

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

**BETWEEN:**

**JOHN KELLY LIMITED  
T/A KELLY FUELS**

**Appellant;**

**-and-**

- 1. DAVID POLLOCK (JUNIOR)  
T/A D POLLOCK & SON and**
- 2. SYLVIA POLLOCK**

**Respondents.**

**CAMPBELL LJ**

*Introductory*

This appeal concerns the exercise, by the Master (Enforcement of Judgments Office), of the discretion given by Article 46(2) of the Judgments Enforcement (Northern Ireland) Order 1981 ("the Order") to make an order charging land subject to a condition as to the time when the charge is to become enforceable. The order in question was made subject to the condition that the power of sale conferred by Article 52(1) of the Order was not to be exercised without the leave of the Master.

At the outset of the appeal Mr Thompson QC for the Appellant who appeared with Mr Lewis stated that the parties have reached a settlement. He invited the Court to continue with the appeal as it raised an issue on which the guidance of the Court would be of general assistance. At a preliminary hearing the Court had invited the Attorney General to appoint an *amicus curiae* as the Respondents were not represented, and when the appeal came on for hearing Mr Nicolas Hanna QC was present to fulfil this role. The Court considered that it should hear the appeal although the outcome will be only of academic interest to the parties.

*The order charging land*

In January 1999 the appellant, having obtained a money judgment against the Respondent, applied to the Enforcement of Judgments Office (“the Office”) for enforcement under Article 22 of the Order and the issue of a custody warrant.

A custody warrant was duly issued under Article 25 and as this proved ineffective the Office exercised its discretion as to which of the methods provided by Article 16 (1) should be used to enforce the judgment. One of the methods decided upon was an order under Article 46 of the Order.

Article 46 (1) and (2) are in these terms:

“(1) The Office may by order (in this Order referred to as an order charging land) impose on any such land or estate in land of the debtor as may be specified in the order a charge for securing the payment of the amount recoverable on foot of the judgment or so much thereof as may be so specified.

(2) An order charging land may be made either absolutely or subject to such conditions as to notifying the debtor or as to the time when the charge is to become enforceable, or as to such other matters, as may be specified in the order”.

Notice of intention to make an order charging the Respondent’s interest in the land and premises at 46 Magherascouse Road, Ballygowan, County Down was served both on the respondent and on his wife. It was stated in the notice that the order charging land would be subject to the condition that the power of sale conferred by Article 52(1) of the Order shall not be exercised without the prior leave of the Office. On 14 January 2000 the order was made, with this condition, and it was registered in the Registry of Deeds.

On 9 May 2000 the appellant notified the respondent and his wife that an application was being made for leave to exercise the power of sale. The respondent and his wife both objected and, after a number of adjournments, the matter eventually came on for hearing on 8 March 2001 when all parties were represented by counsel.

The Master in his judgment described the exercise that he had to perform as balancing the objections of the wife as non-debtor co-owner against the interest of the appellant as creditor. He found an imbalance of equities between the respondent’s wife and the appellant as a commercial institution, which had not made out any case for its own necessity to recover this money. He refused to grant liberty and stated that on the balance of fairness the respondent’s wife had a greater right to remain in the property

than the appellant had to have liberty to exercise the power of sale. The Master added that it was not proper to exercise the power of sale at present and that circumstances would change with the passage of time.

*The appellant's submission*

Judgments to which the Order applies are enforced by or through the Office and the method of enforcement of money judgments is in the discretion of the Office. Articles 18 and 19 of the Order provide:

“18. Where it appears to the Office that a money judgment for the enforcement of which an application has been made under the succeeding provisions of this Order cannot be enforced within a reasonable time by any enforcement order, the Office shall issue to the creditor and to the debtor a notice of unenforceability; or where it appears to the office that such a judgment can be partially enforced, the judgment shall be enforced to the extent that appears to the Office to be reasonably practicable and a notice of unenforceability shall be issued for the balance remaining due.

19. Where the Office has issued a notice of unenforceability it shall give the debtor and the creditor to whom the notice has been issued an opportunity of being heard as to why a certificate of unenforceability should not be granted; and if, after giving the debtor and the creditor such an opportunity, the Office is satisfied that the money judgment in respect of which the notice of unenforceability has been issued cannot within a reasonable time be enforced, or that it is not reasonably practicable to enforce it further within such a time, the Office shall forthwith-

- (a) grant a certificate of unenforceability in respect of the judgment or in respect of so much of it as cannot reasonably be enforced; and

(b) publish a notice of the grant of that certificate in such a manner as may be prescribed by rules;

but if not so satisfied shall refuse to grant a certificate.

It was contended by Mr Thompson QC that the scheme of the Order is such that if a judgment cannot be enforced by any of the methods provided for in the Order within a reasonable time a certificate of unenforceability is granted. No further action is taken by the Office in relation to the enforcement of the judgment unless the certificate is set aside.

The order made by the Master left the appellant with a money judgment that it could not enforce for an indefinite period and not entitled to a certificate of unenforceability.

Mr Thompson submitted that if in the hearing of the application for leave to exercise power of sale the Master had given leave the appellant, as the owner of a charge on land in co-ownership, would have had to request an order for partition or for sale and distribution in lieu of partition. The court, on making such order or at any time before its enforcement, would have had power under Article 49 of the Property (Northern Ireland) Order 1997 to impose such stay or suspension on such conditions as, in the circumstances of the case, it thought fit. Mr Thompson argued that this would have been the proper time for the rights of the appellant's wife to be considered.

In response Mr Hanna QC referred the Court to sections 1 and 3 of the Charging Orders Act 1979 which provides for the enforcement of money judgments in England and Wales by imposing a charge on property of the debtor.

The relevant subsections provide;

“1. (1) Where, under a judgment or order of the High Court. . . a person (the 'debtor') is required to pay a sum of money to another person (the 'creditor') then, for the purpose of enforcing that judgment. . . the. . . court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment

(3) An order under subsection (1) above is referred to in this Act as a 'charging order' . . .

(5) In deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to

- (a) the personal circumstances of the debtor, and,
- (b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.

3. (1) A charging order may be made either absolutely or subject to conditions as to notifying the debtor or as to the time when the charge is to become enforceable, or as to other matters.....

(4) Subject to the provisions of this Act, a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand.”

It will be observed that section 3(1) of the 1979 Act is in virtually identical terms to Article 46(3) of the Order.

In *Harman v Glencross* [1986] Fam. 81 Fox L.J. at page 104 said of section 3(1) of the Charging Orders Act;

“On behalf of the creditor it was, in effect, contended that the proper course was to grant a charging order

and leave the creditor to enforce the security by applying for sale of the house under section 30 of the Law of Property Act 1925. Upon that application, the court would consider what, if any postponement of the sale was appropriate. To that it was objected on behalf of the wife, that the existence of the statutory trust for sale would compel the court to order an early sale. In *re Holliday* [1981] Ch. 405, however, the court (on strong facts) deferred a sale for several years because of family circumstances, and in *Thames Guaranty Co v Campbell* [1985] Q.B. 210 the Court of Appeal remarked that the discretion of the court under section 30 is a real one. However, I do not think it is necessary to investigate that aspect of the matter further because it seems to me that the court could, under the provisions of section 3(1) of the Charging Orders Act 1979, impose a condition that the creditor should not seek to enforce the charging order by means of an order for sale of the house during a specified period. In a case such as the present where there is a risk of real hardship to the wife and children if an unconditional charging order is granted. I would think that a deferment could properly be so long as a child of the marriage is living and under the age of 17 and in full time education."

In the present case the Master did not specify in the order charging land the period during which it could not be enforced. When he refused to give leave to enforce on a subsequent application he said that he did so "without prejudice to a further application, which the Creditor may make at some time in the future when the equities, to their mind, are more in their favour."

Not only is the time unspecified when the order will become enforceable but, unlike a charging order under the Charging Orders Act 1979, this order and later order refusing leave to enforce it were made against the

background of legislation which requires enforcement within a reasonable time – as exemplified by Articles 18 and 19.

*Conclusion.*

The practice of imposing a condition requiring the leave of the Master to exercise the power of sale is inconsistent with the provisions of Articles 18 and 19 of the Order, unless there is sufficient reason to do so. It was the intention of the legislature in enacting those provisions that money judgments should either be enforced within a reasonable time or a certificate of unenforceability should be issued to allow the creditor to pursue other remedies.

In our opinion such a condition should not be inserted as a matter of course, but only if there is some specific reason, and then for a finite period of relatively limited duration. The question of balancing the creditor's normal expectations and the potential hardship to the co-owner can be considered when the creditor applies to the court under Article 49 of the Property (Northern Ireland) Order 1997. The interests of the co-owner wife and her children would be safeguarded at that time, with the added advantage that in that jurisdiction either party would have a right of appeal from the master to the judge.

We consider that the appeal should be allowed. If a remedy had been required, we would have reversed the decision of the Master and given the appellant leave to exercise its power of sale.



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**J U D G M E N T**  
**O F**  
**C A M P B E L L L J**

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