Neutral Citation No. [2012] NIMaster 5

Ref: 2011/99340

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

Delivered: 04/05/12

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

NORTHERN BANK LIMITED

Plaintiff;

and

NIGEL STUART PATRICK ALLEN

Defendant.

MASTER ELLISON

Introduction

[1] This is an application by an originating summons issued on 18 August 2011 for (1) a declaration that principal, interest and the plaintiff's costs of the action are by reason of a solicitor's undertaking (in consideration of the plaintiff granting a loan) and, further, a contract to execute a legal mortgage (in consideration of the plaintiff renewing the loan) are well charged on the interest of the defendant in a dwellinghouse, being lands comprised in a Land Registry freehold folio ("the premises"); (2) alternatively an account of what is due to the plaintiff and a declaration that the sum so found due is well charged on the premises ; (3) an order that upon default by the defendant in payment the premises be sold and that the defendant deliver possession to the plaintiff for that purpose; (4) further or other relief; and (5) costs. The

defendant, who is the registered owner of the fee-simple estate in the premises, claims that the plaintiff has no mortgage or charge whatsoever over the premises by reason of either the solicitor's undertaking or the alleged contract to execute a mortgage.

[2] At the hearing of the originating summons on 15 March 2012 Mr Gowdy of counsel appeared for the plaintiff instructed by King & Gowdy Solicitors and Mr McCracken of counsel appeared for the defendant instructed by Carnson Morrow Graham Solicitors. The history of this matter is set out in sections A and B of Mr McCracken's skeleton argument which read as follows (so far as relevant):-

> `**A Initial Facility**
>
> 3. By Facility letter dated 22nd December 2006 addressed to the Defendant … the Plaintiff confirmed that it was willing to place at the Defendant's disposal a Loan facility of £175,000 ("the Loan") to enable the Defendant to purchase the share capital of a company called Irish Spars & Rigging Ltd ("ISR"). The Loan was to be repaid on or before 30th April 2007 from the sale proceeds of the Premises.
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> 4. According to the Facility letter the Security for the Loan was "any security already held [none on the facts] by the Bank for [the Defendant's] liabilities … together with the following additional proposed security: Letter of undertaking from McCoubrey-Hinds Solicitors for an amount of not less than £180k, representing part sale proceeds of [the premises]. (Emphasis added) Further, it was expressly stated that "If any additional proposed security is listed above then the Bank does not intend that your acceptance of this offer will of itself give the Bank any form of Mortgage or Charge over that additional proposed security to be provided by you and you agree and declare that no such Mortgage or Charge is given to the Bank by your acceptance of this offer."

The provision of the solicitors' undertaking was a condition precedent of the Loan.

5. On or about 28th December 2006 McCoubrey-Hinds executed and forwarded an Undertaking to the Plaintiff, … The Undertaking stated "In consideration of the Bank granting facilities to [the Defendant] I undertake to pay you the amount of not less than £180,000 from the residual net sale proceeds of [the Premises] following the redemption of the outstanding Progressive Building Society Mortgage and subject only to the deduction of the Legal Costs and disbursements relating to the transaction". (Emphasis added.)

B. Renewal Facility

6. On or about 8th April 2010, by further Facility letter addressed to the Defendant … the Plaintiff, in the knowledge that the Loan had not been repaid by 30th April 2007, renewed the existing Loan. The Loan was to be repaid on or before 30th September 2010.

7. According to the second Facility letter the Collateral for the renewal of the Loan was "any collateral already held by the Bank for [the Defendant's] liabilities … together with the following additional proposed collateral: "Second legal mortgage over [the Premises]". (Emphasis added.) Further, it was expressly stated that "If any additional proposed collateral is listed above then the Bank does not intend that your acceptance of this offer will of itself give the Bank any form of Mortgage or Charge over that additional proposed security to be provided by you and you agree and declare that no such Mortgage or Charge is given to the Bank by your acceptance of this offer". As an additional term and condition the Facility letter required the Defendant to undertake and covenant that "once adjoining Premises is demolished, Premises is (sic) to be actively marketed once again"'.

[3] At the hearing Mr Gowdy announced that the balance due by the defendant to the plaintiff and secured by the alleged equitable mortgage was £178,997 for principal and interest.

The Solicitor's Undertaking

[4] As indicated, the plaintiff claims that an undertaking given on 28 December 2006 by a firm of solicitors, in consideration of the bank granting the bridging facility to the defendant, "to pay [the bank] the amount of not less than £180,000 from the residual met (sic) sale proceeds" of the premises "following the redemption of the outstanding Progressive Building Society mortgage and subject only to the deduction of Legal Costs and disbursements relating to the transaction" created an enforceable obligation to discharge the defendant's liability to the plaintiff out of the premises and operates as an equitable charge, not just on the net proceeds of sale should that fund come into being but also on the premises. I refer to the following extracts from Finlay Geoghegan J's judgment in Murray v Wilken & Another dated 31 July 2003 in the High Court of Ireland:-

> "This is an application for:
>
> > `A declaration that the equitable charge by way of solicitor's undertaking dated 23 May, 2001 on behalf of the Defendants relating to the lands and premises situate at No 9 Rockfield, Ardee, Co Louth and given in order to secure repayment of the sum of IR£65,000 or Euro 82,532.98c, stands well charged on the aforesaid lands and premises'.
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> and for the normal consequential order for sale.

The Plaintiff also seeks in the alternative, judgment for the sum of Euro 82,532.98c together with interest thereon, pursuant to the Courts Act 1981.

Facts

The grounding affidavit is sworn by the solicitor for the Plaintiff who states that, by reason of a transaction relating to motor vehicles, the Plaintiff paid to the Defendant on 21 December 2000 IR £65,000, upon the terms of which certain motor vehicles were to be delivered no later than 31 March 2001, and in default of delivery the IR £65,000 was to be refunded to the Plaintiff. It is alleged that the first-named Defendant failed to deliver the vehicles and refused to refund the IR £65,000. Further, that as a response to a threat of proceedings for the return of the money, the Plaintiff's solicitors contacted the then solicitors of the Defendants, Messrs EP Daly & Company, who "indicated that they were instructed by the Defendants to give an undertaking to discharge the sum of IR £65,000 to the Plaintiff out of the proceeds of the sale of the property [the subject matter of these proceedings]". An undertaking was given in writing in the terms set out below in consideration of which the Plaintiff forebore to sue for the IR £65,000:

> `Dear Sirs,
>
> We refer to the above matter and we confirm that we act on behalf of Jurgen & Mary Wilken who are in the process (sic) selling 9 Rockfield, Ardee, County Louth.
>
> We understand that you act on behalf of Mr John Murray. We hereby undertake on our client's instructions to discharge the sum of £65,000 owing to your client out of the proceeds of sale of the above property when same are to hand.

Please note that this undertaking is being given strictly on the basis that there is absolutely no contact between your client and our clients pending the completion of the sale of our client's property and discharge of the sum owing to him.

We look forward to hearing from you in relation to this matter.

Yours faithfully,’

On 22 October 2002 EP Daly & Company wrote stating that the Defendants “are not selling the property at Ardee, Co Louth, and we are in the process of returning their title deeds to the lending institution”. They also requested the Plaintiff’s solicitor to cancel the undertaking given. This was refused.

…

The primary claim

The primary claim is based upon an assertion that the undertaking of EP Daly & Company of 23 May 2001 creates an equitable charge over the property of the Defendants at 9 Rockfield, Ardee, Co Louth. Counsel for the Plaintiff relies upon the description of a charge given by Millett J in Re Chargecard Services Ltd **[1986] 3 All ER 289**, [1986] 3 WLR 697, where at p 309, having reviewed certain earlier decisions as to the requirements for an equitable charge, he stated:

> “Thus the essence of an equitable charge is that, without any conveyance or assignment to the chargee, specific property of the chargor is expressly or constructively appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied on or towards payment of the debt. The availability of equitable remedies has the effect of giving the chargee a proprietary interest by way of security in the property charged.”

I have no difficulty in accepting that this is an appropriate definition of an equitable charge for the purposes of Irish Law. An undertaking given by a solicitor to hold the title deeds of a client’s property for the benefit of another person has long been recognised as the creation of an equitable charge.

Regretfully, I have concluded that the undertaking given in this case cannot be considered to come within the above definition in so far as it is alleged to have created an equitable charge over the property at Rockfield. It is not possible, in my view, to construe it as even implicitly appropriating the property of the Defendants referred to or as an agreement to make it answerable for the payment of the debt of IR £65,000 then due. At best, in so far as the property at Rockfield is concerned, it contains a representation made by the solicitors that their clients are in the process of selling such property.

The undertaking to pay the sum of IR £65,000 is expressly an undertaking to make this payment out of the proceeds of the sale of the property when "same are to hand". As such, it may have created an equitable charge over a future asset of the Defendants, namely the fund comprising the proceeds of sale of the property when received by their solicitor.

The undertaking cannot be construed as containing any implied agreement that the property, as distinct from the proceeds of sale of a potential future sale of the property, be made answerable for the payment of the debt due.

Counsel also referred me to the decision of McWilliam J in the matter of Kum Tong Restaurant (Dublin) Ltd (in liquidation) [1978] IR 446. The undertaking in this case is clearly distinguishable from the form of undertaking given in that case. The undertaking given in Kum Tong was an undertaking given when there was a contract for sale in place and included an undertaking "to hold such documents of title … in trust for the bank and to hand over sufficient monies out of the proceeds of sale …". Insofar as McWilliam J referred to a possible charge on the property, he did so in reliance upon the undertaking to hold the documents of title. The principal conclusion in the case related to the charge over the proceeds of sale which had come to hand and were in existence prior to the commencement of the proceedings. …'
(Emphasis added).

My reading of the following authorities supports the principles as set out in Murray v Wilken: Carlton Atkinson & Sloan v Allied Irish Banks plc [1977] NI 158 per Gibson LJ; Swiss Bank Corporation v Lloyds Bank Limited [1980] 2 All ER 419 and [1981] 2 All ER 449 respectively; Fisher and Lightwood's Law of Mortgage (13th Ed 2010) paras 1.20, 1.21 and 1.22).

I refer in particular to the following extract from the judgment of the Northern Ireland Court of Appeal per Gibson LJ in Carleton Atkinson & Sloan v Allied Irish Banks plc [1977] NI 158:-

> "On the question of the priority of the two claims I would acknowledge my appreciation of the way in which it has been met by Mr Hart who by his researches had satisfied himself and immediately admitted that if the bank advanced the money to Mr Cornett as the result of an agreement that he would lodge the proceeds of sale of the house to reduce the overdraft, and if the solicitor's undertaking was given as part of that arrangement, and if the money was advanced before the date of the appointment of a receiver, it followed that the transaction amounted to an equitable assignment to the bank of the net proceeds of sale which bound the moneys when the fund came into existence".

[5] I am satisfied that the solicitor's undertaking attaches only to the fund which might arise in the event of a sale of the premises and come into the hands of the solicitors concerned. The first facility letter merely referred to the solicitor's undertaking as "collateral" and made the receipt of such an undertaking a condition precedent to the loan. It appears to me that there was no intention at the time of the first facility letter or the giving of the solicitor's undertaking that any interest in the premises should be transferred to or charged in favour of the plaintiff. As in Murray, it is not possible to

construe the undertaking as "even implicitly" appropriating the defendant's estate in the premises or as making it answerable for the payment of the relevant indebtedness. This is quite a different situation from that arising from an undertaking by a solicitor to hold his client's title documents in trust for or to the order of another person.

The Agreement to create a legal mortgage

[6] With regard to the agreement to provide a second legal mortgage contained in the second facility letter, that letter has been signed by the defendant and, (whether or not, given the proviso I shall shortly mention, it would constitute a sufficient memorandum for the purpose of section II of the Statute of Frauds (Ireland), 1695) is evidence of a contract between the parties whereby the defendant agreed to execute a second legal charge of the premises in favour of the plaintiff. Mr McCracken for the defendant argued that the apparent agreement in the facility letter was rendered unenforceable by a proviso to the effect that nothing in the letter about the taking of collateral "by itself" amounted to any form of mortgage or charge. On this point I agree with Mr Gowdy's submission at hearing to the effect that the proviso in question was in effect merely a reiteration or reflection of a point of general law, namely that an agreement (to make and take a loan) which is purely executory is not capable of specific performance. It only becomes capable of specific performance when it has been part executed by one party to the agreement. I refer to paragraph 1.21 of Fisher & Lightwood's Law of Mortgage (13th Edition 2010):-

> "Specific performance will not be ordered in respect of a contract to make or take a loan of money, whether or not the loan is to be on security, so long as the contract remains executory. The parties will be left to their remedies in damages.
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> Specific performance of the enforceable contract to give security will be ordered where the loan has actually been made or the debt or other obligation incurred, because a mere claim to damages or repayment is obviously less valuable than a security in the event of the debtor's insolvency."

[7] In the present case the bank extended the loan facility in the name of the defendant after he had signified his acceptance of the second facility letter. It therefore appears to me that while the plaintiff cannot rely on the letter "by itself" to render the agreement enforceable in equity or to create an equitable mortgage or charge, by its subsequent act of forbearance in extending the loan in a manner favourable to the defendant the plaintiff supplied valuable consideration and rendered the agreement to create a legal mortgage enforceable. I am satisfied that the intention of the parties was that the defendant would grant a legal mortgage or charge to the plaintiff by reason of the accepted facility letter and the later extension of the loan facility to him.

[8] In this connection I refer to Professor Wylie's analysis at paragraphs 12.41 and 12.42 of Irish Land Law (2nd Ed., 1986) where he states:

> "12.41 As part of its general policy of giving effect to contracts for the creation of legal estates, equity will enforce a contract to create a legal mortgage by its usual remedy of a decree of specific performance. Because of this special approach equity goes further and says that, until the legal mortgage is actually created by conveyance of the legal estate or demise, as the case may be, the intended mortgagee has an equitable mortgage on

> the land. Thus in *Eyre v McDowell* it was held that a covenant by a debtor to the effect that, if the debt was not paid by a certain date, the creditor could, by entry, foreclosure, sale or mortgage, levy the amount from the lands of the debtor, was held to create such an equitable mortgage.
>
> 12.42 Such an agreement must comply with the Statute of Frauds (Ireland), 1695, section 2 of which requires the agreement to be evidenced in writing and signed by the party to be charged or his authorised agent. Alternatively, there may be sufficient acts of part performance or elements of fraud present to take the case out of the statute."

In the present case there is sufficient part performance to take the agreement out of the statute.

[9] The defendant also argued that the plaintiff was dilatory in not subsequently insisting on the execution of a deed of charge and indeed in refusing the defendant's proposal for a mortgage in the joint names of the defendant and a friend who happened to be a valued customer of the plaintiff. I agree that it would have been better if the plaintiff had arranged for a legal charge deed to be prepared and executed by the defendant before the restructuring of the loan or shortly thereafter, but there is no delay, default or misconduct on the part of the plaintiff which would render it inequitable or unconscionable for the equitable charge created by the second facility letter and the loan extension to be enforced.

Order to be made

[10] The order I will make shall include a declaration that in the events which have happened including an agreement to create a legal mortgage and the extension of a loan facility, the relevant principal, interest, and costs are

well charged on the defendant's interest in the premises; and provide that upon default in payment within a period to be stipulated in the order the premises should be sold by the plaintiff, the defendant should deliver possession accordingly and all necessary parties shall join in executing the necessary transfer. I shall hear submissions as to the appropriate stay and order for costs.