

Neutral Citation No. [2014] NIMaster 6

Ref: 13/54714

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 19/03/2014

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION

BETWEEN:

PATRICK FINTAN McCAFFREY

Plaintiff;

and

EUGENE McCAFFREY

Defendant.

MASTER ELLISON

1. This is an application by originating summons for a declaration that the freehold land comprised in Folio 9805 County Fermanagh is well charged with the principal sum of £50,000 and £25,043.60 for interest (calculated at the judgment rate of 8 per cent per annum from 24 October 2007 down to the date of hearing 27 January 2014) and for an order for sale and possession of that land, any necessary account, further or other relief and costs. The plaintiff ("Patrick") is the registered owner of the charge pursuant to which he is claiming and the defendant ("Eugene") is the registered owner of the land, which does not include a dwelling. The charge arises as a result of, and the plaintiff claims interest from the date of, an order of

Mr Justice Hart in a Chancery action (number 01/003281) in which the current defendant Eugene was the plaintiff and the current plaintiff Patrick was the third defendant.

2. The Order dated 24 October 2007 reads (so far as relevant) as follows:-

“UPON THE TRIAL OF THIS ACTION against the Third Named Defendant.

AND UPON READING the documents recorded on the Court file as having been read,

AND UPON HEARING Counsel for the Plaintiff and there being no appearance or representation on behalf of the Third Named Defendant.

IT IS ORDERED that:

1. That the plaintiff be entitled to equitable interest of lands of Killycully comprised in folio 9805 County Fermanagh;

2. That Patrick Finton (sic) McCaffrey join all necessary assents to convey the entirety of the lands comprised in folio 9805 County Fermanagh to the plaintiff, subject to a charge on the lands in favour of Patrick Finton McCaffrey of £50,000;

3. That the costs of the registration be borne by the plaintiff;

4. That no order be made as to the costs of this action;

5. That the parties do have liberty to apply”.

3. For a number of reasons the registration of Eugene as owner of the land and of Patrick as owner of the charge did not occur until 16 July 2010. However, Eugene took possession of the land as if he were already its legal owner immediately or very shortly after the Order of 24 October 2007.

4. The plaintiff by his Counsel Mr Ciaran McCollum (instructed by Jerome J Haughey) claims in effect that the provision about a charge in this order created a money judgment payable by the defendant immediately and with interest at the judgment rate. He relies on Article 127 of the Judgments Enforcement (Northern Ireland) Order 1981 (the 1981 Order) to designate it as a money judgment and Order 42 rule 9(2) of the Rules of the Court of Judicature (Northern Ireland) 1980 as prescribing, "where the rate of interest to be paid is not specified in the judgment", the judgment rate of 8 per cent per annum. The plaintiff also refers to the security for the debt as being an Order Charging Land within the meaning of Article 46 of the 1981 Order consequent on the registration on 16 July 2010 of the charge imposed by the Order made by Mr Justice Hart. The defendant by his Counsel Mr Shields (instructed by Fahy Corrigan) argues that neither provision of the 1981 Order applies as the judge's order of 24 October 2010 was neither an award of damages nor one of monies, being of a different character and envisaging Patrick, as the third defendant in that action, "transferring the lands to the current defendant, upon which there would then be a charge". Moreover, argues Mr Shields: "The current (plaintiff) did not transfer the lands until 16 July 2010. The Order of Mr Justice Hart must be read as a whole. The Charge did not exist until 16 July 2010. Any submission that interest can begin running before the Charge even existed must be misconceived".

5. I agree in part with the defendant's submissions. It is established law that the imposition of a charge to secure monies does not of itself create a personal liability on the part of the owner of the land charged to pay the amount secured. There is

nothing in the Order which would appear to subject the defendant herein personally - as opposed to the land once it was transferred to him - to a liability for payment.

6. However, I do not agree with the defendant's further submission that in the circumstances, since the Order of Mr Justice Hart was explicit about the principal sum to be charged on the land but silent as to interest, no interest at all is due. An unusual but established feature of the law about mortgages as opposed to other loan arrangements is that, except where liability to pay interest is expressly (or for some other compelling reason) excluded, interest is payable on debts secured by mortgages or charges, whether legal or equitable and even where it is not expressly reserved in the mortgage deed or other instrument giving rise to the incumbrance: Re Drax, Sawiler v Drax [1903] Ch 781 (in which, as in the present case, the charge to secure monies came about by reason of a court order which was silent as to interest). Re Drax was relied on by the Court of Appeal of England and Wales in its much more recent judgment in Al-Wazir v Islamic Press Agency Inc (2001) EWCA Civ 1276, [2002] Lloyd's Rep 410.

7. These principles are explained in the following extract from the judgment of Sir Anthony Evans in Al - Wazir:-

“31. The problem arises here in the context of a straightforward dispute. A lender took a charge on property as security for repayment of the loan. Is he entitled to recover interest as well as the principal sum from the person by whom the charge was given, if nothing was said or agreed about interest when the loan was made and the security was taken?

32. The common law rule was and is that a debt does not carry interest unless the parties agreed, expressly or impliedly, that it should. This was

held by the House of Lords in London, Chatham and Dover Railway Co v South Eastern Railway Co [1893] AC 429 and again in La Pintada [1985] AC 104. The law does not award damages for breach of an obligation to pay money. Interest may be awarded in certain limited circumstances at law, or under a statutory power, or in conjunction with remedies that were formerly available only in the Chancery Courts.

33. These rules of equity were mentioned by Lord Brandon in the leading speech in La Pintada. One is that that chargee or mortgagee of property, given as security for repayment of a debt, may be awarded interest for late payment, either as ancillary relief, if he brings proceedings to enforce the security, or as an item in the settlement of accounts if the property is sold. But the award is not made unless it is equitable to do so in the circumstances of the case. An express exclusion by the surety of any liability for interest would be likely to preclude an order, if one was sought.

34. The authorities are clear as to the existence of this practice in the Chancery Courts. They include Carey v Doyne (1855) 20 Beav 49, a judgment of the Master of the Rolls in Ireland, much cited in the later authorities; Re Kerr's Policy (1869) Lr 8 Eq 331; Re Drax [1903] 1 Ch 781; and Ezekiel v Orakpo [1997] 1 WLR 340. Whilst the right to award interest when it was equitable to do so was an established feature of the jurisdiction of the equity courts, it was also recognised that there might be cases where "the contrary was implied" (Lippard v Ricketts (1872) LR 14 Eq 291 at 294) or where the circumstances might militate against it (Re Drax at 794).

35. A feature of these authorities is that the equity courts stopped short of holding that the debtor, by whom the property was charged, was personally liable to pay interest on the debt, unless of course he had expressly or impliedly agreed to do so. So the situation was reached where the creditor was not entitled to demand interest, or to recover interest if he took action on the debt, but he might nevertheless receive interest if he took proceedings in the Chancery Court with regard to the property against which it was secured.

36. This apparently anomalous situation, in my judgment, was the direct result of the limits which the Courts of Equity placed on their own jurisdiction. They could supplement but not contradict the law. They

could award interest when they considered it equitable to do so, but only in proceedings which were properly brought before them within their own jurisdiction. They could not and did not challenge the common law rule that the debtor was not liable for interest, unless he had agreed to pay. They went as far as they could, but no further.

37. The result is that equitable interest may be claimed when the proceedings are before the Court in the exercise of its former equity jurisdiction, even though no contractual right exists at common law."

(Emphasis added)

8. The rate of interest, in the absence of express provision as to either interest or its rate, is not prescribed by legislation but is a matter for the discretion of the court in the circumstances of the particular case, which I have already rehearsed in this judgment. In fixing the rate I have had regard also to the relatively low rates of interest generally over the relevant period and to my knowledge of equitable awards of interest in other matters. I have settled on a rate which happens to coincide with the rate as fixed by both the Judge and the Court of Appeal in In Re Drax, some 111 years ago, and (more pertinently) which is also 0.04 per cent more than the five year fixed annual percentage rate for mortgages from UK banks applicable in July 2013. As this interest is fixed pursuant to an equitable discretion it will run from the date of the Order of Mr Justice Hart, 24 October 2007, as the defendant Mr Eugene McCaffrey took possession of the land and treated it as his own immediately or very shortly after that Order was announced, and not from the date on which the plaintiff Mr Patrick McCaffrey became registered as owner of the charge in the Land Registry folio for the land.

9. Accordingly I find the amount properly secured by the registered charge to be £50,000 together with simple interest thereon from 24 October 2007 at the rate of 4

per cent per annum until payment. The declaration will read accordingly. I invite submissions as to the rest of the order to be made including as to costs.