Neutral Citation Number: [2009] IEHC 4

THE HIGH COURT

1986 1055 SP

BETWEEN

ULSTER INVESTMENT BANK LIMITED

PLAINTIFF

ROCKROHAN ESTATE LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Irvine delivered on the 14th day of January 2009

This judgment relates to two notices of motion which are before the Court in the within proceedings. The first of these in time is a notice of motion dated 17th July, 2008 wherein the plaintiff, Ulster Investment Bank Ireland Limited ("UIB") seeks (*inter alia*) an order granting UIB possession of the lands and premises scheduled to the notice of motion and described as ALL THAT part of the lands of Inchigaggin, in the Barony and County of Cork containing 119.588 acres being the lands comprised in Folio 28285 of the Register of Freeholders, Co. Cork. The second motion is that brought by the defendant, Rockrohan Estate Limited ("Rockrohan") dated 28th July, 2008 wherein it seeks a number of reliefs including orders by way of declaration as to the interest if any had by UIB in the said lands, its rights to possession and/or sale thereof and/or the extent of the liabilities secured against the defendant's interest in such lands.

The Nature of the within Proceedings

The within proceedings were commenced by special summons dated 19th November, 1986. The grounding affidavit was sworn by Brian McConnell on 4th December, 1986. In that affidavit he records the fact that UIB advanced a loan to Bula Limited ("Bula") for the purpose of enabling that company finance the development of a lead and zinc mine at certain lands in Navan Co. Meath. Rockrohan, pursuant to a guarantee debenture dated 22nd September, 1981 guaranteed the repayment of the said loan to UIB on terms that the maximum recoverable by UIB from Rockrohan in the event of Bula's default would be £1m together with interest as provided for there under. The loan to Bula was also supported by personal joint and several guarantees executed by Mr. Richard Wood, Mr. Michael Wymes, Mr. Thomas Roche Senior and Mr. Thomas Roche Junior, all of whom were Directors of Bula. Rockrohan is a company which is wholly owned and controlled by Mr. Wood.

In July 1982, Bula defaulted in its obligations to UIB and in 1985, Mr. Laurence Crowley was appointed Receiver over its assets. Subsequently, by letter of 17th July, 1986, Rockrohan was called upon to meet its obligations under the guarantee debenture. The letter of demand provided full details of the default made by Bula and further set out how the sum demanded under the guarantee debenture had been calculated. In addition, the said letter enclosed a schedule specifying the rates of interest applicable to Rockrohan's liabilities from the date the monies fell due under the demand. The schedule also particularised the manner in which UIB had dealt with other securities realised, namely, the proceeds of sale of certain Cement Roadstone Holding ("CRH") shares and dividends.

A replying affidavit was sworn by Mr. Wood on behalf of Rockrohan on 16th January, 1987. That affidavit did not raise any defence to the lawfulness of the guarantee debenture. Neither did Mr. Wood challenge the extent of the liability of Rockrohan under the guarantee debenture. At no stage was it suggested that the terms of the guarantee debenture did not reflect the true intention of the parties in terms of the nature of the security furnished by Rockrohan. Rockrohan made no challenge to the sum sought to be declared well charged on foot of the security. It raised no issue regarding the sums claimed for principal or interest. Neither did it contest the banks right to continuing interest nor the manner in which UIB had dealt with monies realised on the sale of the CRH shares and CRH dividends.

The affidavit of Mr. Wood sworn on behalf of Rockrohan can realistically be categorised as something close to an *ad misericordiam* plea. The Court was asked to exercise its discretion generously to postpone the proceedings to await the outcome of litigation which had been commenced earlier in the year and to which Rockrohan was not a party. In those proceedings ("the Tara proceedings"), Bula (in receivership) and Messrs. Wood, Wymes, Roche Sr. and Roche Jr. sought damages against the adjacent enterprise Tara Mines Limited and a number of other parties whom they alleged had engaged in various tactics with a view to preventing Bula from exploiting its own mine. The Minister for Energy was also joined as a defendant to those proceedings for allegedly failing to enforce certain obligations on the part of Tara Mines Limited under a lease agreement between that company and the Minister. Mr. Wood averred that the damages that would be recovered by the plaintiffs in the Tara proceedings would exceed the debt due by Bula to all of the banks who had financed its mining operations including UIB and that consequently the Bank's proceedings should be postponed to await the outcome of that action.

Mr. Wood in the replying affidavit also relied upon a second set of proceedings which had been instituted by himself and others against the Receiver, Mr. Crowley, and a number of banks including UIB wherein allegations of negligence were made against all of the defendants in relation to their dealings with Bula. Mr. Wood, at para. 12 of his affidavit, deposed as follows:-

> "12. In these circumstances I say and believe it would be inequitable if the plaintiff herein was allowed to proceed to execute against the lands in question as such relief may be entirely unnecessary. Accordingly, I pray this Honourable Court to adjourn the present application until such time as the other proceedings are determined."

In the face of the aforementioned affidavits Blayney J. proceeded to make what is commonly described as a well charging order on 16th February, 1987. The terms of that order are significant. The Court declared as follows:-

(a) That the sum of £1m for principal and a sum of £267,147.02 for interest up to 4th December, 1986 stood well charged on the defendant's interest in the lands earlier described.

(b) That the defendant would have a period of one month from the date of the service of the order to dispute the aforementioned sums.

(c) That in default of Rockrohan disputing or paying the relevant sum outstanding at the expiration of a further three months, the lands and premises would be sold subject to conditions of sale to be settled by the court.

(d) That the plaintiff would have the costs of the proceedings.

The order of the High Court is also significant in two other respects. Firstly, the Court did not direct that an account be taken of the monies declared well charged on Rockrohan's lands. The Court itself, based on the pleadings, affidavits and exhibits declared the sum referred to at para. (a) above well charged on the lands. Secondly, the Court did not grant UIB an order for possession as had been sought at para. 3 of the special endorsement of claim on the special summons. Counsel's note of the judgment, records that Blayney J. refused an order for possession. He concluded that there was no need for such an order as there was no evidence to suggest that the bank would be impeded in the sale of the Rockrohan lands.

By notice of appeal dated 3rd April, 1987 Rockrohan sought to appeal the order of Blayney J. to the Supreme Court. The affidavit grounding that appeal dated the 10th January, 1990 was once again sworn by Mr. Wood. In that 21 page affidavit, Mr. Wood made no challenge to the lawfulness of the order of the High Court and neither did he protest the amount of the principal and/or interest declared well charged on Rockrohan's lands. No complaint was made regarding how the Bank had dealt with the proceeds of sale of the CRH shares or dividends. The thrust of the appeal was that the well charging order should have been postponed to await the outcome of the Tara proceedings and the Bank proceedings. Mr. Wood contended that had it not been for the wrongdoing of the defendants in the aforementioned proceedings that "UIB would have been repaid long ago and that no question of realising security would ever have arisen". He further averred that:-

"It would be inequitable if UIB was allowed to proceed to execute against the lands in question pending the determination of the aforesaid extensive proceedings in which, *inter alia*, the security, the subject matter herein, and the underlying loan are being contested, and which proceedings are being vigorously prosecuted with good cause against UIB and the other defendants."

The Supreme Court accordingly by order dated 11th January, 1990 exercised its discretion and substituted the three month stay which had initially been granted by the High Court with a stay on the order for sale until 2nd October, 1990.

Brief History of the Proceedings *Inter Partes* since the Order of the Supreme Court of 11th January, 1990

As already stated, in 1986 the Bank proceedings were commenced by Bula and its directors against Bula's receiver, a number of banks including UIB and a firm of mining consultants who had advised the receiver. The pleadings in that action bearing Record Number 1986 No. 2264 P, when amended, not only sought damages but also certain declarations. The relief sought included a declaration that the plaintiffs had no liability to repay any of the loans outstanding to the banks, that consent judgments obtained against the guarantors be set aside and that all contracts secured by the plaintiffs or arranged by them as security be rescinded and declared unenforceable. The proceedings encompassed the guarantee debenture in this action and this was confirmed in the plaintiff's replies to particulars in the Bank proceedings by letter dated 4th July, 1989. The nature of the Bank proceedings appear to lend support to the averment made by Mr. John Anderson at para. 12 of his affidavit sworn on 10th November, 2006 in Rockrohan's judicial review proceedings, to which I will later refer, that it was the existence of these proceedings and the challenges to the underlying securities that caused the Bank to take no further steps to enforce the order for sale obtained from Blayney J. on 16th February, 1987.

The Bank proceedings were postponed until the conclusion of the Tara proceedings. The Tara proceedings were lost by the plaintiffs in the High Court and were later appealed to the Supreme Court. A further postponement of the Bank proceedings was granted to await the outcome of that Appeal.

The plaintiffs in the Tara proceedings were unsuccessful in the Supreme Court. Thereafter, the Bank proceedings were heard by the High Court where the plaintiff's claim once again failed with judgment being delivered by Barr J. on 1st February, 2002. The plaintiff's appeal to the Supreme Court subsequently failed with the judgment of that Court being delivered by Denham J. on 13th February, 2003. Following the said judgment the way seemed to be clear for UIB to proceed through the office of the Examiner to sell the Rockrohan lands.

Notwithstanding the outcome of the aforementioned appeal Mr. Wood and Mr. Wymes commenced further proceedings in 2003 seeking, on this occasion, to challenge the Bula debt and the securities furnished in respect of that debt on the grounds that the judgments in the High and Supreme Court had been obtained by fraud and ought to be set aside. Murphy J. in delivering a judgment on 10th June, 2005 on foot of the defendant's motion to have the proceedings dismissed as constituting an abuse of process not only dismissed the proceedings but made an "Isaac Wonder" order restraining Mr. Wood and his co-plaintiffs from instituting further proceedings against the Banks and the other defendants without prior leave of the court.

On 26th September, 2006 the Assistant Examiner of the High Court, Mr. Tom Kinirons set the conditions and date for the sale of the Rockrohan lands. Once again this effort on the part of UIB to proceed was thwarted by Rockrohan bringing an application for leave to seek judicial review of the decision of the Assistant Examiner. Leave was granted permitting Rockrohan to maintain such proceedings and these were determined before McGovern J. on 18th April, 2007 when he dismissed Rockrohan's claim. Mr. Wood swore the affidavit grounding the application for leave to apply for judicial review and the following matters set out in his affidavit are of some relevance to the issues before this Court, namely:-

(i) At paras. 9 – 11 inclusive, Mr. Wood complained that UIB had been guilty of inordinate and inexcusable delay. He

specifically referred to the notice of motion in the Examiner's officer dated 12th February, 1999 and described it as "no more than a colourable device in pursuance of a misconceived attempt to defeat the statute of limitations and keep alive a power of sale". This averment seems to acknowledge that if there was a twelve year statutory time limit on UIB's power of sale that the service of this notice of motion would have had the effect of defeating the statute.

(ii) At para. 12 of the affidavit Mr. Wood asserted that the guarantee debenture was no more than a collateral security furnished to UIB to support his own guarantee and that in circumstances where that liability had been discharged that there could be no amount due by Rockrohan and therefore the well charging order was defunct.

(iii) At para. 19 Mr. Wood stated that his occupation of the lands the subject matter of the well charging order had not been challenged by UIB at any time since 1989 and that his unchallenged occupation of the premises entitled him, as a matter of law, to the benefit of title by way of adverse possession.

Notwithstanding the extensive range of issues covered by Mr. Wood in his affidavit in support of his leave application, the issues which the Court was ultimately asked to consider on the pleadings were somewhat more limited. The pleadings exchanged between the parties in the judicial review proceedings centred upon the contention of Rockrohan that it was entitled to be represented by counsel before the examiner and that the failure on the part of the examiner to hear counsel was a breach of natural justice and fair procedures and was also in breach of Rockrohan's rights under Article 6 of the European Convention on Human Rights.

McGovern J. refused all of the remedies sought by Rockrohan and in the course of his judgment he stated, at p. 5, as follows:-

"In the course of the hearing counsel for the applicants spent a great deal of time arguing that the first named notice party had failed to act with expedition in enforcing the order for sale and had in effect for many years done nothing about enforcing it and that it is now to be estopped from doing so. Counsel claimed, *inter alia*, that the applicants had acquired adverse possession of the lands against the first named notice party and that the lands could not therefore be sold. I reject this argument. Blayney J. did not give an order of possession to the first named notice party and at all times the first named applicant has been in possession of the lands since they have not yet been sold. The applicants have not been in possession adverse to anyone else so the question of adverse possession does not arise. Furthermore I am satisfied that the arguments relating to the alleged delay on the part of the first named notice party are irrelevant to the issues which I have to decide in this judicial review application. They seem to be directed more towards showing that the lands in question should not be sold or that the order of Blayney J. should not be or cannot be enforced. Having heard the submissions of the parties and in particular the submissions of the first named notice party on this issue I am quite satisfied that the delay in achieving a sale of the lands in question is due to protracted litigation which has continued by one or other or both of the applicants up to this date in both the High Court and Supreme Court. These proceedings raise issues such as a declaration that the 'Bula debt' was discharged and unenforceable, a claim relying on the Statute of Limitations including the release of securities collateral to the guarantees given by the second named applicant. It is clear from the proceedings in the various actions which have continued through to the end of 2004 that the basis upon which the judgment of Blayney J. was given has been under attack by the second named applicant."

Whilst McGovern J. in his Judgment stated that it was his opinion that Rockrohan could not have extinguished the rights of UIB to proceed on foot of its well charging order by reason of adverse possession, having considered the exchange of the pleadings between the parties I believe that his pronouncement regarding this issue should not be considered as other than *obiter* in the context of those proceedings.

The Application by Rockrohan brought by Notice of Motion dated 25th July, 2008 and the Application by UIB for Possession pursuant to Notice of Motion dated 17th July, 2008.

These applications were heard before the High Court on the 26th day of November and 27th day of November, 2008. By agreement between the parties a full booklet of pleadings was delivered in respect of each motion as were copy books of pleadings, orders of the court and judgments in all of the proceedings referred to earlier in this judgment.

In addition to the oral submissions made in the course of the hearing, both parties furnished written submissions. The written submissions initially delivered on behalf of Rockrohan do not reflect the matters urged upon the Court in the course of the hearing. A number of such submissions were abandoned at the hearing. Additional written submissions were delivered at the commencement of the trial at which stage Rockrohan agreed to deliver an amended notice of motion reflecting the relief being pursued. The Court also received submissions on behalf of UIB and these, given that they were delivered after the submissions of Rockrohan at the hearing, reflect with accuracy the case made by UIB at the hearing.

Because of the amendments to Rockrohan's notice of motion I propose to set out in full the content of the amended notice of motion delivered as per the Court's direction given on 26th November, 2008. The following was the relief claimed:-

(1) An order setting aside and/or discharging the well charging order, including the order for sale made by Mr. Justice Blayney in the High Court on 16th February, 1987 in respect of the lands of Rockrohan Estate Limited, Folio No. 28285 of the Register of Freeholders, Co. Cork.

(2) Further and/or in the alternative an order varying the said well charging order including the said order for sale.

(3) Deleted.

(4) A declaration that pursuant to the discharge of the personal guarantee of Richard Wood, and the discharge of the judgment on foot of the guarantee, any obligation of Rockrohan Estate Limited to UIB is discharged.

(5) An order directing that any title to and any right to sell, that Ulster Investment Bank Limited may have had with regard to the assets of Rockrohan Estate Limited, in particular the lands in Folio No. 28285 of the Register of Freeholders, Co. Cork, is extinguished by virtue of the provisions of the Statute of Limitations Act 1957.

(6) Further and/or in the alternative an order directing and declaring that the arrears of interest (if any) due and owing by the Rockrohan Estates Limited on foot of the well charging order granted by this Honourable Court on 16th February, 1987 are limited to six years pursuant to the Statute of Limitations Act 1957.

(7) Deleted.

(8&9) Deleted and in substitution.

A declaration that any liability of Rockrohan Estate Limited is subject to the primary debt on the Bula Limited loan account being calculated on the basis that the funds received in December, 1985 in respect of CRH dividends and the sale proceeds of CRH shares have been applied on receipt against the debt of Bula Limited and not having been held in a suspense account.

(10) Deleted.

(11) Deleted.

(12) Further and/or in the alternative an order directing that appropriate accounts and inquiries be taken and as may be directed by this Honourable Court.

(13) Such further and other order and/or reliefs as this Honourable Court may deem fit.

(14) An order for costs.

I propose to briefly deal with the parties submissions in relation to each of the reliefs sought by Rockrohan.

(1) An order setting aside and/or discharging the well charging order of Mr. Justice Blayney made on 16th February, 1987.

(2) An order varying the well charging order including the order for sale.

Rockrohan's Submissions:
In relation to the reliefs set out at (1) and (2) above, Mr. O'Dulchain, S.C., in opening the application by Rockrohan advised the Court that he was not seeking "*per se*" to attack or reopen the judgment of Blayney J. made on 16th February, 1987. He advised the Court that he would only be seeking relief of this nature in the event of Rockrohan being successful in obtaining one or more of the reliefs sought at para. 4, 5, 6, 8 or 9 of the motion.

(4) A declaration that pursuant to the discharge of the personal guarantee of Richard Wood, and the discharge of the judgment on foot of the guarantee, any obligation of Rockrohan Estate Limited to UIB is discharged.

Rockrohan Submissions
Rockrohan submits that the guarantee debenture was, as set out in Mr Wood's Affidavit, "furnished in support of and was tied and collateral to" his obligations under his personal guarantee. Mr. Wood, having satisfied the judgment obtained by UIB on foot of his personal guarantee, now contends that Rockrohan has no liability to UIB. Accordingly, Rockrohan submits that UIB is precluded from pursing the sale of the lands in respect of which it has obtained the well charging order. There are, according to Rockrohan, no monies to be discharged from the sale of such lands. No order for possession can accordingly be justified.

UIB's Submissions
UIB submits that the terms of the guarantee debenture are clear and unambiguous. The guarantee debenture on its face was not, as was asserted by Mr. Wood in his affidavit, "in support of and tied and collateral to the obligations" under his personal guarantee. UIB relies upon the express provisions of the guarantee debenture and in particular clauses 2(a), (e) and (f) thereof. UIB submits that the court cannot permit the parties to a written contract to rely upon the pre-contract negotiations for the purposes of interpreting the contract. It contends that the court must look exclusively to the objective meaning of the words used in the guarantee debenture and that when it does so that those words do not support Rockrohan's claim.

In addition, UIB submits that the contest now being raised by Rockrohan as to the terms of the agreement whereby the Rockrohan lands were provided to UIB as security cannot be challenged by notice of motion in these proceedings. The use of a special summons is limited to the classes of actions which are listed at O. 3 of the Rules of the Superior Courts. That procedure is summary in nature and does not permit of a right of Counterclaim. Further, any proceedings as might alternatively be issued on foot of an originating summons would, at this time, in any event be statute barred.

The Court's Conclusion

Thomas C. Roche, Thomas J. Roche, Michael Wymes and Richard Wood, by joint and several guarantee dated 22nd September, 1981, guaranteed the payment of Bula's liabilities to UIB subject to the limitation that the total liability enforceable against them as guarantors would not exceed IR£1,828,568.91 together with interest thereon from the date of demand until payment or judgment. This guarantee is exhibit "A" to the affidavit of Mr. Wood sworn on 24th July, 2008.

On 22nd September, 1981 Mr. Wood, along with his fellow director John Nagle, executed the guarantee debenture on behalf of Rockrohan in favour of UIB whereby Rockrohan guaranteed the loan provided to Bula by UIB subject to a maximum liability of £1m together with interest in accordance with clause 2(c) thereof.

The following provisions are of relevance to the issue presently under consideration namely:-

> "2(c) If and whenever the borrower shall make default for more than 30 days in payment of any principal monies, interest or other sum or sums secured by and payable under the security, the guarantor shall forthwith on demand by the bank pay the monies hereby guaranteed to the bank together with interest thereon (including interest on overdue interest) at the rate specified in the security from the date on which the said monies ought to have been paid until the actual payment thereof;
>
> (e) This guarantor shall be in addition to and not in substitution for any other guarantee for the obligations of the borrower given to the bank by the guarantor;
>
> (f) This guarantee shall be in addition and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the bank for all or any indebtedness of the borrower to the bank under the security.
>
> 4(1) The guarantor as registered owner hereby charges all the lands more particularly described in the schedule hereto with payment of all sums due or to become due under the provisions hereof."

The use of the word "guarantor" at (e) above would appear to be a misprint and should read "guarantee".

Clause 11 of Mr. Wood's own personal guarantee is also of relevance and it provides as follows:-

> "11. This guarantee shall be in addition to any other guarantee or other security for the Customer(s) which you may now or hereafter hold whether from us or any of us or otherwise and on discharge by payment or otherwise shall remain your property and in particular nothing herein contained shall operate to merge or extinguish our liability under any bill or bills of exchange accepted or endorsed by us or the Customer(s) of which you are the drawers or holders in due course and this guarantee shall not prejudice your rights or remedies under any such bill or bills."

UIB entered judgment against Mr. Wood on foot of his personal guarantee on 7th March, 1985 in the sum of IR£2,321,559.29 (€2,949,927.79). The parties are agreed that the total sum guaranteed by the four directors was fully discharged as of August 2006 in the manner set out by Mr. Wood at para. 13 of this affidavit of 24th July, 2008. Consequently, Mr. Wood, on behalf of Rockrohan, submits that any attempt now to recover monies against Rockrohan constitutes an effort to obtain payment twice in respect of the same liability.

The underlying argument made by Rockrohan is that the terms of the guarantee debenture do not reflect, the true agreement between the parties. Counsel for Rockrohan relied upon a number of documents, exhibited in Mr. Wood's affidavit, which predate the guarantee debenture from which he states it can be inferred that the guarantee debenture was not, as is alleged by UIB and asserted in its provisions, a stand alone security. These documents are fully dealt with by Mr. Wood at para. 15 of this affidavit of 24th July, 2008 and paras. 11 – 21 inclusive of his affidavit of 28th October, 2008.

It is submitted that the aforementioned documents demonstrate that the guarantee debenture was in support of and tied and collateral to the obligations of Mr. Wood under his personal guarantee. Rockrohan seeks to rely (*inter alia*) upon a letter from A&L Goodbody, UIB's then solicitors, dated 16th September, 1980 which Mr. Wood contends provides the explanation behind the need for the additional security from Rockrohan, namely to establish a contractual relationship between Rockrohan and UIB on which the asset mortgage could technically stand. Rockrohan also relies upon a significant number of other documents in support of its submissions including correspondence between UIB and Bula dated 9th March, 1991 and a UIB facility letter of 9th March, 1981. Further, Rockrohan also relies upon the fact that UIB has calculated the interest claimed herein from 28th July, 1982, the same being the relevant date for the calculation of interest under the personal guarantees, in seek support of its contention that the mortgage debenture was only ever intended as security for Mr. Wood's personal guarantee.

The within proceedings since inception have been based upon the provisions of the guarantee debenture dated 22nd September, 1981. The same is exhibited in the grounding affidavit sworn on behalf of UIB by Mr. Brian McConnell on 4th December, 1986. The guarantee debenture was executed by Mr. Wood as director and secretary of Rockrohan and was also executed by Mr. Nagle, Mr. Wood's fellow director. This guarantee debenture has been the subject matter of the attention of Mr. Wood and his legal advisors in the course of the Bank proceedings earlier referred to in this judgment wherein Mr. Wood challenged both the validity of the security and its underlying debt. Notwithstanding such scrutiny, Mr. Wood, for the first time now, over twenty five years after its execution, contends that its provisions do not reflect the true intention of the parties at the time the guarantee debenture was executed.

The terms which Rockrohan contends should be reflected in the guarantee debenture are entirely at odds with the provisions of the signed agreement. The guarantee debenture specifically states that the security thereby provided was to be in addition to any other security provided in respect of the said loan. Further, clause 11 of the joint and several personal guarantees also provided that these guarantees were to be in addition to all other security as may have been obtained by UIB in respect of Bula's liabilities.

There is no rule of legal construction such that would permit this Court to displace the objective meaning of the words so clearly provided for in the guarantee debenture in favour of those terms contended for by Rockrohan. The Court may only permit evidence of previous negotiations to be admitted in an action for rectification where a party seeks to establish that the terms of a written agreement do not reflect the true intention of the parties. Accordingly, the nature of the relief sought by Rockrohan on its present application must be viewed as an application for rectification of the guarantee debenture executed more than 25 years ago and one which is made in the teeth of the protestations of UIB that the terms agreed are those as were executed by Mr. Wood and his fellow director from whom no supporting evidence has been profferred.

The first question therefore is whether or not Rockrohan may maintain a claim for rectification of the terms of the guarantee debenture by way of Defence to UIB's application for possession subsequent to the substantive order made by Blayney J. on 16th February, 1987.

The provisions of O. 1, r. 1 of the Rules of the Superior Courts provide as follows:-

> "Save as otherwise provided in these rules, civil proceedings in the High Court shall be instituted by a summons of the court to be called an originating summons."

Order 54, rule 3 permits an Equitable Mortgagee to issue a Special Summons to seek relief of the type described at Order 3, rule 15. In turn, Order 3 sets out the classes of claims that can be maintained by way of special summons. Order 3 is introduced in the following fashion:-

> "Procedure by special summons may be adopted in the following classes of claims."

The use of the words "may be adopted" in Order 3 and indeed in Order 2 of the Rules of the Superior Courts to my mind make it perfectly clear that an originating summons is obligatory for all claims save those where the use of a summary summons or special summons is authorised under the Rules of Court. This is specifically provided for in O. 1, r. 6 which reads as follows:-

> "6. In all proceedings (other than to take a minor into wardship) commenced by originating summons, procedure by plenary summons shall be obligatory except where procedure by summary summons or by special summons is required or authorised by these Rules."

Order 38, rule 8 sets out the procedure to be followed by the court in special summons proceedings and also the range of orders that may be made. When the relevant affidavits have been filed by the parties the court may direct the trial of issues of fact, refer the proceedings to a plenary hearing or grant the judgment sought.

In the present case the replying affidavit of Rockrohan raised no issues of fact or law for the Court's determination. If, prior to judgment, Rockrohan had raised the issue of the validity of the terms of the guarantee debenture the proceedings might have been referred to a plenary hearing. In such circumstances, Rockrohan might have delivered a Counterclaim seeking rectification of the guarantee debenture. This did not occur and the proceedings were concluded on the basis of the affidavits filed. Accordingly, the Court must conclude that Rockrohan has no right to litigate the issue referred to at para. 4 of its notice of motion in circumstances where the substantive action concluded with the judgment of Blayney J. in February 1987. All that remains of those proceedings which are now under the effective control of the Examiner is the present application of UIB seeking possession for the purpose of enforcing its right of sale under that order.

It is perhaps easy to surmise why Rockrohan is seeking to obtain the relief set forth at para. 4 of its notice of motion within the special summons proceedings. If Rockrohan had proceeded to seek rectification of the terms of the guarantee debenture by way of plenary summons, UIB would inevitably have sought to have the proceedings dismissed as being bound to fail by reason of the provisions of the Statute of Limitations 1957. In this regard s. 72 of the Statute of Limitations 1957, provides as follows:-

> "72(1)Where, in the case of any action for which a period of limitation is fixed by this Act, the action is for relief from the consequences of mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it."

The mistake which is allegedly at the heart of the submissions made by counsel on behalf of Rockrohan was clearly discernable from any even cursory reading of the guarantee debenture. In circumstances where Rockrohan executed the said guarantee following the exchange of correspondence between the Bank's legal advisors and those of Rockrohan, it is unlikely that any case could be made out to suggest that the time limit for maintaining an action for mistake commenced otherwise than on the date of the execution of the guarantee debenture.

For the aforementioned reasons, the Court concludes that it has no jurisdiction to embark upon the exercise urged upon it by Rockrohan at this juncture and even if it did that the passage of time and the conduct of Rockrohan would in all probability preclude such relief being granted.

Given the Court's conclusions on Rockrohan's application for the relief sought at para. 4 of its Notice of Motion, it is not necessary to address what if any weight might have been attached to Rockrohan's submission as to the significance of the date from which UIB has calculated interest in the present proceedings. In this respect, the Court merely notes for the record that the mortgage debenture at clause 2(c) provides that Rockrohan was committed to paying, on demand, the monies guaranteed together with interest thereon "at the rate specified in the security from the date on which the monies ought to have been paid until the actual payment thereof". The monies ought to have been paid by Bula following the demand made by letter dated 28th July, 1982. Hence, there is nothing irregular about the calculation by UIB of interest from that date. The fact that interest is calculated from such date does nothing to lend any support to the argument made by Rockrohan that the guarantee debenture can be construed in support of the assertion that same came into being solely for the purpose of supporting Mr. Wood's own personal guarantee.

Whilst making no determination as to the bona fides of Rockrohan in seeking to raise the issue as to the terms of the guarantee debenture at this time, the Court is nonetheless surprised at the delay on the part of Rockrohan in contending that its terms are so manifestly different from those agreed. This is particularly so having regard to the extensive litigation to which Mr. Wood has been a party and wherein this security has been scrutinised not only by Mr. Wood but also by his fellow directors of Bula and Rockrohan and presumably by their legal advisors.

(5) An order directing that any title to and any right to sell, that Ulster Investment Bank Limited may have had with regard to the assets of Rockrohan Estate Limited, in particular the lands in Folio No. 28285 of the Register of Freeholders, Co. Cork, is extinguished by virtue of the provisions of the Statute of Limitations Act 1957.

(6) Further and/or in the alternative an order directing and declaring that the arrears of interest (if any) due and owing by the Rockrohan Estates Limited on foot of the well charging order granted by this Honourable Court on 16th February, 1987 are limited to six years pursuant to the Statute of Limitations Act 1957.

I propose to deal with issues numbered (5) and (6) above together as it is convenient to do so in light of the relevant case law.

Rockrohan's Submission regarding Issues (5) & (6)

Rockrohan submits that UIB's rights to an order for possession are statute barred by reason of the provisions of s. 11(6)(a) of the Statute of Limitations 1957 ("The Act of 1957"). Rockrohan submits that the twelve year time limit provided for in this provision commenced running against the interest of UIB on the date of the expiry of the stay placed upon the order for sale by the Supreme Court i.e. 2nd October, 1990.

As an alternative argument Rockrohan also relies upon the provisions of s. 33 of the Act of 1957 to allege that "the title of the plaintiff" to the said lands has been extinguished and hence, UIB has no entitlement to possession or sale of its lands.

Rockrohan submits that if the application for possession is one to which Order 42 of the Rules of the Superior Courts applies, it contends that the provisions of this order cannot be used to extend the right of UIB to possession of its lands in circumstances where that right has been extinguished by s. 11(6)(a) of the Act of 1957.

Rockrohan further contends that the plaintiff's entitlement to an order for possession has been extinguished by its adverse possession of the relevant lands.

Finally, Rockrohan relies upon S.11 (6) (b) and s.37(1) of the Act of 1957 to assert any interest due on foot of the monies declared well charged on Rockrohan's lands must be limited to six years from the date of the court order.

UIB's Submissions

UIB submits that its application to the Court for possession of Rockrohan's lands is not an "action" within the meaning of s. 11(6)(a) of the Act of 1957 and that accordingly the time limit provided for therein is of no effect. It further contends that its application for possession is not governed by O. 42, rr. 23 and 24 of the Rules of the Superior Courts. UIB denies that there is any provision in the Act of 1957 which precludes its present application for possession or its right to sell the lands the subject matter of the well charging order and order for sale. UIB submits that its application for possession is a step taken by it for the purposes of enforcing an existing right of sale and emphasises that such a sale takes place under the court's supervision. It denies that its right to recover interest is limited to the period of six years as contended for by Rockrohan. Finally, it denies that Rockrohan has obtained any rights to the lands concerned by way of adverse possession.

The Court's Conclusions

The following provisions of the Act of 1957 are relevant to the Court's conclusions on this issue, namely:-

"2(1) provides that 'action' includes any proceedings (other than a criminal proceeding) in a court established by law.

> 11(6) (a) An action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable.
>
> (b) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

13(2) The following provisions shall apply to an action by a person (other than a State authority) to recover land –

> (a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person;

33 At the expiration of the period fixed by this Act for a mortgagee to bring an action claiming sale of the mortgaged land, the title of the mortgagee to the land shall be extinguished.

36(1) No action shall be brought to recover any principal sum of money secured by a mortgage or charge on land or personal property (other than a ship) after the expiration of twelve years from the date when the right to receive the money accrued.

37(1) No action shall be brought to recover arrears of interest payable in respect of any principal sum of money

secured by a mortgage or charge on land or personal property (other than a ship) or to recover damages in respect of such arrears after the expiration of six years from the date on which the interest became due.

38 At the expiration of the period fixed by this Act for a mortgagee of land to bring an action to recover the land or for a person claiming as mortgagee or chargeant to bring an action claiming sale of the land, the right of the mortgagee or such person to the principal sum and interest secured by the mortgage or charge shall be extinguished."

The provisions of Order 42, rules 23 and 24 of the Rules of the Superior Courts are also relevant and they provides as follows:-

Order 42 rule 23:-

"As between the original parties to a judgement or order, execution may issue at any time within six years from the recovery of the judgement, or the date of the order."

Order 42, rule 24:-

"In the following cases, viz.:-

(a) where six years have elapsed since the judgement or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;

(b) …

(c) … the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly. The Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: and in either case the Court may impose such terms as to costs or otherwise as shall be just. Provided always that in case of default of payment of any sum of money at the time appointed for payment thereof by any judgement or order made in a matrimonial cause or matter, an order of *fieri facias* may be issued as of course upon an affidavit of service of the judgement or order and non-payment."

3. Of particular significance to the Court's judgment on issues (5) and (6) are three decisions to which the Court will later refer namely those in *Lowsley v. Forbes* (*Trading as L.E. Design Services*) [1999] 1 A.C. 329, *Ezekiel v. Orakpo* [1997] 1 WLR 340 and *Yorkshire Bank Finance Limited v. Mulhall & Anor* [2008] EWCA Civ. 1156. Having considered these decisions and such guidance as is available from Messrs Brady and Kerr in their 2nd Ed. of the *Limitation of Actions* and Scanlon in his *Practice and Procedure in Administration and Mortgage Suits in Ireland*, in conjunction with the submissions of the parties, the Court rejects the arguments made by Rockrohan in support of the relief sought at paragraphs 5 and 6 of its Notice of Motion.

The Statutes of Limitations 1957

Given that so much of the submission of Rockrohan is based upon various provision of the Act of 1957, it is worthwhile briefly reflecting upon the purpose of legislation of this nature. Limitation Statutes are intended to prevent stale claims and to relieve certain classes of defendants of the uncertainty of late claims being made against them. They are designed to further remove the potential injustice that may be generated by the increased difficulty of proving a claim or defence after an extended period of time. Brady and Kerr in their 2nd Ed. of *The Limitation of Actions* at p. 3 described such concerns as follows:-

"One can therefore conclude that the underlying rationales of the Statutes of Limitations 1957 and 1991, are threefold, and that they may be described as the certainty, evidentiary and diligence rationales."

These considerations do not apply where one party seeks to enforce a judgment or order previously made against the other party thereto at sometime removed from the date upon which it was made. There is no surprise or evidential unfairness inherent in such a process. This being so there are good policy reasons for the courts to distinguish between "actions" within the meaning of s. 2 of the Act of 1957 and procedures whereby an order or judgment may be executed. Similarly, there are good reasons, beyond the consideration of time limits, why a further distinction should be made between applications for leave to issue execution in respect of a prior order or judgment and an order required for the purposes of giving effect to an existing court order and these reasons emerge in the case law referred to later in this judgment..

The Nature of the Plaintiff's Claim

The next matter which is relevant to the Court's determination on these issues is the nature of the plaintiff's claim.

The present Special Summons proceedings are based on a covenant by Rockrohan to discharge certain liabilities under the guarantee debenture. That covenant entitled UIB to seek to recover such indebtedness, if not discharged by a particular date, by a sale of Rockrohan's lands. The covenant created an equitable charge in favour of UIB but did not convey to UIB any legal or equitable estate in Rockrohan's lands. At no time was UIB entitled to any title or any right to occupy the lands of Rockrohan either before or after the order of the Court dated 16th February, 1987.

UIB did not issue summary summons proceedings seeking judgment against Rockrohan in respect of its liabilities under the guarantee debenture. It sought, instead, to seek an order declaring the monies referred to in the order of the Court of 16th February, 1987 declared well charged against Rockrohan's lands. The relief granted to UIB was a right to sell Rockrohan's lands in default of payment of the monies outstanding. The sale is a court sale and is for the benefit of all other encumbrancers, even though UIB has carriage of the sale.

A plaintiff who obtains a well charging order and order for sale is under an obligation to all concerned to obtain the best price possible for the lands and this obligation may require the party having carriage of the sale to obtain assistance from the court. As an order for possession will not be made, in the absence of special circumstances, at the time the well charging order is made, an application for possession is perhaps to be anticipated at a later date. As was stated by the Master of the Rolls in *Bank of Ireland v. Slattery* [1911] 1 I.R. 33, at p. 40:-

"Where a sale has been ordered, the Court of Chancery has the fullest power in a case in which it is obviously in the interest of the parties that possession be got up before sale, as, for instance, where a mortgagor is wasting the property, or doing anything to prevent a sale, to order, on a mere motion or summons, without a more formal procedure, the delivery up of the possession of the property to some person appointed by the Court. And I have made orders over and over again directing the mortgagor to give up possession before the sale in order that buyers and bidders might not be intimidated."

The right of the mortgagee or charge holder to apply for possession after an order for sale has been made is dealt with by Scanlon (1963) in *Practice and Procedure in Administration and Mortgage Suits*, at p.110:-

"Where the court directs the sale of any property, any party bound by the order and in possession of the property shall be compelled to deliver up possession to the purchaser or to such other person as may thereby be directed. Any mortgagee may, in a proper case but not as a matter of course, obtain delivery of possession of the mortgage property from the mortgagor apart from, and not merely ancillary to, a sale; but the rule does not contemplate a proceeding for possession alone but as ancillary to other relief."

Accordingly, when considering issue No. 5 on Rockrohan's application, the Court must recognise that UIB's application for possession is an application for an order which is ancillary to the well charging order and order for sale previously made and is sought purely for the purpose of enabling it enforce that order. UIB is not maintaining a further "action" against Rockrohan. Blaney J. in his order of the 16th Feb 1987 declared that UIB in its capacity as a secured creditor was entitled to sell Rockrohan's lands for the purpose of discharging its liabilities. The fact that the well charging order and order for sale was granted to UIB as a secured creditor or chargeholder as opposed to a judgment creditor is relevant to the applicability of the time limits referred to in the Act of 1957 as is more clearly demonstrated from the relevant case law.

Relevant Case Law

The decisions of the Court of Appeal in *Yorkshire Bank Finance Limited and Ezekiel*, authorities that only came to the Court's attention following the conclusion of the hearing but which engage with those authorities relied upon by the parties in their submissions provide many of the answers to the legal issues raised on behalf of Rockrohan.

In *Yorkshire Bank Finance Limited*, the second named defendant guaranteed certain sums owed by her Company to Yorkshire Bank. The Company defaulted upon its obligations and the bank obtained summary judgment for a liquidated amount of slightly in excess of IR£40,000 in April of 1991. The bank, in June of 1991, obtained a charging order under the Charging Orders Act 1979 which, at s. 1(1), provides as follows:-

> "1. Where, under a judgment or order of the High Court or a county court, a person (the 'debtor') is required to pay a sum of money to another person (the 'creditor') then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order."

Section 3(4) of the same Act provides as follows:-

> "3(4) Subject to the provisions of this Act, a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand."

In January 2007, the second named defendant applied to set aside the charging order on a number of grounds. In particular, she submitted that pursuant to s. 20(1) of the Limitation Act 1980, the same being equivalent to the provisions of s. 36(1) of the 1957 Act, that the Bank was precluded from taking any steps to recover the sum secured by the charging order. She asserted that the right to receive the relevant principal sum of money secured by the mortgage or charge on the property had accrued more than twelve years before her application. Accordingly she submitted that the charging order could not be enforced and should therefore be discharged.

The second named defendant was unsuccessful in her application. The Court concluded (*inter alia*) that the enforcement of the charging order was not barred by s. 20(1) of the Limitation Act and that the bank's rights were not barred after twelve years because the holder of a charging order did not have a right to possession such that time could run against it under s.15. The provisions of s.15 in the Limitation Act 1980 are similar to those provided for in s. 13(2) of the 1957 Act, the same being the provision which supports a claim to adverse possession.

In coming to its aforementioned conclusions, the Court gave consideration to the two decisions cited earlier in this judgment namely those of *Ezekiel and Lowsley*.

In *Ezekiel*, the plaintiff obtained judgment against the defendant for a sum in excess of IR£20,000 in 1979. The plaintiff obtained a charging order in respect of this judgment in 1982 which made no specific mention of interest. Subsequently, the plaintiff in 1993 applied for an order for possession and sale of the premises over which the charging order had been obtained over eleven years previously. In this respect it is important to note that the time limit in s. 24(1) of the U.K. Limitation Act 1980 provides a six year limit for a plaintiff to bring an "action" on foot of a judgment as opposed to the 12 year limit provided for in S.11.(6)(a) of the Act of 1957.

The defendant tendered the principal sum outstanding and applied to discharge the charging order on the basis that there had been no reference to interest in the charging order. The trial judge held that the plaintiff's security extended to interest on the judgment debt even though there was no reference to the interest in the charging order but also held that by virtue of the provisions of s. 20(5) of the Limitation Act 1980, only six years interest was recoverable. From that decision both parties appealed.

One of the issues considered by the Court of Appeal was whether or not the application for possession and sale was one governed by O. 46, r. 2 of the RSC, a provision remarkably similar to our Order 42 rule 24, which provided as follows:-

"(1) A writ of execution to enforce a judgment or order may not issue without the leave of the court in the following cases, that is to say:-

(a) where six years or more have elapsed since the date of the judgment or order; …"

Millet L.J. concluded that there was a difference to be drawn between an application for leave to issue execution and an application in aid of enforcing an existing order. He held that O. 46, r. 2 did not apply to the application for possession and sale. He stipulated that O.46, r.2 was meant to cover situations which called for some further consideration or investigation by the court before it might justify directing execution. He stated that the application in 1993 for an order for possession and sale was not an application for execution but an application to enforce a charging order previously made. In dismissing one of the arguments raised which relied upon the definition of what constituted a process of execution under the Companies Act 1948 he stated as follows, at p. 344:-

> "In my judgment that case has no bearing on the present, where the question does not depend on the meaning of execution in the Companies Act for a particular statutory purpose, but whether an application for possession or sale under an existing charging order is an application for the issue of a writ of execution for the purpose of the Rules of the Supreme Court. In my judgment it is not."

Millet L.J. was further required to consider whether s. 20(5) or s. 24(2) of the Limitation Act 1980, the equivalent in this jurisdiction being s.37(1) and s.11(6)(b), were such as to limit the plaintiff's right to interest to the six year period prior to the application to enforce the charge. In this regard, Millet L.J. dealt with the matter in the following way, at p. 346:-

> "It is important to recognise at the outset what was the true nature of the plaintiff's application in 1993. He was not bringing an action upon the judgment debt which he had obtained in 1979. He was not even seeking to enforce execution of that judgment. He did that when he applied for and obtained the charging order in 1982. In 1993, he was a secured creditor with the statutory equivalent of an equitable charge. He was taking action to recover what was due to him, not as a judgment creditor, but as a secured creditor. He was in the same position as any other creditor with an equitable charge which had been created in 1982 and which he wished to enforce in 1996. Of course he had to apply to the court for orders for possession and sale, not because he was executing a judgment – as I say, so far as this property was concerned, that process had come to an end when he obtained the charging order – but because he needed an order for possession in order to effect a sale. Because he had no power of sale unless until the court ordered it, the question was not: 'What does the charge secure?' but, 'How much interest must the defendant pay to redeem the charge so as to prevent the sale from taking place in order to bring himself within RSC., Order. 50, rule 7?' Or, to put it another way 'How should the account be taken after the sale if the plaintiff realises his security; should the plaintiff account to the defendant for the surplus after deducting principal and six years interest or after deducting the principal and the whole of the interest due to him since the judgment debt?'
>
> It is a settled rule that a mortgagor is not entitled to redeem a mortgage unless he tenders the full amount of the interest due, whether or not any part of the interest is statute barred: See *Dingle v. Coppen* [1899] 1 Ch 726. Likewise, when a mortgagee sells the mortgaged property, he is entitled to retain all arrears of interest, whether or not statute barred, before accounting to the mortgagor for the surplus."

It is clear that the facts in *Ezekiel* are such that the decision of Millet L.J must be considered good authority for the submissions made by UIB that its application for possession is not one to which Section 11(6)(a) of the Act of 1957 applies as it cannot be considered to be an "action" within the meaning of that section. It is also supportive of UIB's submission that the application for possession is not one governed by Order 42 rules 23 and 24 of the RSC as it is not an application for "execution" within the meaning of that rule but rather an application for an order to assist it in enforcing the order previously made which itself permitted UIB to execute the well charging order by a sale of the Rockrohan lands.

Millet L.J., in *Ezekiel*, went on to consider in some depth the decision in *Lowsley*, a decision referred to by both parties in the present proceedings, prior to concluding that that it was not relevant to the issues in *Ezekiel*. In *Lowsley* the Plaintiff obtained a judgment on consent in the sum of £70,000 which remained unpaid for eleven and a half years and which judgment attracted interest. At that stage the plaintiffs sought a garnishee order and a charging order against the defendant's lands. The Court of Appeal held that the court could make a charging order to secure a judgment debt and interest which had accrued since the judgment even though more than six years had expired since the judgment debt had become enforceable. This was permissible as s. 24(2) of the Act of 1980, (the same being the equivalent to S.11(6)(b) of the Act of 1957) applied only to a substantive action on a judgment and not to an application which amounted to a process of execution. The Court concluded that the process of execution was one governed by the Rules of Court rather than the Limitation Act of 1980.

In the present case Counsel for UIB relied on *Lowsley* in support of his assertion that an application for possession was not an "action" within the meaning of S.11(6)(1). However, Counsel for Rockrohan argued that the Court should reject the Court's conclusions in *Lowsley* on that issue due to the particular historical background to the Limitation Act of 1980, which he submitted would justify this Court reaching a different conclusion. He nonetheless sought to rely on *Lowsley* in support of his argument that UIB's claim to interest should be limited to the period of six years in the event of the proposed sale being permitted. In *Lowsley* the House of Lords held that the words "no arrears of interest….shall be recovered" in s. 24(2) of The Limitation Act 1980 bore their ordinary meaning and that the section barred execution for interest after six years in respect of all judgments.

In concluding that the decision in *Lowsley* was of no application to the facts in *Ezekiel*, Millet L.J. relied extensively on the decision of the Court In *Re Lloyd* [1903] 1 Ch 385. In relation to *Lowsley*, Millett L.J. stated as follows, at p.350:

> "In my judgment neither s. 24(2) of the Act of 1980 nor that case is relevant to the question which we have to decide, which is whether a secured creditor who holds a charging order can recover more than six years' interest out of the proceeds of enforcing his security. By doing so, he is not bringing an action on the judgment; nor is he seeking to enforce the judgment, whether by a process of execution or otherwise. He is enforcing his rights as a secured creditor under the equitable charge which was created by the charging order. The application is of a different kind from that considered by this court in *Lowsley v. Forbes*; the relevant period of six years is different; so is the statutory provision in point."

He accordingly went on to conclude that the provisions of s. 24(2) and s. 20(5) of The Limitation Act 1980 (being the equivalent of S 11(6)(a) and 37(1) in the Act of 1957) placed no statutory restriction on the recovery of interest.

The decision of Lloyd L.J. in *Yorkshire Bank*, in applying the decision of the Court in *Ezekiel*, succinctly summarises the decision in *Lowsley* insofar as the restriction on the claim for interest is concerned in the following manner:-

> "[24] …thus, if a charging order is made more than six years after the date of the relevant judgment, it will secure arrears of interest on the judgment debt, but only for the period of six years up to the date of the charging order. It will also secure interest, until the principal is paid, but that is a different matter."

Accordingly *Lowsley* is only authority for the proposition that where a judgment debt becomes the basis for a charging order that the charging order can only secure six years judgment interest on the relevant lands. The decision does not provide any authority for circumscribing the recovery of interest arising subsequent to the making of the charging order, which interest continues to accrue until the outstanding debt and all interest thereon is discharged by payment or realisation of the security by the chargeholder. For this reason the Court concludes that the decision in *Lowsley* is of no relevance to the interest recoverable by UIB on foot of its well charging order. Neither is the decision of significance to the provisions of S 11(6)(a) insofar as the decision in *Ezekiel* clearly demonstrates that the nature of UIB's present application for possession is neither a fresh "action" within the meaning of that section nor a process of "execution" within the meaning of the Rules of Court, the distinction between these processes being at the centre of the Court's considerations.

There are also practical reasons why the Court believes that the provisions of s. 11(6)(b) nor indeed any other provision of the Act of 1957, were intended to apply in the manner contended for by Rockrohan. The relief granted by the court in proceedings brought of foot of an equitable mortgage or charge provides the plaintiff with the right to recover monies outstanding by seeking a sale of the defendant's lands. That sale is under the control of the court and is for the benefit of all who may have a charge or encumbrance burdening the land. The plaintiff's ability to realise a defendant's assets is not entirely within its control. The uncertainty of a plaintiff's ability to realise the assets the subject matter of the court order within any defined period is all too readily apparent from the facts in the present case. Firstly, there was the delay generated by the earlier proceedings wherein a challenge was made to the security on foot of which the plaintiff obtained its order for sale. Secondly, there was the claim of Mr. Hegarty to adverse possession of certain portions of the lands the subject matter of the well charging order. Whilst this claim did not ultimately trouble the Court on the present application, in another case such a claim could have delayed an application for possession or the possibility of affecting a sale for many years. Finally, the judicial review proceedings instituted by Rockrohan also delayed UIB's present application for a further period of approximately eighteen months.

Any number of complications may arise, unrelated to any default on the part of a plaintiff, which could result in the lands charged not being sold within six years of obtaining a well charging order. On the basis of Rockrohan's arguments, a plaintiff might find itself unable, because of matters outside its control, including obstruction tactics on the part of a defendant, to recover the sums due for principal and interest which a defendant had contracted to pay at the time the charge was created. All of these factors would suggest that it is unlikely that the legislature intended to impose any time limit on firstly, the right of a plaintiff to enforce a well charging order, secondly, its rights to take such steps as might prove necessary to enforce that order or thirdly, its right to recover interest on the monies outstanding on foot of such order.

In relation to s.37 of the Act of 1957, in these proceedings UIB sought to have certain sums for principal and a further sum for interest declared well charged on the defendant's lands. That portion of UIB's claim as related to interest was incurred within the six year period prior to the commencement of the action, as is apparent from the pleadings. Thus, the requirements of s. 37 of the Act have been met. The section cannot be deemed to apply to interest which has accrued since the making of the well charging order. In this regard the Court notes that what is provided for in the order of the Court is for continuing interest as per the guarantee debenture "until payment". Accordingly, there is no restriction on the entitlement of UIB to recover interest which arises subsequent to and/or in accordance with the terms of the well charging order.

Finally, s.33 of the Act of 1957 does not apply to the facts in the present case. UIB, as the holder of an equitable charge, has never enjoyed any title to Rockrohan's lands. Accordingly the question of the extinguishment of title simply does not arise for consideration.

Adverse Possession

The Court concludes that the right of UIB to sell Rockrohan's lands or to obtain the order for possession as sought are not defeated by any right of Rockrohan to what it describes as "adverse possession" of such lands. The provisions of s. 13(2) of the Act of 1957 are set out earlier in this judgment. That section forms the basis upon which squatters or other persons in possession who are not the owners of land may seek to deny recovery of that land by their owners.

The argument of Rockrohan contending for adverse possession based on the provisions of the above section appears to be based on a misunderstanding as to the nature of the present well charging order proceedings. The proceeding have as their foundation stone a covenant by Rockrohan to discharge certain liabilities. That covenant created an equitable charge but conveyed no legal or equitable estate in those lands to UIB as is clear from the decision in *Ezekiel*. Time could never run against UIB as it has never had any title or right to occupation of the lands.

The case of *Ashe .v. National Westminster Bank* [2008] EWCA Civ 55 relied upon by Rockrohan is not of any assistance to the Court on the issue of adverse possession as it relates to a legal mortgage. In that case the mortgagee permitted the mortgagor to remain in possession whilst not having made payments on foot of the mortgage for in excess of twelve years. In that case the title to the lands was with the mortgagee from the date of the mortgage and the mortgagor could therefore be deemed to be in possession adverse to the bank's interest from the date it ceased to make its mortgage payments. The bank had a right to possession under the legal mortgage and time began to run against it from the date upon which that right accrued.

The application of UIB for an order for possession is not an action to recover land as already determined by the Court earlier in this judgment. UIB has never had ownership or possession of Rockrohan's lands. Rockrohan has at all times been in possession and entitled to the ownership of the relevant lands. Accordingly its possession of these lands cannot be deemed to have extinguished any right on the part of UIB to effect a sale of such lands or its present right to possession of those lands to enforce its existing right of sale.

Having considered the decisions in the case law referred to above and the written and oral submissions of all parties, the Court has no difficulty concluding as follows in relation to issues 4 and 5, namely:-

(a) UIB's application for possession is not "an action" for the purposes of s. 11(6)(a) of the Act of 1957.

(b) The provisions of s. 11(6)(b) and s. 37(1) do not apply so as to restrict the right of UIB to interest to the period of six years post the date of the well charging order.

(c) The provisions of s. 36(1) and/or s. 37(1) do not restrict the right of UIB to proceed to recover the principal and interest declared well charged by the Court in its order of the 16th February, 1987.

(e) The provisions of s. 13(2)(a) do not apply to support any claim of Rockrohan to adverse possession.

(f) The provisions of s.33 of the Act of 1957 do not apply to the facts of the present case.

(e) That O. 42, rr. 23 and 24 do not apply to UIB's application for possession is not an application to execute a judgment or order that is an application to enforce a prior order of the Court. If the Court is incorrect in this regard, the Court concludes that there are good reasons for the Court to grant the relevant extension of time so as to permit UIB to maintain its present application.

(f) There is nothing to preclude UIB from obtaining possession of Rockrohan's lands nor effecting a sale over the same so as to recover all of the principal and interest outstanding.

For the avoidance of doubt, if the Court is wrong in its conclusion as to the nature of the application for possession and if the application is governed by Order 42 rules 23 and 24, the Court is entirely satisfied that UIB has established good reason for the exercise by the Court of its discretion to grant the necessary leave to issue execution in the manner now proposed. The Court notes the decision of the Supreme Court in *Philip Smith and Genport Ltd. v. Hugh Tunney and others* [2004] IESC 24, at p.512, where that Court concluded that it was not necessary for a plaintiff applying for relief under Order 42 rules 23 and 24 to show the existence of unusual, exceptional or very special reasons for a successful application to issue execution more than six years after the date of an order or judgment once there was something to which the judge could attach the Court's discretion.

In this case there are reasons advanced to support the exercise by the Court of its discretion. The initial period of delay was brought about by various applications by Rockrohan for a stay on the relevant order. Thereafter, the validity of the security and the debt underlying the order were the subject matter of a challenge in the Bank proceedings. The Court accepts that it would have been futile for UIB to have sought to pursue a sale of Rockrohan's lands whilst any such proceedings were in being. The fact that Rockrohan was not a party to those proceedings is immaterial having regard to the state of knowledge of its Director and beneficial owner Mr. Wood who was intimately involved in the extensive litigation referred to earlier in this judgment. Had the Bank litigation been successful, the same would have inured to Rockrohan's benefit. Further, Rockrohan voiced no complaint regarding any delay on the part of UIB in pursuing its right to sell the relevant lands. Neither could Rockrohan have been lured into any false sense of security that UIB did not intend to pursue its rights under the well charging order. In this regard the Court notes the service of the Notice to Proceed dated the 12th Feb 1999 .

In considering the applicability of the 1957 Act and Order 42 rules 23 and 24, the Court has given consideration to the prejudice that could be occasioned to a defendant if a plaintiff were to delay for an excessive period in seeking to effect a sale of the lands over which it had obtained a well charging order particularly having regard to its right to continuing interest. These concerns are assuaged by the procedures available to the debtor to ensure he is not prejudiced by such a delay. Clearly the debtor may discharge the debt but even if unable to do so he may pursue an application to the court under O. 33, r. 11 which provides as follows:-

"11. If it shall appear to the court on the representation of the examiner or otherwise that there is any undue delay in the prosecution of any accounts or enquiries or in any other proceedings under any judgment of order, the court may require the party having the conduct of the proceedings, or any other party, to explain the delay, and may there upon make such order with regard to expediting the proceedings or the conduct thereof, or the stay thereof, and as to the costs of the proceedings, as the circumstances of the case may require; and for the purpose of foresaid, any party, or a special solicitor to be made by the court for the purpose, may be directed to summon the persons whose attendance is required, and to conduct any proceedings, and to carry out any directions which may be given; and any costs of such special solicitor shall be paid by such parties or out of such funds as the court may direct; and if any such costs be not otherwise paid, the same shall be paid out of such monies (if any) as the Oireachtas may provide."

Rockrohan could have applied to court under O. 33, r. 11 to seek to have the proceedings and/or sale of the land expedited so as to avoid ongoing interest. To the contrary, Rockrohan firstly applied to the High Court for a stay on the well charging order and later to the Supreme Court to seek to postpone execution by UIB on foot of the guarantee debenture until the outcome of both the Tara and the Bank proceedings. Clearly, the reason why Rockrohan did not seek to avail of the procedure under O. 33, r. 11 was that Mr. Wood as a director of Bula was seeking to challenge the validity of the underlying security which was the subject matter of the order of Blayney J. of February 1987 which, had he been successful, would have had the effect of extinguishing the rights of UIB in these proceedings.

The Court concludes that s. 32(2)(a) of the Act of 1957 is the only section of that Act which provides time limits relevant to these proceedings. That section requires a person who claims a right to the sale of land which is subject to a mortgage or charge to bring that action within twelve years from the date the right to maintain the action accrued. The Special Summons proceedings were commenced by UIB within that time limit. Thereafter, the time within which that order may be enforced or any ancillary relief obtained is not restricted by the provisions of the Act of 1957.

(8&9) A declaration that any liability of Rockrohan Estate Limited is subject to the primary debt on the Bula Limited loan account being calculated on the basis that the funds received in December, 1985 in respect of CRH dividends and the sale proceeds of CRH shares having been applied on receipt against the debt of Bula Limited and not having been held in a suspense account.

Rockrohan's Case

Rockrohan submits that UIB had in its possession as security for the Bula loan certain CRH shares and dividends since September 1981. Rockrohan relies upon the express provisions of a Letter of Transfer dated 22nd September, 1981 which authorised UIB, in default of payment by Bula on the loan, to sell all or any securities held by it and to apply the net proceeds of sale towards payment and discharge of the loan. Rockrohan submits that UIB was mandated to sell the shares and dividends with immediate effect and credit the same to Bula's liabilities when Bula was in default to UIB in July 1982. Instead, interest was permitted to accrue on the liabilities outstanding by Bula between July 1982 and December 1985 with which interest Rockrohan was affixed at the time the well charging order was made by Blayney J. in February 1987.

Rockrohan also contends that the proceeds of sale of the CRH shares and dividends should have been placed in an interest bearing account rather than in a Securities Realised Account in the name of Rockrohan where those monies remained until they were applied to the Bula Limited Loan Account on 23rd May, 1986. If treated in this way the sum of IR£690,405 (€876,630.90) being the proceeds of the sale of the shares and dividends would have been worth IR£4,354,407 (€5,530,097) in May 2003. If this had been done the monies in the interest bearing account would have exceeded the liability of Mr. Wood and his fellow directors on foot of their personal guarantees. The total liabilities discharged by them on foot of their personal guarantees was a sum of €2,949,927.79.

UIB's Response

UIB contends that all times it acted in accordance with the terms of the guarantee debenture, the letter of facility dated 22nd September, 1981 and the personal guarantees dated 22nd September, 1981. UIB sold the CRH shares and dividends in December 1985. The proceeds of sale were applied to the liabilities of Rockrohan under the guarantee debenture and accordingly Rockrohan has received credit for the realisation of these assets in the course of the within proceedings.

UIB contends that it lodged the monies realised from the sale of the CRH shares and dividends to the Rockrohan (Securities Realised Account) until such time as the Bank proceedings were concluded in the Supreme Court when the said sum of €876,630.90 (IR£690,403.00) was credited to the Bula Limited loan account. This was in accordance with normal banking practice and also in accordance with the agreement between the parties.

The Court's Conclusions

Rockrohan contends that there was an obligation on UIB to realise the value of the CRH shares and dividends in July 1982 and thereafter to immediately apply these proceeds to the Bula account in discharge of its liabilities when it defaulted on its loan obligations. Notwithstanding this assertion on the part of Rockrohan, no legal basis has been proffered for this submission by reference to the terms of the guarantee debenture, the personal guarantees or the Letter of Transfer dated 22nd September, 1981. It is undoubtedly the case that UIB had an entitlement to realise all security held by it on default of payment of the loan when due. There is no clause or provision which mandates the sale by UIB of such securities with immediate effect following Bula's default on foot of the loan facility.

Rockrohan has canvassed a wide range of complaints regarding the manner in which UIB dealt with the monies realised on the sale of the CRH shares and dividends. The only matter of concern to this Court, Rockrohan having failed to establish that UIB was mandated to realise the value of the shares and dividends with immediate effect as of July 1982, is to be satisfied that Rockrohan, as opposed to any other third party, received the benefit of those securities in terms of the sum declared well charged on its lands. The Court is not concerned with how the Bank's actions impacted on Bula or on the liability of its directors under their personal guarantees. The later issues, if they had any validity, should have been canvassed by Bula's directors in the proceedings brought against them by the Bank on foot of their personal guarantees. The Court notes that notwithstanding these late protestations, which are in any event extraneous to these proceedings, that the guarantors nonetheless, and presumably with the benefit of legal advice, each fully discharged their liabilities to UIB on foot of their personal guarantee as set out by Mr. Wood at para. 13 of his affidavit of 24th July, 2008.

The Court notes that the affidavit of Brian McConnell on 4th December, 1986, in grounding the application for the well charging order sets out full particulars of how the sums which UIB sought to have declared well charged on Rockrohan's lands were calculated. That affidavit exhibits a letter advising Rockrohan as to how the sums in respect of principal and interest had been calculated. Enclosed with that letter was a schedule which shows the treatment of the outstanding liabilities both in respect of principal and interest and demonstrates how the monies realised in respect of the sale of the CRH shares and dividends were applied. This document is exhibit "C" to Mr. McConnell's affidavit. The schedule attached to UIB's letter of 17th July, 1986 shows that the proceeds of the CRH shares and dividends were credited to the liability of Rockrohan under the guarantee debenture on 2nd December, 1985 and 10th December, 1985 respectively.

Rockrohan in its replying affidavit filed by Mr. Wood to those proceedings made no challenge to any delay on the part of UIB in realising these assets. Neither did Mr. Wood in any way dispute how the Bank had treated the monies realised from the sale of the CRH shares and dividends. In these circumstances the Court has in fact adjudicated upon the sums due and owing on foot of the security the subject matter of the proceedings.

Whilst Rockrohan appealed against the well charging order and was successful in obtaining a further stay on the order in the Supreme Court, no challenge was made to the sum declared well charged in respect of principal or interest and which sums were adjusted to give credit for the monies realised on the sale of the CRH shares and dividends as particularised in the schedule attached to the letter of the 17th July, 1986.

What is also of some importance in relation to this issue is that Blayney J. in his order dated 16th February, 1987 provided a period of one month within with Rockrohan might dispute the amount of principal and interest declared well charged on its lands. No dispute was raised in the Office of the Examiner regarding the amounts declared well charged and as already

stated there was no appeal against the same. The issue is therefore, in the eyes of this Court, *res judicata*.

The Court accordingly concludes that there is no merit to the assertions made by Rockrohan to the effect that the dealings by UIB with the monies realised in respect of the CRH shares or CRH dividends affords them any basis for seeking to undermine the sums declared well charged in the order of this Honourable Court dated 16th February, 1987.

Conclusion

For all of the reasons earlier set forth in this judgment the Court concludes that there is no merit to the claims made by Rockrohan in its amended notice of motion and accordingly the Court will decline all of the relief sought. Consequently, the Court will grant to UIB the relief sought in its Notice of Motion.