

**THE HIGH COURT
JUDICIAL REVIEW**

[2006 No. 1182 JR]

BETWEEN

ROCKROHAN ESTATE LIMITED AND RICHARD WOOD

APPLICANTS

**AND
ASSISTANT EXAMINER THOMAS KINIRONS**

RESPONDENT

**AND
ULSTER INVESTMENT BANK LIMITED, IRELAND
AND THE ATTORNEY GENERAL**

NOTICE PARTIES

Judgment of Mr. Justice McGovern delivered the 30th day of March, 2007

1. On the 16th October, 2006 the applicants were given leave to apply for judicial review for the relief set forth at paragraph D in the Statement of Grounds and on the grounds set forth at paragraph E of the said statement. The reliefs sought in paragraph D were:-

1. An Injunction, or Order of Prohibition, by way of an application for Judicial Review restraining the respondent from taking any further step in the matter entitled Ulster Investment Bank Limited Plaintiff and Rockrohan Estates Limited Defendant (High Court 1986 No. 1055 Sp).
2. A Declaration by way of an application for Judicial Review that the exclusion of the applicants counsel from the public hearing before the Respondent was a denial of the applicants rights in the determination of his civil rights to a fair and public hearing trial within a reasonable time.
3. A Declaration by way of an application for Judicial Review that the admission of the press and the public but the exclusion of the applicants counsel constituted a denial of a fair trial or hearing to the applicant.
4. A Declaration by way of an application for Judicial Review that the exclusion of the applicant's counsel at the hearing before the respondent was not warranted in the interests of morals, public order or national security in a democratic society.
5. A Declaration by way of an application for Judicial Review that the exclusion of the applicants counsel at the hearing before the respondent was not warranted or required in order to or by reason for need to protect lives of the parties.
6. A Declaration by way of an application for Judicial Review that the exclusion of the applicants counsel at the hearing before the respondent was not warranted or required to any extent in order to prevent prejudice to the interests of justice and was not, in any event, strictly necessary.
7. A Declaration by way of an application for Judicial Review that the exclusion of the applicants counsel at the hearing before the respondent was prejudicial to the interests of justice and was not, in any event, strictly necessary.
8. A Declaration by way of an application for Judicial Review that the applicant (defendant) is entitled to defend itself as a minimum right through legal assistance of its own choosing.
9. A Declaration by way of an application for Judicial Review that Order 55, Rule 53 of the Rules of The Superior Courts is incompatible with the applicant's right pursuant to Article 6 of the European Convention on Human Rights and Fundamental freedoms adopted into Irish law in the first Schedule of the European Convention on Human Rights Act, 2003.
10. A Declaration by way of an application for Judicial Review that the respondent erred in fact and in law in refusing to admit counsel of the applicant's own choosing to the Hearing List on the 26th September, 2006.
11. A Declaration by way of an application for Judicial Review that the respondent erred in fact and in law in refusing to hear counsel of the applicants own choosing at the hearing on the 26th September, 2006.
12. A Declaration by way of Judicial Review that the decision of the Assistant Examiner purporting to set the conditions and date for sale of the applicant's property was made ultra vires and in breach of the Order of the High Court, Blayney J. made on the 16th day of February, 1987.
13. An injunction by way of an application for Judicial Review quashing the decision or order of the Assistant Examiner made on the 26th September, 2006 (but not yet perfected) wherein he purported to set the conditions and date for the sale of the applicants property.
14. An injunction by way of an application for Judicial Review for an Order staying any order or directions made by the Assistant Examiner until further order.
15. An injunction by way of an application for Judicial Review order restraining the respondent and any person having knowledge of the making of this order from taking any step whatsoever to give effect to the terms of the purported order of the Assistant Examiner made the 26th September, 2006 but not year perfected.
16. A Declaration that the refusal of the Assistant Examiner to give reasons in writing for his decisions constitutes an attack on the applicant's right to a fair hearing.
17. Damages.
18. Further and other relief.

19. Costs of an incidental to these proceedings.

2. The first named applicant is a limited liability company and is the owner of lands comprised at Folio 28285 in County Cork. Ulster Investment Bank Ireland Limited (the first named notice party) obtained a Well Charging Order and Order for Sale in proceedings bearing record number 1986 No. 1055 Sp between Ulster Investment Bank Limited Plaintiff and Rockrohan Estates Limited defendant. The Well Charging Order and Order for Sale was made by Blayney J. on the 16th February, 1987. By virtue of that order the sum of one million Irish pounds together with interest thereon stood well charged on the first named applicant's property being the lands comprised in Folio 28285 of the Register of Freeholders County Cork. In the said order it was stated

"the said lands and premises be sold at such time and place subject to such conditions of sale as shall be settled by the Court and the following Account and Inquiry are to be taken and made in the Examiner's office namely:-

No. 1 An Account of all encumbrances subsequent as well as prior to and contemporaneous with the plaintiff's demand.

No. 2 An Inquiry as to the respective priorities of all such demands as shall be proved".

3. And the parties were given liberty to apply.

4. The order of Blayney J. also provided that in default of the defendant disputing the sum claimed within one month and in default of paying the sums due within three months from the date of service of the order on the defendant "... the said lands and premises be sold at such time and place and subject to such conditions of sale as shall be settled by the Court...". The respondent submits, and I accept, that the grounds on which the applicant's have been granted leave to apply for judicial review can be encapsulated in the following three complaints:-

(a) That having regard to the order of Blayney J. the Assistant Examiner acted *ultra vires* by purporting to settle the conditions and date of sale of certain lands since these functions were reserved to the High Court.

(b) That the exclusion of Counsel from a hearing before the respondent was unfair and in violation of the right to a fair trial protected by Article 6 of the European Convention on Human Rights and that O. 55, r. 53 of the Rules of the Superior Court 1986 (which provides that Counsel shall not be heard in proceedings before the Examiner unless the Court shall otherwise direct) is incompatible with Article 6 of the Convention.

(c) That the failure of the Assistant Examiner to give reasons for his decisions is unlawful.

5. 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 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.

6. In his grounding affidavit sworn on the 3rd October, 2006 the second named applicant purports to suggest that the first named notice party was guilty of inordinate delay and that for a period of almost 12 years it did not exercise its right to apply to the court or explain the reasons for its delay in acting on the Order for Sale of the 16th February, 1987. I am quite satisfied that the facts deposed to by the second named applicant do not meet the requirement of him to make a full and candid disclosure of the facts in bringing an application for leave to apply for judicial review. Even a cursory glance at the various sets of proceedings which continued in the intervening years makes it clear that the bank's entitlement to proceed on foot of the Order for Sale was being challenged in one form or another as the second named applicant either attacked the basis on which this judgment was predicated or sought to extinguish the "Bula debt" and all security contingent thereon.

7. I propose now to deal with the applicants argument that the respondent acted *ultra vires* by purporting to settle the conditions and date of sale of these lands in question and the contention that these functions were reserved to the High Court.

8. The office of Examiner was created by s. 3 of the Courts Officers Act, 1926. This section provides that it "shall be attached to the High Court". Section 13 (the Examiners Office) and s. 14 (the Examiner) make it clear that the Examiner in carrying out his office is the successor of the Chief Clerks of the Judges of the former Chancery Division of the High Court. The Eight Schedule of the Courts (Supplemental Provisions) Act, 1961 provides; at paragraph 10(1) that. The Examiners Office shall be under the management of the Examiner and at 10(2)

"There shall be transacted in each Examiner's Office or in the Examiner's Office (where there is only one Examiner) that all such business as shall from time to time be assigned thereto by statute or rule of court and in particular (unless and until otherwise provided by statute or rule of court) all such business as was formerly transacted in the offices attached to the respective Chambers of the Master of the Rolls and the ordinary judge of the Chancery Division of the High Court of Justice in Southern Ireland and also such business as was formerly transacted in the offices attached to the Land Judge of the said Chancery Division including the offices attached to that judge in his capacity of Receiver Judge."

11(1)- "Each of the Examiners or the Examiner (where there is only one Examiner) shall have and exercise all such powers and authorities and perform and fulfil such duties and functions as shall from time to time be conferred on or assigned to him by Statute or Rule of Court and in particular (unless and until otherwise provided by Statute or Rule of Court) shall perform and fulfil such duties and functions as were formerly performed or fulfilled by the several Chief Clerks and

Assistant Chief Clerks of the Master of the Rolls and the Ordinary Judge of the Chancery Division of the High Court of Justice in Ireland respectfully and by the Chief Receiver or the Receiver – Examiner.”

9. Section 55 of the 1961 Act provides

“the provisions set out in the Eight Scheduled this Act shall apply in relation to offices and officers to be attached to the High Court, the Supreme Court and the President of the High Court respectively”.

10. It is to be construed as one with the 1926 Act. It is similar to the language found in part V of the Supreme Court of Judicature Act (Ireland) 1877 which is entitled “Officers and Offices”.

11. Section 72 of the Act provides that the Officers

“attached to any Court or Judge whose jurisdiction is hereby transferred to the High Court, or to the Court of Appeal... shall, from and after the commencement of this Act, be attached to the Supreme Court of Judicature”.

12. The section also provides that

“all Officers who at the time of the commencement of this Act shall be attached to the Court of Chancery, or any Judge or Master thereof, shall be attached to the Chancery Division of the High Court of Justice.”

13. Section 73 provides that

“the Authority of the Supreme Court of Judicature and of the Court of Appeal and of the High Court of Justice, over all or any of the Officers attached to the said courts, or any of them generally, with respect to any duties to be discharged by such officers respectively, may be exercised by the Lord Chancellor, and over the Officers attached to any division of the High Court by the President of such Division, with respect to any duties to be discharged by them respectively”.

14. While the 1926 does not refer to the position of “Assistant Examiner” paragraph 11(3) of the Eight Schedule of the 1961 Act, states

“(3) the powers, authorities, duties and functions of an Examiner or of the Examiner (where there is only one Examiner) may subject to any restrictions which the President of the High Court may think fit to impose, be executed, performed or fulfilled by an Officer (to be designated by the President of the High Court) who is employed in that Examiners Office or in the Examiners Office (where there is only one Examiner) and who is qualified to be appointed Examiner.”

15. The respondent is an Officer employed in the Examiners Office who has been designated by the President of the High Court to execute, perform and fulfil the powers, authorities, duties and functions of the Examiner, pursuant to s. 55(1) and paragraph 11(3) of the Eight Schedule of the Courts (Supplemental Provisions) Act, 1961. There are no restrictions imposed by the President of the High Court so the powers, authorities, duties and functions of the respondent in these proceedings are the same as those of the Examiner himself.

16. Order 55, r. 1 of the Rules of the Superior Courts 1986 states

“the Examiner shall take such accounts and conduct such inquiries as may be ordered by the Court, and may make such orders of an interlocutory nature as have heretofore been made by the Examiner, and shall perform and fulfil such other duties and functions as have heretofore being performed and fulfilled by the Examiner or as shall from time to time be conferred on or assigned to him by Statute or Rule of Court.”

17. I am satisfied from the submissions and authorities opened to me that the practice of the Chief Clerks attached to the Chancery Division of the Supreme Court of Judicature, and prior to that, to the Court of Chancery, was to settle particulars and conditions of sale when the court ordered the sale of lands on foot of a Well Charging Order. Order IV Rule 16 of the 1891 Rules of the Supreme Court (Ireland) states

“the Judges of the Chancery Division shall have power, subject to these Rules, to order what matters shall be heard and investigated by their Chief Clerks, and what matters shall be heard and investigated by themselves, and particularly if the Judge shall so direct, his Chief Clerks shall take such accounts and make such inquiries as had usually been taken and made by the Chief Clerks, and the Judge shall give such aid and direction as in every such encounter inquiry as he may think fit, but subject to the right hereinafter provided for the parties to bring any particular point before the Judge”.

18. In these proceedings the Examiner Mr. James Finn swore an affidavit in which he stated that it has always been the practice in the Examiners Office for the Examiner to settle particulars and conditions of sale after a sale has been ordered by the Court. No contrary evidence was adduced on behalf of the applicants. I have been referred to a number of decisions which indicate that over an extensive period of time this has been the practice. In *Delves v. Delves* [1875] 20 L.R. Eq.77 at 81 Sir R. Mallins, V-C said

“it is my lot sometimes to have to fix reserved biddings, though it is generally done by the Chief Clerk”.

19. In *Pemberton v. Barnes* [1872] 13 L.R. Eq. 349 the same Judge expressed the view that his Chief Clerk was competent to hold the auction itself although on the facts he deemed it more expedient to engage a professional auctioneer. In *Debenham v. Sawbridge* [1901] 2 Ch. 98 the Master was closely involved with Court Conveyancing Counsel in the settling of the particulars and conditions of sale. In *Bank of Ireland v. Smith* [1966] 1 I.R. 646 Kenny J. stated at 650 in connection with a court ordered sale

“The Examiner fixed the reserve price and particulars and conditions of sale were prepared by Court Counsel”.

20. The evidence is that in making his order of the 16th February, 1987 Blayney J. made “the usual order” for sale of the lands if the sums due are not paid within three months.

21. The uncontradicted evidence in this case is that it has been the practice for many years for the Examiner and/or the Assistant Examiner to carry out the functions which he did in this case. The Examiner sets out in paragraph 8 of his Affidavit, sworn on the 20th. November, 2006, the standard practice which exists in settling particulars and conditions of sale. He says :

"Where the High Court orders the sale of land in a mortgage suit, the standard practice in settling the particulars and conditions of sale and for settling the time and place for sale can be summarised as follows.

- The Examiner directs the plaintiff as the party having carriage of proceedings to send a brief to Court Conveyancing Counsel, i.e. counsel appointed by the President of the High Court for the purpose of drafting conditions of sale and advising on title.
- Court Conveyancing Counsel drafts the particulars and special conditions of sale.
- The plaintiff prepares a draft document incorporating the particulars and special conditions as drafted by counsel with the general conditions of sale used in court sales.

The Examiner settles the particulars and conditions of sale in a sitting held for that purpose and sets the time and place of auction, having received submissions on these issues from the parties and in particular from the auctioneer appointed to conduct the sale."

22. I am satisfied that the respondent was not acting *ultra vires* in setting the conditions and date of sale of the applicant's property. I also hold that it was not breach of the order of Blayney J. made on the 16th February, 1987 but rather was in conformity with it and following a well established procedure which has been in operation in this country for many years and is recognised in a line of statutory provisions and successive editions of the Rules of the Superior Courts.

23. The next ground of challenge by the applicant to the respondent is based on the refusal by the respondent to hear counsel. The respondent refused to allow counsel to attend the hearing before him and relied on O. 55, r. 53 of the Rules of the Superior Courts. That Rule states "Counsel shall not be heard in proceedings before the Examiner unless the Court shall otherwise direct". It is contended on behalf of the applicants that this was a violation of a right to a fair trial protected by Article 6 of the European convention on Human Rights and that the Rule is incompatible with Article 6 of the Convention.

24. In this case there was no direction by the Court that counsel should be heard. Counsel for the respondent argues that the Rule is clear and it was the Respondent's duty to abide by its terms and not to adjudicate on the merits of the prohibition. The Rule appears to go back many years. In O. IV, r. 2 of the Supreme Court (Ireland) 1905 it states

"Counsel shall not be heard in any case before the Chief Clerk."

25. I accept what Mr. Finn the Examiner has said on affidavit that the business dealt with by the Examiner is largely non contentious. There are good practical reasons for keeping costs down and avoiding the full panoply of rights and procedures associated with a Court hearing. The applicants were at all times represented by a solicitor as is their right. Counsel for the respondent argues that there was in fact an alternative to this Judicial Review application which was not only adequate but superior and that this is to be found in O. 55, r. 48 of the Rules of the Superior Courts which states:

"Any party or other persons interested may, before the proceedings before the Examiner are concluded, take the opinion of the Court upon any matter arising in the course of the proceedings upon notice given to all proper persons. Such notice shall be in one of the forms Nos. 14 and 15 in appendix G."

26. It seems clear that in such a hearing before the Court the applicants would be entitled to be represented by Counsel, and if there was any dispute concerning the settling of the particulars and conditions of sale this could be resolved by the Court.

27. Counsel for the Attorney General argues that the applicants are not entitled to relief under this heading on the basis that they have not demonstrated that "no other legal remedy is adequate and available" within the meaning of s. 5 of the European Convention on Human Rights Act, 2003. Furthermore Counsel argues that the decisions of the respondent do not involve a determination of disputes over "civil rights and obligations" within the meaning of Article 6 of the Convention. He does not make any decision which is decisive of the rights and obligations of the applicants but is merely exercising an administrative role at the direction of the High Court and is subject, at all times, to the overriding supervision of the High Court. In the circumstances he argues that a full scope of Article 6 Rights are available to the applicants before the High Court and therefore no issue of breach of Article 6 can or does arise. It was clearly open to the applicants to apply to the High Court under O. 55, r. 53 for a direction that counsel be heard on its behalf in proceedings before the Examiner but the applicants failed to make such an application. Alternatively the applicants could have taken "...the opinion of the Court upon any matter arising in the course of the proceedings..." before the respondent pursuant to O. 55, r. 48. Again the applicants choose not to do so. An applicant for relief under the European Convention on Human Rights is obliged to exhaust all domestic remedies in respect of the matter giving rise to his complaint. I accept the argument made by Counsel for the Attorney General that the respondent does not determine rights or obligations. At all times before the respondent the applicants had a solicitor present and if they were unhappy with the respondent refusing to admit counsel pursuant to O. 55, r. 53 there were remedies available to them which they choose not to exercise. I therefore reject the contention made by the applicants that the exclusion of counsel from the hearing before the respondent was unfair or in violation of the rights of the applicants under Article 6 of the European Convention on Human Rights and I also reject the argument that O. 55, r. 53 of the Rules of the Superior Courts 1986 is incompatible with Article 6 of the Convention.

28. The final basis on which this application is brought is that the failure of the respondent to give reasons for his decisions is unlawful. No particular decision was referred to. If it was the decision not to hear Counsel and that is covered by O. 55, r. 53 of the Rules of the Superior Courts. The applicants have failed to show what prejudice arises as a result of the alleged failure of the respondent to give reasons for his decision. If they were dissatisfied that any of his decisions they were entitled to bring the matter before the Court by way of an application under O. 55, r. 48. As I have already indicated they did not take this step. If they had done so then the decision of any Judge would supersede the decision (if any) of the respondent. It seems to me that the Examiner is not obliged to give reasons for his decisions although that does not mean that his decisions cannot be challenged in appropriate circumstances. Counsel for the respondent argues that the position of the Examiner or the Assistant Examiner is similar to that of the Taxing Master. In *McEniry v. Taxing Master Flynn* [1998] I.E.H.C. 65; [1998] W.J.S.C. – H.C. 9749 McCracken J. held there was no obligation on the Taxing Master to give reasons for his decision. If that is so it seems to me that the Examiner and Assistant Examiner are in a similar position particularly as there is a mechanism provided under the Rules of the Superior Courts which permits matters to be brought back before the Court before the proceedings before the Examiner are concluded. (See O. 55, r. 48).

29. The remedy sought by the applicants is a discretionary remedy. Having considered the affidavits before me in this case and the submissions made by Counsel for the parties I am satisfied that the applicants gave a distorted view as to the reasons for the delay

in carrying into effect the Order for Sale made by Blayney J. On that ground alone I would refuse the application. But the matter goes further than that. In this case there is no credible evidence or legal bases offered by the applicants to show that the respondent was acting ultra vires. On the contrary it has been established that the procedures adopted by the respondent in this matter were procedures which have been operated for many years under the authority of successive editions of the Rules of the Superior Courts and on foot of powers which are conferred by Statute. Furthermore I am satisfied that the Rules of the Superior Courts challenged by the applicants are not incompatible with the European Convention on Human Rights and are not unfair on the applicants or in violation of their rights to a fair trial under Article 6 of the Convention.

30. I refuse the relief sought.