Neutral Citation: [2016] IEHC 396

THE HIGH COURT

[1999 187SP]

BETWEEN

PAUL HICKEY

PLAINTIFF

AND

LAURENCE CARLYON

DEFENDANT

JUDGMENT of Mr. Justice David Keane delivered on the 12th day of July 2016

Introduction

1. On the 15th November 1999, the Court made a well charging order and directed the sale of certain lands and premises, followed by the appropriate accounts and inquiries in the Examiner's Office. In circumstances that I will shortly describe, the said lands and premises were not finally sold until March 2013 and the proceeds of that sale, amounting to €280,000, were afterwards lodged in court in June of that year.

2. The Assistant Examiner of the High Court now seeks the Court's direction on whether interest on the principal sum and costs that were found to be well charged on the property concerned runs to the date of payment out of court of the sale proceeds, as the order recites on its face, or is limited to six years arrears of interest on those moneys by operation of the Statute of Limitations 1957 ("the Statute").

3. Subsequent to the Assistant Examiner's request for a direction, the plaintiff brought an application by motion on notice seeking, presumably on an interim basis, an order directing the Examiner to pay out the principal moneys covered by the well charging order.

4. I will deal with each of those matters in turn.

Background

5. On the 1st April 1998, the plaintiff obtained judgment against the defendant in the sum of Ir£60,500, the euro equivalent of which is €76,835 ("the judgment debt").

6. The defendant failed to discharge the judgment debt and, on the 20th August 1998, the plaintiff registered a judgment mortgage against certain property of the defendant.

7. The judgment debt remained unpaid. The plaintiff next commenced a mortgage suit, as a process of execution, and, on the 15th November 1999, this Court (per Laffoy J.) made a well-charging order and an order for sale of the property in the event of non-payment of the debt. The material portion of the operative part of that Order states:

> "The Court doth declare that the principal moneys secured by the said Judgment Mortgage created by the registration as aforesaid of an office copy of a Judgment Mortgage Affidavit, the interest thereon, the costs of such registration and the costs hereinafter awarded stand well charged on the Defendant's interest in the said land and premises.
>
> And It Appearing that there is due to the Plaintiff on foot of the said Judgment Mortgage a sum of £60,500.00 for principal and an unascertained sum for costs and interest on the said sums at the rate of £8 per cent per annum from the 1st July 1998 to date of payment."

8. The defendant appealed that decision to the Supreme Court. In 2003, the Supreme Court affirmed the Order of the High Court.

9. In 2006, the defendant purported to convey the property into joint names with his son, in spite of the existence of the orders just described. That resulted in further proceedings, which culminated the following year in a declaration made by the High Court (per McGovern J.) that the said conveyance was fraudulent and, hence, void.

10. In 2008 the conditions of sale of the property were fixed. However, the process of sale of the property was delayed once more when, in early 2009, the defendant's son issued Circuit Court proceedings in which he sought various declarations concerning the property, together with an order joining him as a notice party to these proceedings. Those proceedings were dismissed by the Circuit Court in the autumn of that year. The defendant's son appealed that decision to the High Court and that appeal was refused in February 2010.

11. An order for possession of the property was granted in mid-2010, subject to a seven month stay. The County Dublin sheriff took possession of the property in September 2011 and, after an unsuccessful public auction, an order approving terms of sale by private treaty was made in December of that year. The property was ultimately sold in March 2013, realising a sum of €280,000. The sale proceeds were lodged in court on the 25th of June 2013.

12. Although the Examiner's Certificate of Account and Inquiry was filed on the 10th October 2013, the finalisation of the associated payment schedule depends upon the direction now sought.

Issue

13. The issue presented is whether the plaintiff is entitled to all of the interest accrued to date on the principal moneys found due

under the well charging order that was made on the 15th November 1999 or may only recover six years arrears of interest on that sum, by operation of the terms of s. 11 (6) (b) the Statute.

Position of the parties
14. The plaintiff submits that he is entitled to recover the principal moneys together with all of the interest that has accrued upon that sum since the making of the well-charging order, without prejudice to his application for the payment out of the principal moneys on an interim basis. The defendant has elected to play no part in the consideration of either matter.

The law
15. As the Assistant Examiner has raised certain concerns about the proper interpretation and application of the relevant statute and case law, it is to that law that I now turn.

16. S. 11(6) of the Statute provides:

> "(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."

17. The leading case on whether s. 11(6)(b) of the Statute captures the interest due on monies declared well charged on a property is that of this Court in *Ulster Investment Bank v. Rockrohan Estate Limited* [2009] IEHC 4.

18. In 1981, the defendant in that case ("Rockrohan") had entered into a debenture with the plaintiff ("UIB") guaranteeing the indebtedness of a connected company that defaulted on its debt the following year. Under the debenture, Rockrohan had provided UIB with an equitable charge over certain lands in the form of a covenant that permitted the sale of those lands in the event of such default to recover the borrower's indebtedness to UIB.

19. In 1987, UIB obtained a well charging order (i.e. an order that the principal and interest then due stood well charged against Rockrohan's lands), together with an order for the sale of those lands, against Rockrohan.

20. In 2008, at the conclusion of many years of related litigation, UIB moved for an order for possession of the lands to facilitate that sale and Rockrohan responded by seeking various reliefs, including two that are relevant to the direction now sought. The first of those was a declaration that UIB's application for an order of sale was statute barred under, among other provisions, s. 11 (6) (a) of the Statute as an action brought on a judgment more than twelve years after that judgment became enforceable. The second was a declaration, presumably in the alternative, that the arrears of interest due from Rockrohan to UIB on foot of the said well charging order were limited to six years interest pursuant to the terms of s. 11 (6) (b) of the Statute.

21. In deciding that neither of those propositions was correct, Irvine J. drew particular assistance from three English cases: *Ezekiel v Orakpo* [1997] 1 WLR 340; *Lowsley v Forbes* (trading as L.E. Design Services) [1999] 1 A.C. 329; and *Yorkshire Bank Finance Ltd v Mulhall* [2008] EWCA Civ. 1156.

22. Before considering those cases, it may be helpful to compare and contrast the relevant law in each jurisdiction.

23. A comparison between the provisions of s. 11 (6) of the Statute and those of s. 24 of the UK Limitation Act 1980, which applies to England and Wales, establishes that they are couched in identical terms, save that the twelve year limitation period on taking an action upon a judgment in s. 11 (6) (a) of the Statute is instead a six year limitation period under s. 24 (1) of the UK Act. S. 11 (6) (b) of the Statute, which provides that 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, is identical to s. 24 (2) of the UK Act.

24. The Judgment Mortgage (Ireland) Acts 1850 and 1858 established a mechanism whereby a plaintiff who obtained judgment could register that judgment as a mortgage against the defendant's land by swearing an appropriate affidavit and filing it in court and in the relevant registry. As McGovern J. pointed out in *Minister for Communications v. M.W.* [2010] 3 I.R. 1 at 8, the registration of a judgment mortgage did not, in itself, constitute execution of a judgment. It did, however, have the same effect as a mortgage by deed over the judgment debtor's beneficial interest in the relevant lands, by virtue of the provisions of s. 7 of the 1850 Act. In consequence, such a judgment creditor had special powers in relation to the property by virtue of s. 19 of the Conveyancing Act 1881, including a power to appoint a receiver and a power of sale, although it is doubtful that a judgment creditor could have sold out of court. Hence, the judgment creditor's usual remedy was to seek a well charging order, together with an order for sale, by institution of a mortgage suit. Such an application was, undoubtedly, a form of execution. While the Judgment Mortgage (Ireland) Acts 1850 and 1858 were repealed by the Land and Conveyancing Law Reform Act 2009, s. 117 (1) of that Act provides that the registration of a judgment mortgage in accordance with the requirements of that Act 'operates to charge the judgment debtor's estate or interest in the land with the judgment.'

25. The Judgment Mortgage (Ireland) Acts (and the relevant provisions of the 2009 Act) have no direct equivalent in England and Wales. The closest analogue in that jurisdiction is the charging order available under the UK Charging Orders Act 1979. A useful description of the relevant procedure is set out in the Law Reform Commission *Consultation Paper on Judgment Mortgages* (Dublin, 2004) LRC CP 30-2004. Essentially, a judgment creditor cannot avail of any statutory process to register the judgment as a mortgage against the judgment debtor's property but may apply to the relevant court for a charging order for the purpose of enforcing judgment. The court has a discretion whether to grant or refuse such an order. If an order is made, it imposes on specified property of the judgment debtor a charge for securing the payment of any money due under the judgment. S. 3 (4) of the UK 1979 Act provides that the statutory charge is enforceable "in the same manner as an equitable charge created by the debtor by writing under his hand."

26. Returning to the decision in *Rockrohan*, Irvine J. gave significant consideration to the judgment of the English Court of Appeal in *Ezekiel*, already cited. In that case, the plaintiff had obtained judgment in 1979 and a charging order over the defendant's property to secure it in 1982, before seeking an order for possession and sale of the property concerned in 1993. In considering the defendant's argument that the effect of s. 24 (2) of the UK 1980 Act (the direct equivalent of s. 11 (6) (b) of the Statute) was to limit the plaintiff to six years' interest prior to the application to enforce the charge, Millet L.J. (Phillips and Neill L.JJ. concurring) stated, in effect, that the plaintiff in that case was neither bringing an action upon the judgment that he had obtained in 1979 nor seeking to enforce execution of that judgment, as he had done when he applied for and obtained a charging order in 1982. Rather, he was taking action to secure what was due to him not as a judgment creditor but as a secured creditor with the statutory equivalent of an

equitable charge. Millet L.J. concluded (at p. 347 of the report):

> "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."

27. The second English case considered by Irvine J. in *Rockrohan* was *Lowsley*, already cited. There, the facts were significantly different. The plaintiffs in that case had obtained judgment in 1981. Upon discovering in 1992 that the defendant, who had gone abroad after the judgment, owned property in England, the plaintiffs obtained a charging order against that property in the same year. The defendant brought an application to have the charging order set aside, which failed, but he did have some success when the court held that, by virtue of s. 24 (2) of the UK 1980 Act, the plaintiffs were only entitled to six years' interest. The Court of Appeal reversed that finding but the House of Lords reinstated it.

28. In *Rockrohan*, Irvine J. summarised the resulting position as follows:

> "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 charge holder. 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."

29. The decision of Irvine J. in *Rockrohan* was subsequently appealed to the Supreme Court. In giving judgment on that appeal, Charleton J. (Denham C.J., Dunne J. concurring), noted that no argument had been pursued at the oral hearing concerning the effect of s. 11 (6) (b) of the Statute. Having referred to the analysis of the relevant case law conducted by Irvine J., the judgment went on to quote the following additional passage from the judgment of the High Court (at pages 40 – 41):

> "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 [not] intended to apply in the manner contended for by Rockrohan. The relief granted by the court in proceedings brought on 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 to readily apparent from the facts in the present case. Firstly, there was the delay generated by the earlier proceeding 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 the 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 [e]ffecting a sale for many years. Finally, the judicial review proceedings instituted by Rockrohan also delayed the plaintiff bank's 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, the plaintiff might find itself unable, because of matters outside its control, including obstruction tactics on the part of the 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 may prove necessary to enforce that order or thirdly, its right to recover interest on the monies outstanding on foot of such order."

30. Having quoted that passage, Charleton J. concluded:

> "It has not been demonstrated that this analysis by Irvine J. is in any way incorrect. Rather, that reasoning is compelling."

The concern raised

31. As I understand it, the Assistant Examiner's concern is that a particular difference between the facts here and those in *Rockrohan*, coupled with a difference between our law and that of England and Wales, may lead to a different result in this case, namely the conclusion that the provisions of s. 11(6)(b) of the Statute are engaged and that, in consequence, the plaintiff is only entitled to six years arrears of interest on the principal and interest found well charged on the property in 1999.

32. The relevant difference between the facts of this case and those in *Rockrohan* is that the plaintiff here is a judgment creditor, whereas the plaintiff in *Rockrohan* was not. That is to say, the well charging order here was made in respect of monies due on a judgment, whereas the well charging order in *Rockrohan* was made in respect of monies due on a guarantee debenture that provided for an equitable charge over certain lands.

33. It may be that, in this context, the Assistant Examiner has in mind the following passage from the judgment of Irvine J. in *Rockrohan*, at p. 32:

> "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."

34. I do not think it is correct to say, as the plaintiff submits, that in drawing attention to this distinction, the Assistant Examiner is "suggesting a distinction between various types of well charging orders." Rather, I believe the Assistant Examiner is drawing attention to the use of the term "arrears of interest in respect of any judgment debt" in s. 11 (6) (b).

35. Against the backdrop of our judgment mortgage procedure and the 'charging order' procedure in England and Wales, the relevant difference of law identified by the Assistant Examiner is that, in respect of the latter, s. 3 (4) of the UK Charging Orders Act 1979 expressly provides that a statutory charge is enforceable in the same manner as an equitable charge.

Conclusion

36. I have come to the conclusion that the distinctions just described do not bring the circumstances of the present case outside the *ratio decidendi* of the judgment of Irvine J. in *Rockrohan*. They are, in that sense, distinctions without a difference.

37. While it is true that the plaintiff in *Rockrohan* was not a judgment creditor, the plaintiff in each of the English cases that Irvine J. considered with approval in determining the proper construction and application of s. 11 (6) (b) of the Statute was one.

38. It seems to me that the fundamental – indeed, the decisive – question is not whether the plaintiff concerned is a judgment creditor but whether he or she is a secured creditor. I am satisfied that the plaintiff in this case is a secured creditor, just as the plaintiff was in *Rockrohan*.

39. The confusion appears to me to arise from the fact that, under the 'charging order' procedure in the UK, a judgment creditor is unsecured until he or she obtains a 'charging order', which thereafter provides the same security as an equitable charge over the property concerned. Of course, under our law as it stood before the commencement of the 2009 Act, the registration of a judgment mortgage had the same effect as that of a mortgage by deed, a security at least equivalent, if not superior, to an equitable charge. Similarly, under the 2009 Act, registration of a judgment mortgage operates as the creation of a statutory charge upon the judgment debtor's estate or interest in the land concerned.

40. It follows that the analysis of Millet L.J. in *Ezekiel* applies with equal force to the position of the plaintiff in this case, who obtained security in respect of his judgment debt by registering it. That is to say, the plaintiff is now seeking to recover what is due to him as a secured creditor, rather than as a mere judgment creditor. In that regard, he is a mortgagee who has obtained the sale of the mortgaged property and, as Millet L.J. pointed out in Ezekiel, under long settled principles he is entitled, as such, to retain all arrears of interest, whether or not statute-barred, before accounting to the mortgagor for the surplus. The conclusion of Irvine J. in *Rockrohan* that such an entitlement is not within s. 11 (6) (b) of the Statute as not being one that directly involves "arrears of interest in respect of a judgment debt", holds equally good in this case.

41. There is one final point that must not be overlooked and it is this. A statute bar must be specifically pleaded, certainly, as is the case here, when it would have the effect of barring a remedy rather than a right. In *Rockrohan*, for example, the defendant pleaded the Statute in the guise of an application for a declaration that the plaintiff's claim was captured by the provisions of s. 11 (6) (b). No such plea has been raised in this case and it is at least open to question whether the court can, or should, address the issue of its own motion. Nevertheless, I have done so in the present case on the basis that the Court's direction was expressly sought by the Assistant Examiner and because no issue in that regard was raised on behalf of the plaintiff.

42. In view of the conclusion I have reached, it does not seem necessary to me to consider the plaintiff's application for an order directing the payment out of the principal moneys covered by the well charging order, although I will hear any submission that either of the parties may wish to make in that regard.