-compliance with express wording, there are a number of accepted canons of construction. An unstated one is that common sense should not be abandoned.

If the words used, are imperative, non-compliance is fatal; if the words are directory, non-compliance is not fatal. In determining the nature of the provision there is no rule of general application save to seek to identify the purpose of the legislation. What is the purpose here? Is it other than to secure the judgment whether it is position both as to the date and amount of his charge? If the property is clearly and adequately identified, so that none could be under any misapprehension, in a manner that would be appropriate to a conveyance of the property, is the legitimate charge to be defeated by the omission of a detail of which few may know and which even fewer be concerned? I think not."

15. He went on to note that in some cases great care may have to be taken in an individual case to ensure that no possibility of mistake can occur by reason of non-compliance with the strict terms of the section.

16. Subsequently that decision was considered in the case of *Ulster Bank Limited v. Neil Crawford and Cathal Crawford* (Unreported, High Court, 20th December 1999). Laffoy J. considered the *Irish Bank of Commerce Limited v. O'Hara* decision and the decision in the case of *Allied Irish Bank plc v. Griffin* referred to above. At p. 8 of her judgment Laffoy J. commented:

"Although the foregoing observations of Finlay C.J. were *obiter dicta* I must have regard to them. It seems to me that the approach I should adopt is to consider whether the affidavit of Alfonsa Duff Kelly leaves any doubt whatever as to the identity of the persons against whom the judgment which was to be a charge upon the lands registered on Folio 9790 had been obtained, the test posited by the Lord Chancellor in *Thorpe v. Brown*. In my view, no doubt whatever is left by the affidavit of Alfonsa Duff Kelly from which it is clear that the judgment was obtained against the defendants as the proprietors of the business which traded as Crawford Construction. The word 'proprietor' is defined in the New Oxford Dictionary of English (Oxford University Press 1998) as 'the owner of a business'."

17. Accordingly she was satisfied in that case as to the validity of the judgment mortgage therein.

18. It is clearly the case that the decisions to which I was referred and to which I have referred in this judgment do not all deal with the same points that have arisen in this case. The issue in the case of *Allied Irish Banks plc v. Griffin* related to the description of the defendant. In the case of *Ulster Bank Limited v. Crawford and Crawford* the issue related again to the description of the title, trade or profession of the defendants. In the case of *Irish Bank of Commerce v. O'Hara* the issue that arose was the failure to state the name of the Parish in which the premises were situate. In this case, the non-compliance relates to the abode of the judgment debtor and the failure to describe fully the particulars in relation to the premises by reference to the correct Parish and Townland in which the property was situate. It has to be said that the submissions made on behalf of the second named defendant in relation to these points are of the most technical nature possible. They do not address the merits of the plaintiff's claim at all. Although the cases I have referred to may not be precisely on all fours with the facts of the present case, it is clear from the majority of those cases that what could be described as a mere technical non-compliance with the requirements of the Act of 1850, has not proved fatal.

19. In each respect in which non-compliance has been referred to in this case, namely the address at which the first named defendant resided and the description of the property it is, it seems to me, necessary to consider what was the purpose of the requirement in the legislation as to the description of the property and the place of residence of the judgment debtor. In each case it is for the purpose of adequately and clearly identifying the individual concerned and the property concerned. In my view the property

in this case has been clearly and adequately identified so that none could be confused as to what property is concerned and although there was non-compliance as to the abode of the judgment debtor, it is equally the case that none could be confused as to who the judgment debtor is. In other words he has been properly identified. The position might be otherwise if there was room for confusion as to the identity either of the individual concerned or of the property described. However that is not the case in the present circumstances. In those circumstances I am satisfied that the application to have the judgment mortgage declared well charged is not defeated by reason of the non-compliance with the statutory requirements.

20. Accordingly, I am satisfied that the non-compliance of the judgement mortgage affidavit with the strict requirements of the Judgement Mortgage Ireland Act of 1850 is not fatal to the well charging application.