THE COURT OF APPEAL

The President
Finlay Geoghegan J.
Irvine J.

2015/382

Allied Irish Banks plc

Plaintiff/Respondent

and

Anthony O'Reilly

Defendant/Appellant

And

Indexia Holdings Limited and Brookside Investments Limited

Defendants/Notice Parties

Ex Tempore Judgment of the Court delivered Ms. Justice Finlay Geoghegan on the 6th day of October, 2015

1. This is an appeal brought by the first named defendant, Dr. Anthony O'Reilly ("Dr. O'Reilly") against an order made by the High Court (McGovern J.) on the 8th June, 2015. The order was made following the hearing of a motion issued on behalf of the plaintiff (AIB) on the 24th April, 2015. The order granted the reliefs sought at paragraphs 2, 3 and 4 of the notice of motion save for the variation of the value of assets to which para. 4 applied to €100,000. The order was in the following terms:-

> "IT IS ORDERED that the First Named Defendant do identify on oath by way of a Statement of Affairs whether and what means he has to satisfy the judgment of this Honourable Court dated the 23rd day of June 2014, the said Statement of Affairs to be furnished to the Solicitors for the Plaintiff by the 7th day of September 2015
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> And IT IS ORDERED that the First Named Defendant do disclose on oath and furnish all relevant documents, including but not limited to all books, records, account statements, pension statements, ledgers, certificates, contracts, loan documentation, transfers and title documents in support of and evidencing the entries made in the aforesaid Statement of Affairs, the said documents and Affidavit of Discovery to be furnished to the Solicitors for the Plaintiff by the 7th day of September 2015, and which said Affidavit and documentation shall include without prejudice to the foregoing the constitutive documents and latest management accounts of the following companies:-
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> (a) Galicia Management Limited
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> (b) Birchfield Holdings Limited
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> (c) Balinae Enterprises Limited
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> (d) Araphoe Investments Limited
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> (e) Glandore Limited
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> (f) Arquette Limited
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> (g) Collins Hill Investments Limited
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> (h) Halsey Investments (Cayman) Limited
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> And IT IS ORDERED that the First Named Defendant do disclose on oath by the 7th day of September 2015 details of any asset transfers within the last five years where the market value of the asset individually exceeded €100,000.00."

2. The background to the motion was that on the 23rd June, 2014, a judgment had been granted in the High Court against Dr. O'Reilly in favour of the plaintiff in the sum of €22,657,432.10. A stay was subsequently refused. It appears from the grounding affidavit of the motion in the High Court that as of the 20th April, 2015-, a sum of €14,291,362.46 of the said judgment amount remained unsatisfied.

3. The first relief sought in the motion was an order pursuant to O. 42, r. 36 of the Rules of the Superior Courts that Dr. O'Reilly attend before the court for examination pursuant to that rule. That relief was not proceeded with by reason of evidence as to Dr. O'Reilly's state of health which was before the High Court on the 8th June. Nevertheless AIB have not abandoned that relief, they simply deferred seeking the fixing of a time and date. That fact is relevant to the issues on appeal.

4. The order of the High Court required disclosure on oath in accordance with the order on or before the 7th September, 2015. Following an application to this Court a stay was placed on that order pending the full hearing of the appeal yesterday.

5. Helpful written submissions were lodged on behalf of Dr. O'Reilly and AIB. The other defendants did not participate in the appeal. Counsel for Dr. O'Reilly synthesised the issues which fell for determination on the appeal both in the written submissions and in oral submission under three headings:-

(i) Whether there was sufficient evidence to warrant the making of the order for discovery in aid of execution.

(ii) Whether the alleged apparent collateral purpose for which the order for discovery in aid of execution was sought by AIB ought to have influenced the High Court judge against the exercise of a discretion to grant the order.

(iii) Whether the order made was too broad particularly having regard to the judgment of Clarke J. in the High Court in *Mooreview Developments Limited and Others* [2011] 3 I.R. 615.

6. Prior to considering the issues in dispute, I wish to set out briefly the legal framework in which the order in the High Court was made and which is not in dispute on appeal.

7. As stated, the first relief sought in the motion brought before the High Court was an order pursuant to O. 42, r. 36 of the Rules of the Superior Courts for the attendance of Dr. O'Reilly and the production of books and documents in his possession. That rule provides:-

> "When a judgement 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 judgement or order, or in the case of a corporation that any officer thereof, or that 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 judgement or order, before a judge or an officer of the Court as the Court shall appoint; and the Court may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents."

8. The orders sought and obtained in substance at paras. 2, 3 and 4 of the notice of motion were orders obtained pursuant to the inherent jurisdiction of the court. Whilst referred to and termed "discovery in aid of execution" (as indeed the title in that section of O. 42, commencing with r. 36 states), they are orders made pursuant to the inherent jurisdiction of the court identified by Clarke J. in *Mooreview* and primarily for the purpose of and curtailed by the ambit of the proposed examination of Dr. O'Reilly pursuant to O. 42, r. 36. I will come back to this point later.

9. In *Mooreview* on the question as to whether the court had jurisdiction to make an order of the type made by the High Court on the 8th June herein, Clarke J. set out his reasoning as to the existence of such a jurisdiction at paras. 58 to 60 of his judgment as follows:-

> "58. It is true that O. 42, r. 36 simply requires a relevant debtor to be 'orally examined' as to means. There is no express provision requiring the debtor to make any information available before he is cross-examined. It should be noted that it has become a common practice in the commercial list in recent times (without objection in most cases) for debtors to be required to make information available in advance of cross-examination. The reason for this is obvious. Leaving aside for the moment the scope of the matters that can be inquired into under O. 42, r. 36, the fact is that a debtor can be required to answer any questions in relation to those matters and is required to bring along all relevant books or documents. It is, therefore, the case that a debtor can be asked about his means of satisfying a judgment in the witness box and can be required to produce in court any documents relevant to his answers. The jurisprudence makes it clear that it is and can be appropriate to ask searching questions of a debtor under such an examination in cases where any real doubt as to the debtor's means may emerge.
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> 59. The case made on behalf of Mr. Cunningham is to the effect that the questioning on behalf of the creditor has to be done, in effect, although not put this way, 'on the blind'. In other words, the relevant debtor cannot be required to make any information available in advance. He simply turns up in court with his books and records and it is left to the creditor's advocate to examine him at length to find out the basic facts and to identify the documents that might be relevant to his means. There may well be straightforward cases where that will work. A person who does not have significant assets (or at least many types of assets) and a relatively straightforward income, may well be easily required to reveal all relevant information without any advance disclosure. However, it is only necessary to contemplate the type of complex interlocking asset ownership arrangements that many of those who now come before the courts have engaged in, to demonstrate that a huge amount of valuable court time would be wasted in requiring the relevant creditor to start with a blank sheet of paper. It would, in many cases, require days under cross-examination before even a reasonable picture of the position of the debtor would emerge. Doubtless time would be spent searching amongst the undoubtedly large volume of books and records for appropriate items to be produced to verify the answers to questions legitimately put. It seems to me that such a course of action would amount to a way of conducting the court's business that would give rise to a serious waste of valuable resources. It is important to emphasise that it is not asserted on behalf of First Active that Mr. Cunningham be obliged to reveal, in advance, anything which he could not be obliged to reveal in the witness box. This is not a case where it is being suggested that the substantive obligations of disclosure go beyond what is set out in the rules. The only issue is as to whether it is necessary to give prior disclosure of relevant matters so as to shorten the amount of court time that will be spent in the actual cross-examination. I am more than satisfied that the court has a jurisdiction to order a debtor to disclose any matters that properly come within the scope of a cross-examination under O. 42, r. 36 in advance of the hearing so as to enable the hearing to be focused on issues of real inquiry.
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> 60. The rule allows all relevant matters to be explored under cross-examination. Providing a practical way to make that cross-examination more efficient seems to me to be encompassed within the rule. To exclude a jurisdiction to allow preliminary disclosure as an aide to effective and efficient cross-examination would be a course which should only be adopted if the rule made absolutely clear that no such prior disclosure could be directed. The rule does not make that clear. It seems to me to be inherent in the rule that the court can adopt practical measures to ensure that the disclosure which the rule in any event requires is to be made in the most efficient and practical way possible."

10. I respectfully agree with Clarke J. that the primary reason for the inherent jurisdiction to make orders for discovery of the type made is as a practical measure to ensure that the examination and disclosure (which O. 42, r. 36 in any event permits and requires) is done in the most efficient and practical way possible. Thus, whilst the order is referred to as an order for discovery "in aid of execution" it is more precisely an order made in aid of a proposed examination pursuant to O. 42, r. 36.

11. The importance of this is that both the circumstances in which a person will be required to attend for examination under O. 42, r. 36 and the ambit of the examination governs the order for discovery which may be made pursuant to the inherent jurisdiction of the court as identified in *Mooreview*.

12. I now turn to the issues in dispute.

Evidential threshold
13. Counsel for both parties are in agreement that an applicant for an order pursuant to O. 42, r. 36 and as in this instance a further order pursuant to the inherent jurisdiction of the court must provide evidence of the fact that the applicant has a judgment ie. is a judgment creditor and that the judgment remains unsatisfied. Counsel for Dr. O'Reilly submits that there is a further, albeit low evidential threshold which must be satisfied by the applicant. He does so in reliance firstly on a submission that the order to be made is a discretionary order and there must therefore be evidence put before the court upon which it can exercise its discretion. He secondly relies upon the judgment in the Supreme Court of Keane C.J. in *Foley v. Boden* [2003] 2 I.R. 607.

14. Counsel for AIB submits that there is no obligation on such an applicant to adduce evidence beyond the fact of the unsatisfied judgment debt. He submits that the correct position is that an applicant who proves his judgment debt and that it remains unsatisfied is prima facie entitled to an order pursuant to O. 42, r. 36 and the connected orders pursuant to the inherent jurisdiction of the court unless the judgment debtor establishes that there are special circumstances which justify the refusal of such an order. He relies upon the judgment of the Court of Appeal in *Brown v. Stafford* [1944] 1 AER 172.

15. It is important to note that this application in the High Court was an application against the judgment debtor. *Foley v. Boden*, relied upon by counsel for Dr. O'Reilly was not such an application. It was an unusual application for an order that the Commissioner of An Garda Síochána be examined pursuant to O. 42, r. 36 upon the basis that there was a possibility that the State had entered into a contractual arrangement with the judgment debtor which provided for continuing payment of sums of money to him under a witness protection programme. Keane C.J. having noted that O. 42, r. 36 provides for the examination of the debtor or "any other person" then expressed the view on the evidence before the Supreme Court that the plaintiff "reaches the relatively low threshold which appears to be fixed for the making of an order under the rule". Earlier in the judgment Keane C.J. appears to have distinguished potentially the application before the Supreme Court from one where the application was against the judgment debtor as in the case of *Patterson v. Doyle* [1878] 4 LR. Ir. 33. He did not consider the issue before us, namely the evidential threshold if any required to be satisfied by a judgment creditor who seeks an order against the judgment debtor.

16. I will leave open for another day the question as to whether and if so to what extent there is an evidential threshold beyond the proof of an unsatisfied judgment where there is an application to examine a person who is not the judgment debtor pursuant to O. 42, r. 36.

17. In the case of a judgment debtor such as is at issue here, I have formed the view that the submissions made by counsel for AIB are correct. There is no further evidential threshold which must be met by an applicant for an order against a judgment debtor. In *Brown v. Stafford,* Greene M.R. at p. 175 in relation to the relevant English rule (O. 42, r. 36) stated:-

> "It is perfectly true that when the language of r. 32 is looked at it is couched like many other rules, in discretionary form. The word used is 'may' but if any one chooses to search through the Rules of the Supreme Court he will find that many rules used the word 'may' when nobody would suggest that the court has any real discretion to refuse to exercise the powers conferred; and in the present case counsel for the respondent was, I think, quite fairly and rightly constrained to admit that in the ordinary case, apart from the Court (Emergency Powers) Act, the order for examination of a debtor is made practically as of course. That does not mean that in very special circumstances there may not be a discretionary power to refuse, but such a refusal would be quite out of accordance with the universal practice under the rule."

18. I respectfully agree as a matter of principle with this approach. A person who has obtained a judgment which the judgment debtor leaves unsatisfied appears to me prima facie entitled to orders which may be made pursuant to O. 42, r. 36 and the connected orders envisaged by *Mooreview* pursuant to the inherent jurisdiction of the court. The obligation is on the judgment debtor to pay the amount due under the judgment. If there is proof he has not done so, there is no further evidential obligation on the judgment creditor to establish a prima facie entitlement to the order. There may, however, be special circumstances established by the judgment debtor which might require evidence in response, to avoid a court being persuaded that it should not exercise its discretion to make the orders sought.

19. On the facts herein, I am not satisfied that there were before the High Court any such special circumstances. Counsel for Dr. O'Reilly has referred to the statement of assets produced in connection with the Bahamian Protection proceedings and sought to rely upon the fact that AIB did not on affidavit aver that such information was unsatisfactory or point to its deficiencies. However there was evidence in the exhibits before the High Court of AIB's dissatisfaction with the nature of the information provided and the nature of the unencumbered assets recorded in the summary statement and notes thereto such that the provision of such information could not amount to special circumstances on the facts herein such as to deprive AIB of its entitlement to the order for discovery pursuant to the inherent jurisdiction of the court. Counsel also referred to the failure by AIB to execute against unencumbered assets since obtaining the judgment despite opposing a stay. That also in my view does not amount to a special circumstance. It is primarily a matter for the judgment debtor to realise and pay. Execution only arises in default.

Collateral purpose
20. The order made by the High Court is a discretionary order. As indicated insofar as it is an order made in aid of a proposed examination of a judgment debtor it appears to me that a judgment debtor seeking to oppose such an order upon the basis that either the applicant did not intend to examine the judgment debtor or did not in truth, seek the discovery for the purpose of enabling it ascertain the property or other means available to the judgment debtor to discharge the judgment would have to place before the court cogent evidence of the grounds for such a belief. There was no such evidence before the High Court.

Breath of order made
21. Counsel for Dr. O'Reilly submits that the order made and in particular the third part of the order in relation to the five year look back of transfers exceeding €100,000 is broader than the type of order envisaged by Clarke J. at para. 66 of his judgment in *Mooreview*. There he stated:-

> "66. However, for the reason which I have already set out, I am satisfied that it is appropriate to make an order directing that Mr. Cunningham attend before the court for the purposes of being cross-examined in accordance with O. 42, r. 36. I am also satisfied that it is appropriate to make an order requiring Mr. Cunningham, in advance of such examination, to disclose on oath any assets or entitlements, whether capital or income, and whether present or future, from which the judgment against him could be satisfied together with any documents relevant to those questions. In my view the terms of such disclosure order should be cast in a way which most closely resembles the terms of O. 42, r. 36 itself, for those orders are not stand alone orders but rather orders designed to make the process of the cross-examination under O. 42, r. 36 more efficient. I will hear counsel for First Active further on the precise formulation of the orders in question. It seems logical that a date for the cross-examination of Mr. Cunningham should be deferred until after he has complied with the disclosure orders to which I have referred."

22. Counsel for AIB accepts that the ambit of the permissible order pursuant to the inherent jurisdiction of the court is itself governed by O. 42, r. 36. As stated by Clarke J. this follows from the fact that the orders are not stand alone orders, but "rather orders designed to make the process of the cross examination under O. 42, r. 36 more efficient".

23. Starting from that premise, on appeal before this Court, the question appears to me to be whether it would or would not be permissible to ask Dr. O'Reilly on an examination pursuant to O. 42, r. 36 for the information in relation to which he is required to make discovery pursuant to the High Court order of the 8th June. Order 42, r. 36 permits the judgment debtor to be 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 order". A person who has made transfers of property in certain circumstances may retain a beneficial interest in or a debt or other entitlement in relation to the transferred property. Thus it appears to me that questions in relation to transfers made in the past five years would be permitted on examination and hence it follows that the order for discovery made was within the ambit of the inherent jurisdiction of the High Court. The High Court judge had raised the threshold of €10,000 sought on behalf of AIB to €100,000 which he considered to be more reasonable for a person in the position of Dr. O'Reilly.

24. Insofar as some detailed criticism was advanced against the second order made in relation to constitutive documents and latest management accounts of the eight identified companies such detailed criticism was not advanced either on the affidavit evidence or in submission before the High Court. These are stated to be companies in which it is contended Dr. O'Reilly has an interest and again it appears to me it follows that he would entitled to be asked questions about the financial standing of the companies and other questions which would permit an examination as to whether they do constitute property or other means available to him of satisfying the judgment debt.

25. I would add that whilst as appears Clarke J on the facts in *Mooreview* considered at paragraph 66 (above) that the order for discovery "should be cast in a way which most closely resembles the terms of O. 42, r. 36 itself" there cannot be an objection in principle to making a more specific order provided of course it remains within the ambit of permissible examination pursuant to O. 42, r. 36. Depending on the facts, it may be helpful and indeed avoid potential disputes to seek and make an order in more specific terms as was done in the High Court herein.

26. Accordingly, I would dismiss the appeal and the only remaining question is the variation of the date by which there must be compliance with the High Court order from the 7th September, 2015, by reason of the lapse of time and stay placed on the order by this Court in advance of hearing the appeal.

Note: The President and Irvine J concurred with this judgment.