THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 91

Appeal No. 2015/00057

Peart J.
Irvine J.
Hogan J.

HALSTON STREET CREDIT UNION LIMITED

PLAINTIFF/RESPONDENT

- V -

RAYMOND COSTELLO

DEFENDANT

AND

EMBERTON FINANCE LIMITED

APPLICANT/APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 23rd day of April 2015

1. This is an appeal against an order of the High Court (Barrett J.) made on 23rd January, 2015, whereby he refused the application of Emberton Finance Limited, ("Emberton") to extend the time fixed by the Examiner to admit its claim to have a judgment mortgage, which it had registered against the property of the defendant, discharged out of the proceeds of the intended sale of that property.

2. The appeal concerns the circumstances in which an application of this nature should or should not be granted by the High Court when exercising its jurisdiction pursuant to Ord.55, r.36 of the Rules of the Superior Courts.

Background

3. Emberton's interest in sale of the defendant's property is stated to arise from the fact that by loan sale agreement, dated 19th December, 2013, Friends First Finance Limited ("Friends First") assigned unconditionally all of its loan assets, including the benefit of certain judgments, to Emberton. By subsequent deed of transfer, dated 3rd March, 2014, all loan assets belonging to Friends First were also assigned to Emberton.

4. Prior to the aforementioned assignment, Friends First obtained judgment against the defendant on 26th July, 2010, for the sum of €28,805.12 together with costs of €644. Then, on 2nd December, 2010, that sum was registered as a judgment mortgage against the defendant's interest in the lands and premises contained in Folio WX39665F.

5. On 15th November, 2011, Halston Street Credit Union ("Halston"), the respondent on this appeal, obtained judgment against the defendant for a sum of €75,459.64 and on 20th December, 2011, proceeded to register that judgment against the defendant's interest in the folio of land last referred to.

6. Halston instituted proceedings on 23rd February, 2012, seeking to have its judgment declared well charged on the defendant's interest in the aforementioned lands and on 30th July, 2012, duly obtained an order to that effect together with an order for the sale of the property.

7. Consequent upon that order, on 15th August, 2013, the Examiner directed that Halston advertise for encumbrances, which it duly did by the insertion of notices in *The Irish Independent* and *The Wexford People*. These called on creditors of the defendant to submit their claims before 27th September, 2013.

8. The Examiner also directed Halston to notify Friends First of his direction and this was done by letter dated 22nd August, 2013. A further letter was sent to Friends First on 23rd of July, 2014, noting that it had made no claim in respect of its judgment of 26th July, 2010, advising that the property was moving to auction and that if it wished to pursue a claim against the property an application would have to be made to the court seeking its consent to the late submission of such a claim.

9. By notice of motion dated 24th October, 2014, Emberton duly applied to the High Court seeking leave to submit a claim to the Examiner's Office in respect of its judgment mortgage. There then followed an exchange between Halston's solicitors and those of Emberton regarding the *locus standi* of Emberton, as successor in title to Friends First, to make that application.

10. Emberton's application was grounded upon an affidavit of Mr. Ciaran Duffy in which he set out the factual background referable to the judgment obtained by Friends First and to the manner whereby Emberton became entitled to the benefit of that judgment. He also referred to the judgment obtained by Halston and to the proceedings wherein it obtained a well charging order and an order for sale of the property.

11. Mr. Duffy was not in a position to provide any concrete reason why Friends First had failed to lodge a claim in the Examiner's Office notwithstanding the correspondence and advertisements relied upon by Halston. The best he could do was to state:-

> "I cannot explain why a claim was not made in advance of the stipulated date except to proffer a possible explanation to the Court to the effect that as the advertisements were placed in the two newspapers over the summer months, it is possible that they were simply overlooked by the predecessor in title of this debt. I say that as Emberton Finance Limited is now the legal owner of this debt, it is most anxious to ensure that it receives what it is lawfully entitled to under the judgment from the sale of the property."

12. The application of Emberton was opposed by Halston, based on the affidavit of Ms. Emma Lynch. Her principal complaints were

that Halston had fully complied with its obligations and that no valid explanation had been advanced to justify how the time limit which had been imposed by the examiner had been overlooked or ignored by Friends First. Ms. Lynch further questioned the proof that had been provided by Emberton as to its right to make a claim as successor in title to the interests of Friends First, and she asserted that it would be prejudicial to admit Emberton's claim as it would take priority over that of Halston.

Judgment of the High Court
13. In the course of a lengthy and closely considered judgment delivered on 16th December, 2015, the High Court judge stated that in exercising his discretion on the application before him he felt it appropriate to have regard to, *inter alia*, to the following matters:

> (a) The purpose of well charging orders in the context of judgment mortgages;
>
> (b) The principles which apply when the parties seeks to have a judgment that was obtained against them in default of defence set aside for surprise and
>
> (c) Whether there were any special circumstances which required to be considered on the application.

Then, having had regard to these considerations and the particular circumstance outlined on affidavit, he refused Emberton's application.

Submissions
14. Mr. O'Keeffe SC on behalf of Emberton submitted that the trial judge had applied the wrong test when considering how he should exercise his discretion on an application under Ord. 55, r.36 of the Rules of the Superior Courts. While he accepted that "special leave" should not be granted automatically, he submitted that unless a court was satisfied that prejudice would arise to other creditors, leave should be granted. On the facts of the present case, Halston would not be prejudiced by the extension of time, he submitted, as the list of encumbrances has not yet been finalised and the property has not been sold. By contrast, the refusal of the relief would result in the loss to his client of its right to recover its judgment out of the proceeds of sale. While accepting that there was no legal authority precisely on point, he relied by way of analogy on certain case law concerning the admission of late claims in the administration of estates and in the course of bankruptcy. In particular, he relied upon the judgment of Power J. in *Browne v Browne* [1919] 1 I.R.251.

15. Mr. O'Scanaill S.C. on behalf of Halston submitted that the burden of proof lay upon Emberton to establish the existence of circumstances such as would justify the court granting relief under Ord., 55 r. 36. The words "special leave", he submitted, had to be afforded considerable weight and must be assumed to have a particular meaning. He maintained that these words were intended to impose a higher threshold than would otherwise be imposed thereby if the word "special" was not included in the rule. Counsel submitted that the circumstances outlined by Mr. Duffy fell woefully short of what might reasonably be considered necessary under the rule.

16. Counsel also relied upon the fact that Halston had fully complied with the directions of the Examiner and was accordingly, he submitted, entitled to the benefit of the notice that had been inserted in the relevant newspapers which advised any incumbrancer that if they failed to enter their claim with the examiner before 20th September, 2013, they would be peremptorily excluded from the benefit of the sale.

17. Finally, counsel submitted that, insofar as Ord. 55, r.36 permitted the court to grant the relief sought "upon such terms and conditions as the Court shall direct", this provision gave the court jurisdiction, as a term and condition of granting leave, to alter the priority in which creditors might be satisfied from the proceeds of sale. Accordingly, if the appeal was to be allowed, he submitted that it should only be allowed on terms that the examiner be directed to discharge the claim of Halston in priority to that of Emberton. The prejudice which had been visited upon Halston, he maintained could not be met by an order providing for costs in its favour.

Discussion
18. The starting point for a consideration of Emberton's application is Ord. 55, r.36 of the Rules of the Superior Courts. However, all of the following Rules are also of relevance.

> "29. Every creditor shall on request produce security (if any) held by him, and shall, if required by notice in writing given by the executor or administrator of the deceased, or by such other party as the Court shall direct, produce all other deeds and documents necessary to substantiate his claim before the examiner at such time as shall be specified in such notice. The notice shall be in form number seven in appendix G"
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> 30. In case any creditor shall neglect or refuse to comply with rule 29, he shall not be allowed any costs of proving his claim unless the Court shall otherwise direct"
>
> 36. No claim shall be received after the time fixed by the advertisement except by special leave of the Court. Application for such leave shall be made by motion on notice and it may be granted upon such terms and conditions as the Court shall direct."

This last rule is of some interest insofar as the time within which an application for "special leave" may be made is not specified. It would appear, therefore, that such an application may be made at any time, even after the sale of the property and/or the distribution of some or all of the proceeds of sale.

19. As to the adjudication of claims by the examiner, Scanlon, in *Administration and Mortgage Suits*, 1st Ed., (Dublin, 1963) at p. 51, states as follows: –

> "The advertisement requires creditors to send particulars of their claims to the solicitor for the legal personal representative within a time thereby fixed, allowing usually about one month from the date of the publication, and incumbrancers are required to enter their claims at the Central Office (Examiners' General Office) and to file their affidavits in proof of claims within the time so fixed. Claims sent in after the time fixed are not absolutely excluded -- the rules are *in terrorem* only."
>
> While this statement is made in respect of deadlines fixed by the Examiner in the course of administration suits, the sentiments are probably equally apt in the context of deadlines fixed following the making of a well charging order and order for sale.

20. Section 116 of the Land and Conveyancing Law Reform Act 2009 ('the 2009 Act') provides that *"a creditor who has obtained a judgment against a person may apply to the property registration authority to register a judgment mortgage against that person's estate or interest in land."* The registration of such a judgment operates to charge the judgment debtor's estate or interest in land with the judgment debt entitling the judgment mortgagee to apply for a well charging order and order for sale.

21. Any judgment mortgage is, of course, subject to all registered rights and unregistered burdens as are in existence at the time of registration, as is clear from s. 117 (3) of the 2009 Act which provides that *"the judgment mortgage is subject to any right or encumbrance affecting the judgment debtor's land, whether registered or not, at the time of its registration."*

22. It is clear from these provisions that the legislative intention is that creditors who register a judgment as a mortgage against a debtor's interest in land, will, when the property is sold and the purchase monies realised, have their judgment discharged in the priority in which it was registered against the property. This being so, anyone looking at the relevant folio at the time when Halston registered its judgment would expect that on the sale of that property the judgment of Emberton would be discharged in priority to that of Halston.

Jurisdiction.
23. The first matter to be addressed, albeit briefly, is the jurisdiction of this Court when dealing with an appeal against an order made by a High Court judge in the exercise of his/her discretion. This issue was dealt with in some detail in a recent decision of this Court in *Collins v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2015] IECA 27.

24. Following consideration of a long line of somewhat inconsistent authorities, the Court concluded that the true position was as stated at para. 79 of its judgment:

> "[T]hat while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."

25. Accordingly, the appellate court on its own motion may set aside a High Court judgment regardless of whether or not any error in principle emerges from that judgment if it is in the interests of justice so to do. Thus, the discretion of the Court on this appeal is a relatively free one.

Decision
26. Having considered the particular circumstances of this case and the type of exercise upon which the court was engaged when it refused Emberton's application, I am not satisfied that it was appropriate for the High Court judge to have had regard to the principles that apply when a defendant moves to set aside a judgment obtained by surprise.

27. The position of Emberton is simply not comparable to the position of a defendant against whom judgment has been obtained and who seeks to have that judgment set aside. In this case Emberton had obtained judgment against the defendant and had registered that judgment as a valid judgment mortgage, not only against the defendant's interest in the property concerned but also against the interests of any subsequent creditor, including Halston. Had Emberton proved its claim before the Examiner within the time specified, there could be no doubt as to its entitlement, not only to have its judgment discharged out of the proceeds of sale, but to be discharged in advance of any sum due to Halston in respect of its judgment of mortgage.

28. In sharp contrast, a defendant against whom judgment has been obtained may have no defence to the plaintiff's claim and may, in applying to set aside the judgment, be seeking to deprive the plaintiff of its lawful entitlement or to obtain some other tactical advantage. That being so, it is only appropriate that certain criteria must be met by a defendant seeking to dislodge a judgment validly obtained against them. The plaintiff whose judgement is to be set aside is to be moved from a position of certainty to complete uncertainty and vulnerability, whereas the success of Emberton's application was one which was destined to have no effect on the validity attaching to Halston's security.

29. Apart from being satisfied that the trial judge erred in principle as to the matters to which he had regard when exercising his discretion, I am satisfied in any event that the interests of justice in this case dictate that the application of Emberton should be considered *de novo* on this appeal.

30. Of significant relevance to this appeal is the nature of the exercise upon which a court is engaged when considering an application pursuant to Ord. 55 r. 36. For myself, I am satisfied that the Court is concerned not with any judicial process, but rather with the administrative process whereby the Examiner seeks to marshal all potential claims against property which is the subject matter of an order for sale.

31. To enable him carry out his administrative functions, the Examiner has been afforded particular powers and duties. He is naturally entitled to prescribe certain time limits such as those specifying the time within which incumbrancers should seek to have their claims admitted. Any time limit so prescribed is, in essence, an administrative matter and it should not be viewed as if it were prescribed by statute or by judicial order, the non compliance with which might even be treated as a matter going to jurisdiction. Such administrative time limits are deadlines designed to assist the Examiner with in the orderly and efficient management of creditors claims so that when the sale proceeds are available he can, with expediency and certainty, draw up his final certificate of incumbrances and discharge creditors in accordance with their respective statutory priorities.

32. It is important to note that an incumbrance by judgment mortgage may be created against a landowner's interests in property up to the date upon which the sale of that property is completed. This being so, the Examiner, when preparing his certificate of incumbrances after the sale, must take account of any belatedly registered judgment mortgage, and, subject to the availability of funds, that creditor will be discharged from the proceeds of sale. For this reason, while it may cause administrative complications, no real prejudice arises if the holder of a prior judgment mortgage fails to meet the deadline advertised for creditors. If they obtain leave to submit their claim at any stage prior to the sale of the property, or indeed prior to the dispersal of the proceeds of sale, the Examiner will have their claim to hand when preparing his final certificate of incumbrances which he does not, in any event, prepare until after the sale.

33. Clearly, creditors must be encouraged to submit their claims in time as otherwise the Examiner might be delayed in the completion of his role. It is for this reason, presumably, that Ord. 55 r. 30 provides that any creditor who fails to comply with such a time limit is not to be allowed their costs of proving their claim unless the court otherwise directs. This is the type of sanction that is appropriate where a creditor is late in making their claim and where no prejudice has otherwise been generated by their delay.

34. I am quite satisfied that the Court's discretion under Ord. 55 r.36 must, principally, be exercised by reference to the legislative intention of the 2009 Act, which mandates that creditors be discharged in accordance with the priority afforded to their judgment mortgage by reference to the date of its registration. The refusal of an application, such as that made by Emberton, has catastrophic consequences for the creditor as its security becomes unenforceable and, to my mind, inflicts a wholly disproportionate penalty upon the creditor for failing to meet an administrative deadline which, as Scanlon has pointed out, was only intended to be *"in terrorem".* In this regard, it is relevant to recall that on 23rd July, 2014, albeit at the direction of the Examiner, Emberton was actually invited to bring in its claim long after the deadline had expired and then did in fact so in early course. In circumstances where the Examiner was clearly concerned to ensure that Emberton was afforded an opportunity to rely upon its security, and in the absence of any change of circumstances prior to the issue of the motion dated 24th October, 2014, it is hard to see any valid or just basis upon which the relief sought might be refused

35. The only relevant authority referred to in the course of the present appeal was the decision of *Powell J in Browne v. Browne* [1919] 1 I.R. 25. This was an administration suit in which the Bank of Ireland, a secured creditor, was allowed to prove its debt against the general estate of the deceased, although the time for the making of its claim had long since elapsed.

36. In *Browne*, the deceased's liability to the bank had been secured by way of mortgage over a certain property. Following the death of the deceased, the bank did not return its claim to be included in the list of the deceased's creditors because it believed at the time that it was amply secured. It later transpired that the land over which it held its security was subject to a prior charge and there were insufficient funds to discharge the sum which it was owed when the property was sold. At that stage the Chief Clerk's certificate, which finalised the list of creditors in the estate, had been filed and the time for the making of a claim by the bank had long since expired.

37. Following consideration of a number of authorities referable to claims made beyond deadlines imposed in the administration of estates as a result of death or bankruptcy, Powell J., at p.255, expressed himself satisfied that there was no authority which would favour refusing the bank's application, as a creditor, to make a late application and to share in the assets which were still available for distribution. In his judgment he stated that the appropriate approach was to admit the claim and if satisfied that delay had been occasioned by reason of the late application, to impose terms and conditions as to costs. He expressly supported the proposition that it would be inappropriate to impose terms which would have the effect of altering the legal right of the creditor.

38. Having considered the judgement in *Browne*, I am satisfied that breach of an administrative deadline such as that which requires to be rectified by an application under Ord.55, r.36 should not, in the absence of some legal reason, such as a specific abandonment of the right to claim, as was mentioned in *Browne*, or proof of significant prejudice, be refused. In this regard, Emberton's delay has not been shown to have adversely affected the interests of any other creditor. It has not been responsible for any delay in the sale of the property or any delay that has affected the value of the assets available for distribution. The property remains unsold for reasons unconnected with Emberton. It follows that there are no proceeds of sale as yet available for distribution and the Examiner's Certificate of Incumbrances has not, therefore, been finalised.

39. In these circumstances I must reject the argument made on Halston's behalf that the use of the words "special leave" in Ord. 55 r.36 elevates the threshold at which the court should grant the relief sought. The term "special leave" is one which appears elsewhere in the Rules of the Superior Courts, not least in the context of the admission of new evidence on appeal: see, *e.g.,* Ord. 58, r. 30(c)(formerly Ord. 58, r. 8). It is nevertheless implicit from the case-law dealing with the admission of new evidence on appeal from *Lynagh v. Mackin* [1970] I.R. 180, onwards that the reference to "special leave" was simply a convenient term to describe a procedure where the applicant was required to proceed by motion on notice to all relevant parties so that the court might have before it all relevant material which might govern the exercise of the discretionary power it was called upon to apply. It is in this sense that the reference to the "special" nature of the leave should be understood. It simply means that the leave ought not to be granted save where the applicant has complied with the appropriate formalities and procedures involved in a application brought by way of notice of motion. As I have just indicated, the term does not, however, imply or suggest that such leave should only be granted in exceptional or unusual circumstances or by reference to some otherwise elevated standard.

40. As already stated, deadlines imposed on foot of a direction of the Examiner are set for the purpose of ensuring that his role can be carried out in an orderly and efficient fashion to the benefit of all creditors. That this is so is supported by the wording of the rule itself, which does not impose either any restriction on the court's discretion or any particular burden on the applicant. It does not, as it might have done, require the applicant to provide "good and sufficient reason" or "exceptional circumstances" or even "good reason" for its delay.

41. I also reject the submission that Ord.55, r.36 gives the court jurisdiction, as a term and condition of granting the relief sought, to reverse the priority in which incumbrancers will be paid by the examiner when distributing the proceeds of sale. The priorities which attach to judgment mortgages are provided for by statute and cannot be rearranged by the court in the exercise of its discretion. The decision in *Browne* would appear to lend some support to this conclusion. There are only two options available to the court when faced with an application under Ord. 55, r. 36. It may grant the relief sought, in which case the creditor, if successful in proving its claim, will be discharged in accordance with the priority attaching to its mortgage by reference to the date upon which it was registered. Alternatively, the court may reject the application.

42. If this Court was to reject Emberton's appeal, an extraordinarily unjust and anomalous situation could arise. Given that the property has not yet been sold, another judgment could still be registered against it. If that were to happen, the Examiner, once satisfied as to its validity, would have to discharge that judgment out of the proceeds of sale while Emberton, who held a prior judgment mortgage and had applied to have its claim admitted over a year earlier, would have no entitlement to claim given that its security had been nullified as a result of the Court's refusal to grant the relief sought under Ord. 55, r. 36. Such a scenario would suggest that the Court should lean in favour of granting the relief sought, particularly where the proceeds of sale have not been dispersed, save where it would be unlawful or where it can be established by credible evidence that the same would unfairly prejudice or otherwise visit an injustice on other creditors.

Conclusions

43. In all of the aforementioned circumstances, I am satisfied that the Court should allow Emberton's appeal. To do so is, firstly, to uphold the intention of the legislature as to the manner in which creditors who have registered judgments against the property of their debtors should be treated. Secondly, it ensures that a disproportionate sanction is not imposed on a creditor as a result of its failure to meet a deadline in the course of an administrative process, where no injustice has resulted to other creditors. Finally, it avoids conveying to other creditors of the defendant, including Halston, a right to be discharged in advance of Emberton, an unjust and opportunistic benefit in respect of which they enjoy no entitlement, either at law or upon the merits.