

THE HIGH COURT

Record Number: 2004 No. 19653P

BETWEEN

**NORA GALLAGHER PRACTISING UNDER THE STYLE AND TITLE OF
NORA GALLAGHER & COMPANY**

PLAINTIFF

**AND
JENNIFER MAHON**

DEFENDANT

Judgment of Mr Michael Peart delivered on the 27th day of June 2007

1. An unusual situation has arisen for determination in relation to an order of garnishee made by this Court in the above proceedings on the 24th May 2007 over a sum of money to which the defendant is entitled, in circumstances where in other proceedings in the Circuit Court, Her Honour Judge Linnane has made an order on the application of another judgment creditor of the same defendant over the same fund. Those proceedings in the Circuit Court are entitled: Aileen Dignam, plaintiff, and Jennifer Mahon, defendant, and bearing Record Number 2005 No. 03738.

2. The question arises as to which creditor is entitled to have their judgment satisfied from the fund, since it is insufficient to satisfy both.

3. Some chronology and facts are relevant first of all.

4. On the 7th February 2005 judgment was obtained in the High Court by Nora Gallagher against the defendant in the sum of €107,075.95.

5. On the 10th January 2006, judgment was obtained in the Circuit Court against the same defendant in the sum of €34,589 and interest thereon at 8%.

6. Neither judgment has been satisfied either in whole or in part.

7. On the 16th May 2007, an action in which the defendant was a plaintiff was settled in the sum of approximately €40,000 inclusive of special damages. Of that sum a sum of in or around €38,000 represents general damages, and as such is the amount available by way of Garnishee to satisfy almost entirely the Dignam judgment obtained in the Circuit Court, and in part only the Gallagher judgment obtained in the High Court.

8. *On the 18th May 2007* a conditional order of Garnishee was made in the Circuit Court attaching so much of the sum for which the said action was settled as was required in order to satisfy the Dignam judgment. The making of that order was immediately communicated to the Hibernian General Insurance Company ("Hibernian"), to their solicitors, Stephen MacKenzie & Co, and the defendant's solicitors, by telephone and by letter, liberty in that regard having been granted by the Court.

9. The return date for that conditional order was the *24th May 2007*. On that date the solicitors for Hibernian did not show cause as to why the sum should not be paid over to Ms. Dignam, and accordingly the Conditional order was made absolute. Following the making of the absolute order of garnishee on the 24th May 2007, same was served that day of the solicitors for Hibernian, and on the defendant's solicitors.

10. *On the 21st May 2007*, Ms. Gallagher applied to this Court for a Conditional Order of Garnishee over the same fund, having also found out that the action brought for damages by Ms. Mahon had been settled in the said sum. That Conditional Order was granted. It is a fact that some weeks previously, an application was made by Ms. Gallagher for an order over any sum that might have been obtained in the action commenced by Ms. Mahon for damages, but the Court declined to make any order since the amount of any such sum was not at that stage ascertained since the action had neither been settled or heard. Be that as it may, a *Conditional order* was made on Ms. Gallagher's behalf on the 21st May 2007 over the sum for which that action was settled, being the same sum for which at that point a conditional order had been made in the Circuit Court. That order was made *absolute on the 24th May 2004* but at a time in the morning after the Circuit Court had already made absolute its order.

11. However at the application by Ms. Gallagher to make absolute the High Court's conditional order, Hibernian was represented and indicated, as one might expect, that it was of no concern to them to whom the sum was paid and they undertook to make no payment of the sum involved until further order, so that this Court could have an opportunity to hear submissions from both judgment creditors the question of how to deal with the position which by then existed. On that undertaking, the Court adjourned the matter for further argument.

12. Roughan Banim BL for Ms. Dignam, who obtained the absolute order of garnishee in the Circuit Court, submitted, I think correctly, that it would have been preferable from a procedural point of view, for this Court to have allowed his client to appear on the application to make absolute, and make submissions as to why the Court should refuse to make the conditional order absolute where the Circuit Court had already made an order which effectively exhausted the available funds for all practical purposes, or at least have made its absolute order in terms which limited its application to whatever small balance may remain after the Dignam judgment has been satisfied.

13. In my view, it would have been more correct, with the benefit of hindsight, for this Court on the application to make its conditional order absolute, to have directed that Ms. Dignam be put on notice of the application, so that she could be represented in order to make such submissions. However, as it happened, this Court made the Conditional Order absolute, but put back the question of which order should take precedence. The Court's principal concern was that the status quo should be maintained pending resolution of this question, and that was achieved by the giving of the undertaking by Hibernian.

14. On the hearing of submissions, Ms. Fennell BL, appearing for Ms. Gallagher submitted first of all that because her judgment (as opposed to order of garnishee) pre-dated the judgment obtained in the Circuit Court by Ms. Dignam, and also because Ms. Gallagher's judgment was put into the public domain by having same registered in the judgments' office, resulting in its publication in the various trade gazettes, this gave the latter judgment a priority over the later judgment of the Circuit Court. She submits that it would be inequitable for the later judgment to exhaust the available fund simply because that judgment creditor was able to make her application earlier in the Circuit Court simply because the appropriate day for making such applications fell earlier than the appropriate

day in the High Court. Ms. Fennell sought to assist her submission in this regard by reference to the position pertaining to judgment mortgages where a judgment registered as a judgment mortgage will take priority over a judgment which has not been registered as a judgment mortgage. She submitted also that Ms. Dignam ought to have carried out a search in the judgments' office which would have revealed the existence of the registered High Court judgment in favour of Ms. Gallagher and that this judgment should therefore have been brought to the attention of the Circuit Court judge when the conditional order was applied for. Ms. Fennell referred to the 4th edition of *Halsbury's Laws of England* at para. 257 in this respect where, in relation to the procedure to be followed in applications for a garnishee order, it is stated that the application must contain certain information referred to, but including as to whether the judgment creditor "knows or believes that any person other than the judgment debtor has any claim to the money owed by the third party.....". She puts her client in the position of such a person, and submits that the Circuit Court should have been so informed.

15. Mr Banim relies on the fact that on the 18th May 2007 the conditional order of garnishee obtained in the Circuit Court on that day was served on Messrs. Mackenzie & Co for Hibernian and on the defendant's solicitors, and that from the time that order was served, the fund was attached for the benefit of his client to satisfy her judgment. He relies on the judgment of Jessel MR in *Hamer v. Giles* [1879] Ch. XI. 942 wherein it was decided, *inter alia*, that a conditional order of garnishee (referred to therein as 'a garnishee order nisi') "does not create a charge until service of it on the garnishee".

16. Mr Banim submitted that there was no authority for the proposition that a judgment which is first in time has priority to a judgment obtained subsequently. He submitted also that the position of judgment mortgages has no relevance to the issue before this Court. He submits also that the mere obtaining of judgment creates no right, equitable or otherwise over any particular fund, but merely entitles the judgment creditor to apply to attach a fund should one be known to exist, or execute, or otherwise seek to have the amount of the judgment satisfied. He submits that in the present case, even though Ms. Dignam's judgment in the Circuit Court post-dated the judgment obtained by Ms. Gallagher in the High Court, Ms. Dignam nevertheless succeeded in obtaining an order over the fund referred to, and that once that order was served on the garnishee, the latter was obliged to pay it over to Ms. Dignam. He submits that in such a situation the most that Ms. Gallagher can achieve by way of garnishee order is one over any balance which remains in that fund after Ms. Dignam's judgment has been satisfied. As it happens, any remaining sum is insignificant, but in Mr Banim's submission that is of no relevance to the determination of the question arising.

17. Mr Banim rejects the idea that when making the application to the Circuit Court his client should have previously carried out a judgment search in the judgment's office and that had she done so she would have ascertained that an earlier High Court judgment existed and that this would then have been brought to the attention of the learned Circuit Court judge.

Conclusion

18. I cannot accept Ms. Fennell's submission that the fact that her client obtained her judgment in the High Court at an earlier date than Ms. Dignam obtained hers in the Circuit Court, of itself creates some right to priority over the Hibernian fund. Neither does the fact that her client's judgment was registered in the judgment's office give her any right to the fund. In any event the fund in question did not even exist until the defendant's damages action was settled on the 16th May 2007. I am also completely satisfied that any reliance upon or analogy being drawn to the judgment mortgage procedure is misplaced. Neither am I satisfied that when making her application to the Circuit Court for an order of garnishee there was any obligation upon Ms. Dignam to carry out a judgments search in the judgments office so as to inform the learned Circuit Judge of the existence of the High Court judgment in favour of Ms. Gallagher. The reference to the practice described in *Halsbury* relates only to providing information to the Court as to what other party, besides the judgment debtor, may have already a "claim" over the fund over which the garnishee order is being sought. That is not the same as providing information as to what other judgment creditors may exist. It would be information such as that there is already an order of garnishee made over the same fund, since in such an instance the Court may have to word its order in such a way as limits the applicant to such sum out of the fund as remains after the first applicant for garnishee has been satisfied.

19. I am satisfied that the judgment obtained earliest in time remains simply that – a judgment. It of itself creates no interest, equitable or otherwise, in any fund such as the Hibernian fund, or indeed any other asset of the judgment debtor until such time as steps are taken to enforce the judgment. This is not in fact a case of competing equitable interests in a specific fund, where the Court must decide on which equitable interest should receive priority over the fund.

20. In the present case the situation is that while both judgment creditors became aware of the existence of the Hibernian fund immediately it became established, it was Ms. Dignam who first obtained a conditional order of garnishee over that fund and served notice of the making of that order on both the judgment debtor and the garnishee. I am satisfied that once that order was served, the garnishee (Hibernian) was precluded from paying that sum to any other party until, in the first instance, after the application to make that order absolute. Once the order was made absolute, the garnishee was obliged to obey the order from the moment of being aware of same, and to pay so much of that fund as was required to be paid in order to satisfy the judgment of Ms. Dignam. After all, it is an order made by a Court of competent jurisdiction. It must be obeyed.

21. The fact that this Court made a conditional order three days after the conditional order made in the Circuit Court did not oust the Circuit Court order. Rather the making of that conditional order provided an opportunity for both the judgment debtor and the garnishee to show cause to the High Court why the conditional order should not be made absolute. In the present case, such an opportunity would, in the ordinary course, have enabled this Court to be appraised of the fact that another party, Ms. Dignam, did in fact have a claim over the fund by having obtained an earlier conditional order over the same fund in the Circuit Court. That would enable this Court to either refuse to make the order, or tailor its absolute order in such a way as attached only whatever balance remained after the Dignam judgment had been satisfied. I have already set forth the way in which the application proceeded before this Court, and have stated that ideally but with hindsight this Court should not have made its absolute order ahead of hearing submissions. But be that as it may, the position seems to me to be clear. That position is that the order absolute made by this Court on the 24th May 2007 should be set aside as being one which ought not to have been made in the face of a valid and subsisting Circuit Court order over the same fund, or at least that the order should now be amended so as to remain in force only over so much of the fund as is not required in order to satisfy the judgment of Ms. Dignam.

22. I will make the appropriate order depending upon what is urged on behalf of Ms. Gallagher, bearing in mind that a very small sum will so remain available.