Master 33

28/06/2005

No 2001/2843

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF THE PARTITION ACTS 1868 & 1876

Between

JORDAN BROTHERS (NI) LIMITED

Plaintiff

and

1. JAMES DOYLE

2. HANNAH DOYLE

Defendant

MASTER ELLISON

[1] This is an application by originating summons brought by the plaintiff as a judgment creditor for the following reliefs: -

1. an order for delivery by the defendants of possession of the premises described in the second schedule to the originating summons, namely (a) the lands comprised in Folio TY 6641 County Tyrone, stated in the originating summons to "consist of" a dwelling house which appears from the affidavit evidence to be 15 Derrybard Road, Fintona, County Tyrone ("the dwelling"), and (b) the lands comprised in Folio 3186 County Tyrone, which lands do not include a dwelling ("the land in Folio 3186");
2. an order for partition of the dwelling;

3. an order for sale in lieu of partition of the dwelling and that for the purpose of such sale all necessary acts and deeds may be done and executed by the proper parties;
4. all necessary consequential accounts and inquiries;
5. further or other relief;
6. costs.

[2] The plaintiff is a judgment creditor on foot of a county court judgment obtained against the first defendant on 8 October 1997 for payment of the sum of £11,484.47 together with costs of £687.53.

[3] No fewer than four orders charging land have since been made by the Enforcement of Judgments Office pursuant to that judgment - three against the first defendant's interest in the dwelling, the fourth and most recent order charging land being against the land in Folio 3186.

[4] The defendants are the registered owners of the fee-simple estate in the dwelling which they both occupy. The first defendant is the sole registered owner of the fee-simple estate in the land in Folio 3186 in respect of which, however, the second defendant claims in these proceedings that she is entitled in equity to a one-half share.

[5] The first order charging land against the defendant's interest in the dwelling was made on 8 September 1998. As no notice of intention to make the order charging land was served on the second defendant by the Enforcement of Judgments Office it is

agreed between the parties that under the principles set out by the then Chancery Judge, the Honourable Mr Justice Girvan, in Ulster Bank Limited v Carter [1999] NI 93 that order charging land is a nullity as it was made in contravention of the principles of natural justice and is therefore "outwith the statutory power".

[6] The second order charging land against the first defendant's interest in the dwelling was made on 26 January 2000. Each of the defendants in their affidavit evidence denies having received notice of intention to make that order charging land. Although in the course of these proceedings the plaintiff obtained a certificate (albeit unsigned) of postal service from the Enforcement of Judgments Office, it appears from that certificate that the relevant notice of intention was incorrectly addressed to the first defendant at '13' Derrybard Road but a notice was sent to the second defendant at the correct address, namely 15 Derrybard Road. If the affidavit evidence of the defendants is correct and as a result neither of them was afforded an opportunity to contest the making of the second order charging land, or if one of them was not afforded such an opportunity, that order charging land would also be void under the principles in the judgment of Girvan J in Carter, which judgment includes a reference to the following extract from the judgment of Carswell LCJ (as he then was) in Hallmark Furniture Company Limited –v- Collins [1998] NI 4: -

> "It is constantly described as a cardinal principle of justice that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard…it is impossible to sustain the validity of an order charging land made without notice of any kind to the person most directly affected, the owner of the legal title to the land. It seems to us incontestable that the purported order charging land made on the 10 March 1997 was void, for such an order made without notice would…be without the statutory power, being made in breach of the rules of natural justice."

[7] The second order charging land contains a restriction on enforcement in the form of a condition that the leave of the Master (Enforcement of Judgments Office) would be necessary before the power of sale conferred by Article 52(1) of the Judgements Enforcement (Northern Ireland) Order 1981 ("the 1981 Order") could be exercised. On an application by the plaintiff's solicitors for removal of that restriction, the third order charging land purportedly affecting the first defendant's interest in the dwelling was issued. This order charging land bore the same date and was essentially in the same terms as the second order charging land save that it did not contain any restriction on exercising the power of sale. There is no evidence to the effect that notice of intention to make that particular order charging land was sent to either defendant and the order charging land would appear to have been drawn on a date unknown in the Enforcement of Judgments Office and of that Office's own motion. It appears that the purpose of the issue of this order was to give effect to a practice direction which had been made in the Enforcement of Judgments Office consequent on the judgment of Campbell LJ on behalf of the Northern Ireland Court of Appeal in John Kelly Limited t/as Kelly Fuels –v- Pollock [2002] NIJB 249, in which it was ruled that such restrictions (in orders charging land) on the power of sale conferred by Article 52 (1) of the 1981 Order "should not be inserted as a matter of course, but only if there is some specific reason, and then for a period of relatively limited duration".

[8] I am satisfied that the first and third orders charging land made in respect of the dwelling are void in accordance with the principles set out in Carter and Collins because of the omissions to notify the second defendant of intention to make the first

order charging land and to notify either defendant of intention to make the third order charging land.

[9] In respect of the second order charging land, it falls to me to determine whether the affidavit evidence of the defendants to the effect that they received no notice of intention to make that order charging land should be accepted notwithstanding evidence referred to in the affidavit of Justine McCormick, the Plaintiff's credit manager, sworn on 22 November 2002 and in the affidavit sworn on 13 January 2003 of Derek Lawther of Carson & McDowell solicitors for the plaintiff.

[10] In his affidavit sworn on 7 December 2002 the first defendant states as follows at paragraph 6: -

> "I note that on the Order dated 26/01/00 that it states that the order was made without any objection. I do not understand how this occurred as I would have objected to the order being made. I received no notification that the order was being made and I was not in attendance."

In her affidavit also sworn on 7 December 2002 the second defendant avers as follows at paragraph 4: -

> "I would ask this honourable court not to make the order sought by the plaintiffs as it will penalise me in respect of the debt of which I had not knowledge. Furthermore, I did not receive notice of the last hearing in front of the Enforcement of Judgments Office, nor did my husband and I was given no opportunity to put my case at that stage."

[11] Although there has been no request for cross-examination of these or any other deponents, the accuracy of these averments may be said to be undermined by the following: -

a) The first defendant says that, had he received notice of the intention to make "the Order dated 26/01/00", he would have objected. He fails to explain satisfactorily why he would have objected to that order charging land when he failed to object to the first order charging land in respect of which he does not deny having received prior notice and which recites on its face the fact that no person objected to the order being made. The first defendant does also say that 'at the time of the proceedings before the Enforcement of Judgments Office (he) had no legal representation' but I would regard that as an inadequate explanation for a failure to object at all to the making of an order charging land affecting a person's home. Moreover, he fails to explain adequately why, although he considered that the correct indebtedness, the subject of the court proceedings which gave rise to the judgment should have been in or about £3,200 and thus very much less than the actual amount of the actual judgment, he failed to defend those proceedings or apply to have the relevant judgment varied or discharged. He states that 'at the time of the original court proceedings, (he) was debarred from defending the proceedings. (He) does not know why this was'.

b) The affidavit evidence of the defendants on the issue of prior notice was followed by Ms McCormick's affidavit sworn on 22 November 2002 in which she points out that the 'Partitioning Order Charging Land made on 26 January 2000 (the second order charging land) records on its face that on 15 September 1999 Notice of Intention to make such a Partitioning Order Charging Land was sent to the defendants'.

c) As I have mentioned, the affidavit of Mr Lawther solicitor also sworn on 22 November 2002 exhibits what appears to be an unsigned certificate of posting produced by the Enforcement of Judgments. At paragraph 4 of this deponent's affidavit he avers as follows: -

> "I made enquiry with the Enforcement of Judgments Office as to the steps taken by that office to serve notice of intention to make the second order charging land. The Enforcement of Judgments Office has produced a certificate of posting which shows that the notice of intention to make a partitioning order charging land dated 8 September 1999… was posted to the first named defendant at No 13 Derrybard Road, Fintona, Co Tyrone, BT78 2JH, and to the second named defendant at No 15 Derrybard Road, Fintona, Co Tyrone."

d) Mr Lawther's affidavit sworn 22 November 2002 also exhibits a copy extract from the relevant land registry map in respect of which he states at paragraph 5 as follows: -

> "I have obtained a land registry map which appears to show that the lands which were the subject of these proceedings are numbered 15 Derrybard Road and that there appears to be no number 13 Derrybard Road. I can confirm that on inspection of the exhibited copy map there is no property identified by the number '13' although the dwelling is numbered '15' on that map."

e) Although (contrary to my own expectations) neither side requested the opportunity to have oral evidence adduced at hearing, so that the defendants or the relevant official or officials of the Enforcement of Judgments Office could give oral testimony the subject of cross-examination, the omission of the defendants to request such a course notwithstanding the certificate of postal service does nothing to add credibility to their assertions by affidavit that neither of them received prior notification of the second order charging land. (It has been put to me by Counsel that it would be unfair to reject the affidavit evidence of the

defendants since the plaintiff did not seek to cross-examine them on the contents of their affidavits. The plaintiff did however adduce further affidavit evidence in order to counter that of the Defendants about prior notification and as neither side requested the opportunity to cross-examine I am left to make a key determination of fact based on consideration of the affidavit evidence and the related submissions of Counsel.)

f) Even if the first defendant did not receive a notice because it was misaddressed to number 13 Derrybard Road, there appears to be no point of disagreement between the defendants in the affidavits or any suggestion that they are anything other than a close family who would, presumably, have been likely to have discussed such matters between themselves in the event that only one of them had been served with notice of intention to make an order charging land. (As mentioned, the certificate from the Enforcement of Judgments Office appears to record that notice to the second defendant was sent to her at the correct address.)

[12] Accordingly I find on the material before me and on the balance of probabilities that the defendants did receive sufficient notification in advance of the intention to make the second order charging land.

[13] That leaves the plaintiff with the apparent problem that the second order charging land, being the only valid order charging land affecting the dwelling, contains a restriction which has not been removed, namely that on exercise of the power of sale conferred by Article 52 (1) of the 1981 Order.

[14] It appears to me that even if that restriction were not removed by the Master in the Enforcement of Judgments Office, the plaintiff would still be entitled to request an order for sale in lieu of partition of the dwelling as a person interested in a moiety in accordance with section 4 of the Partition Act 1868 ("the 1868 Act") which reads as follows: -

> "In a suit for partition, where if this Act had not been passed a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upward in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

[15] The plaintiff as a judgment creditor with the benefit of an order charging land is a person deemed by Article 48 of the Property (Northern Ireland) Order 1997 ("the 1997 Order") to have the necessary standing to request partition or sale in lieu of partition - provided that is, "good reason" within the meaning of section 4 of the 1868 Act is not shown to the contrary. Since an order for sale in lieu of partition need not involve the exercise of a mortgagee's power of sale, I believe the continued existence of the restriction on exercise of the statutory power of sale under Article 52(1) of the 1981 Order is not an obstacle to the making of such an order and (in light, inter alia, of the Pollock judgment) would not be tantamount in the present case to 'good reason' for refusing an order for sale in lieu of partition.

[16] I shall therefore make such an order in respect of the dwelling. However, if on handing down this judgment it appears likely that the entire indebtedness, including costs, can be discharged out of the proceeds of sale of the land in Folio

3186 within a reasonable time, I shall consider (if invited to do so) whether it would be appropriate to exercise the jurisdiction under section 36 of the Administration of Justice Act 1970 and Article 49 of the 1997 Order to stay or suspend an order for sale in lieu of partition of the dwelling or a requirement in such an order for delivery of possession of the dwelling to the plaintiff.

[17] I turn now to the plaintiff's claim in respect of its order charging land dated 18 June 2003 against the land in Folio 3186 and registered in that folio on 2 July 2003.

[18] The first defendant is the sole registered owner of the land in Folio 3186, having inherited in 1973 all the land then in that Folio upon the death of his uncle (at which time the folio also included lands now registered in three other folios including TY6641 which contains both the dwelling and "one and a half acres of land"). It is not in dispute that for a period after 1973 until relatively recently the land in Folio 3186 was farmed actively. Indeed the relevant judgment debt relates to agricultural foodstuffs ordered by the first defendant during the 1990s.

[19] The first defendant's acquisition of the lands in 1973 preceded his marriage to the second defendant in 1975, when they built a bungalow on that part of the land in Folio 3186 which is now comprised in Folio 37842.

[20] The defendants subsequently decided to renovate an old farmhouse (elsewhere on Folio 3186) in which the first defendant had lived with his uncles. In 1979 the bungalow and the other land in Folio 37842 were sold and the proceeds applied to

discharge the mortgage on the bungalow and towards the cost of renovating the old farmhouse.

[21] Another part of Folio 3186, being land the title to which is now registered in Folio 37260, was sold in or about 1981 for approximately £4,000. In or about 1988 the old farmhouse was mortgaged for some £20,000. The defendants state that as part of that exercise they were advised to create a new folio, since opened as Folio TY 6641, which would be in their joint ownership. Accordingly, the defendants are registered as joint owners of the land in Folio in TY 6641 which includes the dwelling but the first defendant remains the sole registered owner of the land still comprised in Folio 3186 and which is the subject of an order charging land in favour of the plaintiff – i.e., the fourth order charging land pursuant to the same judgment debt.

[22] The first defendant at paragraph 6 of his affidavit sworn on 26 March 2004 states as follows: -

> "….both the second named defendant and myself were always of the view that all of the land and the various houses in which we lived belonged to both of us irrespective of whose name the title for same was held. We were husband and wife and what was mine was my wife's and what was hers was mine. We were of this view since we were married and always worked together through good times and bad times. When our children came along, we again naturally assumed that we would leave whatever we had accumulated to them. This is the norm where we live and it is common to find houses and land registered in the sole name of the man when everyone knows that the reality is that they are owned jointly by the man and his wife. This is strengthened in our particular case because all of the land was originally contained in Folio 3186 which we viewed as belonging to both of us and the only reason some of the land was transferred into joint names was

> because we were advised to do this when applying for a mortgage. We have always regarded the land as one and have not distinguished between the folios as to us it was always one farm, albeit that parts of it had to be sold or mortgaged."

[23] The second defendant, in her affidavit also sworn 26 March 2004, adds at paragraph 3 the following on this subject: -

> "I wish to add to my husband's comments in respect of the ownership of the farm. When I married my husband we were both of the view that anything that one of us owned also belonged to the other and we did not need to put that into any formal document. Our marriage certificate and then our years living together, our children and the way that we shared everything was enough. I have always regarded the farm and house as belonging to both my husband and myself and I have never distinguished between the two Folios 3186 and TY 6614, as I have always regarded them together as the farm. I did not work during the marriage as I looked after the children and my husband. This did not detract in any way from my belief that I owned the farm and house jointly with my husband. We had separate roles. I looked after the children, my husband and the house and my husband was the breadwinner. I did not find it strange that the land was in my husband's sole name and I believe that this is common practice where we live. The house would also be in my husband's sole name but for the fact that we had to get a mortgage on it and we followed the advice we were given."

[24] Therefore the second defendant with the support of her husband, the first defendant, is claiming a one-half share in the land in Folio 3186 in respect of which the plaintiff claims possession but does not request sale in lieu of partition.

[25] The defendants are asserting that by reason of a common understanding claimed to exist between them the second defendant is entitled to an equitable interest in the relevant land. I am unable to accept submissions to the effect that the second defendant is entitled to any proprietary interest in the land now comprised in Folio

3186. The claim that such an interest subsists relies on a joint understanding alleged to be shared between the defendants to the effect that they shared ownership of the farmland by reason of their marriage and subsequent married life. I am not aware of any authority which would support that proposition. The second defendant has not made any contribution to the acquisition of the land which had already been inherited by the first defendant at the time of their marriage and on the evidence she did not make any, or any direct, financial contribution post-acquisition (other than a contribution in kind by looking after the 'the children, my husband and the house'), the first defendant being described as "the breadwinner".

[26] Moreover, this land is, or at least was for a substantial period of their marriage, worked as farmland and while parts, including the land now in Folio TY 6641, have been carved out of Folio 3186 for residential purposes, the land now comprised in Folio 3186 would appear to be either farmland or land with development potential or both. (Indeed, at a late stage of these proceedings, a copy of an application for planning permission for use of the land in part of Folio 3186 as a dwelling was produced.) I record that Counsel for the defence was unable to draw my attention to any case-law authority for the proposition that circumstances as outlined by the defendants in their affidavits could give rise to a constructive or other implied trust or other equitable right in favour of a spouse such as the second defendant with no legal title in respect of land that was agricultural or commercial in nature, acquired by the registered owner well in advance of their marriage and no part of which is used as their matrimonial home.

Conclusions

[27] The plaintiff has a valid order charging land in respect of the dwelling, i.e. the order charging land dated 26 January 2000 which was registered as a charge against the estate or interest of the first defendant in the land in Folio TY6641. The order I make will include a declaration that the money expressed to be secured by the second order charging land including interest on the principal at the appropriate rate specified in the order charging land, namely 8 per cent per annum from 23 February 2000 (the date of registration in the Land Registry) are secured by charge against the moiety of the first defendant in the land comprised in Folio TY6641 County Tyrone. The Order will then direct sale of the dwelling in lieu of partition and that possession be given up for that purpose (possibly, if circumstances merit such a course, subject to a stay or suspension provided it is likely that the indebtedness will be discharged in a reasonable time whether out of proceeds of sale of land in Folio 3186 or otherwise).

[28] I am also satisfied on the balance of probabilities that the second defendant has no proprietary interest in the land now comprised in Folio 3186. The order I shall make shall declare that the amount expressed to be secured by the order charging land dated 18 June 2003 and registered in that folio on 2 July 2003 together with interest on the principal at the rate of 8 percent per annum from the date of registration until payment is well charged on the land. The Order will also require possession of the land to be delivered to the plaintiff.

[29] The plaintiff's costs of such much of these proceedings as relates to the land in Folio 3186 will be added to the plaintiff's security on that land when taxed or agreed.

[30] I shall hear submissions about the costs of the remainder of the plaintiff's application.