Neutral citation no. [2005] IEHC 91

THE HIGH COURT

[2001 No. 7654 P]

BETWEEN

CLIFFORD HONNIBALL

PLAINTIFF/RESPONDENT

AND
BRIAN CUNNINGHAM

DEFENDANT/APPLICANT

Judgment of Mr. Justice Roderick Murphy dated the 18th day of March, 2005.

1. Motion on notice
The defendant's notice of motion dated 29th November, 2004 sought leave to speak to the minutes of an order made by this court on 8th March, 2004, registering a judgment mortgage for the purpose of discharging or vacating the order.

2. The defendant's application was grounded on his affidavit filed 1st November, 2004 which referred to the affidavit of the plaintiff dated 17th February, 2004 for the registration of judgment as a mortgage.

The defendant referred to an agreement drafted by the plaintiff by which he was required to pay a sum of money in addition to delivering up the contested property at Finglas Shopping Centre to the plaintiff. A dispute had arisen between himself and the solicitor who was then acting for him and in respect of which complaints had been made to the Law Society.

3. Grounding affidavit
Mr. Cunningham says that he was unaware that an application for an examination had been made to the court and knew of no reason why such application could not have been made on notice so that he could have been represented at the hearing of the application.

Examination before the Master was initially fixed for 16th June and had been adjourned from time to time. The defendant was in attendance on each occasion. He said that on 21st July his solicitor furnished all the documentation which was relevant to the debts owed by him, to the property which he owned and of the means of satisfying the judgment. He says that the plaintiff attempted to continue the examination by way of letter.

On 13th October when he attended upon the Master, the solicitor for the plaintiff handed a document to his counsel with a copy to him, outside the court which purported to be service. Both documents were returned to the plaintiff's solicitor.

Mr. Cunningham said that his counsel took objection to the course that the examination was taking and questioned whether the application had been appropriately brought and applied for an adjournment. On consent it was adjourned to 27th October. On the steps of the Four Courts the solicitor for the plaintiff again endeavoured to purport to serve a document which was dropped on the ground where it remained.

On 27th October, 2004 the examination recommenced. The defendant's counsel objected to questions still being cast in broad terms. Counsel for the plaintiff confirmed that his client had sworn an affidavit of registration on 17th February, 2004 and proceeded to register the entire judgment as a mortgage against his estate and interest in San Pedro, Gray's Lane, Howth, the subject property, and also confirmed that the order of *fieri facias* issued to the sheriff by the plaintiff had been returned.

4. Plaintiff's affidavit
The plaintiff, as judgment creditor, responding to the defendant's affidavit of 29th October, 2004, said that the proceedings arose out of an agreement between the parties for the sale of Unit 9, Drogheda Mall, Finglas, in the County of Dublin, by the plaintiff to the defendant in the sum of £825,000, which the defendant failed to complete. Proceedings were listed for hearing in December, 2002 and re-listed on 30th April, 2003, adjourned to 1st May, 2003 when the plaintiff agreed to compromise the proceedings with the defendant. That agreement was made an order of the court by Mr. Justice Ó Caoimh on 1st May, 2003, who ordered and adjudged that the plaintiff recover against the defendant a sum of €850,000 and the costs of the proceedings when taxed and ascertained.

It was further ordered that execution and registration of the said judgment be stayed on condition:

(1) that the defendant make the following payments:

(a) €50,000 on 1st August, 2003

(b) €200,000 on 1st November, 2003

(c) €250,000 on 1st June, 2004

(d) €200,000 on 1st May, 2005

(e) costs of the proceedings to be paid within one month of agreement or taxation

(2) that the defendant agrees to create a mortgage over his premises at San Pedro, Gray's Lane, Howth, Co. Dublin, in favour of the plaintiff as security for payment for the said monies in paragraph (1) within four weeks of the date of the order.

(3) that the defendant agrees not to create any charge, lien or encumbrance over his said premises or otherwise deal with same prior to the creation of the mortgage referred to at paragraph (2).

It was further ordered that the said settlement be received and filed as part of that order and that all further proceedings be stayed save as might be necessary to execute on foot of the said settlement. Liberty to apply was granted.

The plaintiff averred that the costs had been agreed by solicitors on 3rd February, 2004 in the sum of €120,833.74 (inclusive of VAT). He further averred that he was advised in February, 2004 that the appropriate procedure to adopt for the making of an order for

discovery in aid of execution was to apply on an *ex parte* basis. He says that all relevant documentation and all factual circumstances pertaining to the purported execution of the debt were put before the court.

The plaintiff averred that the defendant had refused to meet his obligations in respect of the agreement reached on 1st May, 2003. His solicitor had written to the defendant on 28th May, 2004 informing him that he was to be examined before the Master on 16th June following. The matter had been adjourned peremptorily until 7th July and the defendant's counsel confirmed that all documentation would be delivered to the plaintiff before 24th June. There was some disagreement as to whether an undertaking had been given in that regard.

5. The affidavit of Peter Dempsey, Solicitor for the defendant, referred to being in the Master's Court and confirmed that no such undertaking had been given. He believed that the matter would be adjourned unconditionally.

6. Applicant/Defendant's Submissions
The applicant's motion is to set aside the order granting liberty to conduct an examination of the defendant on the grounds that the plaintiff/respondent had sworn an affidavit of registration and had proceeded to register the entire judgment as a mortgage against the defendant's estate in the subject property. An order of *Fieri Facais* issued to the sheriff had been returned.

The purpose of the application made by the plaintiff/respondent in March 2004 and the order granted to him at that time was to aid executions pursuant to O. 42 r. 36. Counsel for the applicant queried the purpose of an examination in such circumstances. The examination was an exceptional process to aid execution and was not a mechanism for placing a judgment creditor in jeopardy of imprisonment.

Counsel for the applicant argued that such an application should not have been made ex parte as there were no reasons for urgency. *Haughey v. Moriarty* [1999] 3 I.R. 1 and *Wallace v. Kennedy* [2003] and *Baril v. Obelnicki*, State of Manitoba, 4th July, 2004 were relied upon.

Where an application ex parte is justified it must be made *uberrima fide: McDonagh v. Davis* [1875] I.R. 9 CL 300 *per* Palles C.B. All facts which can have a bearing on the order sought must be brought to the notice of the court. However, no material was placed before the court to justify the making of the order *ex parte* rather than *inter partes*. On the authority of *Regina v. Jackpine*, High Court of Ontario, 15th March, 2004, the order should be discharged. Moreover, the applicant relied also on in *Re Steepleview*, High Court, Finlay Geoghegan J., *ex tempore*, 13th February, 2004. In that case an application to conduct an examination order of a director under s. 254 of the Companies Acts, 1963 to 2000 was refused where the reasons for the examination were not set out *in exstenso*.

There was no concrete or comprehensive statement of what information was sought by the plaintiff and why it was necessary to effect execution.

If the court were not minded to set aside the order in its entirety then it should amend the order to limit the books, bank statements, documents, records or notes (including bank records).

7. The respondent plaintiff's submission was that the application of 8th March, 2004 required a relatively low threshold for an order for examination of a debtor made pursuant to O. 42, r. 36. Reference was made to *Foley v. Boden and The Commissioner of An Garda Síochána,* (Unreported, Supreme Court, 23rd June, 2003, referred to such relatively low threshold that appeared to be fixed for the making of an order under the rule.

The affidavit sworn by the respondent averred that the defendant had not created a mortgage over the subject property and, that given the debt of the applicant, the respondent was entitled to examine all possible options for the purpose of execution of the judgment debt.

8. Judgment of the Court
The Rules of Superior Court deal with discovery in aid of execution and in proceedings under the Debtor's Act (Ireland), 1872 in the following four rules. Order 42, rule 36 provides:

> "36. Where a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the court for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, or any other person be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or officer of the court or whoever the court shall appoint; and the court may make an order for attendance and examination of such debtor or of any other person, and for the production of any books or documents."

Rule 37 provides as follows:

> "37. In case of any judgment or order other than for the recovery or payments of money, if any difficulty shall arise in or about the execution or enforcement thereof, any party interested may apply to the court, and the court may make such order thereon for the attendance and examination of any party or otherwise, as may be just."
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> "38. The costs of the application under Rules 36 and 37 or either of them and of any proceedings arising from or incidental thereto shall be in the discretion of the court.
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> 39. Nothing in this order shall affect any of the provisions contained in the enforcement of Court Orders Acts, 1926 and 1940."

It is common case that in exceptional circumstances the application may be made in the first instance ex parte before a judge of the High Court.

It would appear that the plaintiff must meet a relatively low threshold and, indeed, that a defendant is entitled to seek to set aside the order as the applicant herein seeks to do. *Foley v. Boden* applied. The applicant attended for examination without initial objection.

However, it is also of importance that full disclosure be made on any *ex parte* application so that the court may have before it all facts which can have a bearing on the order sought.

This indeed, would have been a ground for the applicant to have sought to set aside the order before acceding to the examination before the Master. This court has to bear in mind that no objection was taken to the examination order until counsel for the respondent began what was termed a widespread cross-examination.

There would seem to be no doubt that r. 36 is very wide indeed in relation to debts owing and property or means of satisfying the judgment or order and, indeed, in relation to the production of any books or documents.

It does not seem that the wider scope of an examination order under the Companies Acts is an appropriate comparison.

While there is no express provision for *ex parte* applications as there is in the equivalent English Order 48, r. 1, the practice would appear to reflect the reality under which judgment debtor scarcely ever appeared in answer to a summons or, where he did, rarely had grounds for resisting the order for his examination.

It is also clear that an examination under the English rule "is not only intended to be an examination, but to be a cross-examination and that of the severest kind" and not confined to answering the simple question "what debts are owing?". The debtor must answer all questions "fairly, pertinent and properly asked" with a view of ascertaining what debts are owing to him and from whom they are due and must give "all necessary particulars to enable the plaintiff to recover under a garnishee order" (*Republic of Costa Rica v. Strousberg* [1880] 16. ChD. 8). If a debtor refused to answer questions then, ultimately the judgment creditor may apply to the court for his committal.

The court has some concern in relation to the bringing all facts to its notice bearing on the order sought. The applicant says that the affidavit grounding registration was sworn on the very day as the affidavit used to ground the application for examination made a month later. Even if this were so, it does not seem that such disclosure would have affected the order made by the court. It may, however, be a matter sounding in costs rather than affecting the relief sought.

The applicant has also asked the court to restrict the order in relation to books and documents. It seems to me that the order itself indicates the parameters of books and documents which relate to debts and property. Accordingly, the court will not limit the order.

In the circumstances the court refuses the application.