

## ORDERS CHARGING LAND – OVERKILL IN THE COURT OF APPEAL

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*John Kelly Limited t/a Kelly Fuels v David Pollock (junior) t/a D Pollock & Son and Sylvia Pollock* (hereafter *Kelly v Pollock*),<sup>1</sup> is a decision of considerable importance relating to the enforcement of judgments. In a seven page judgment of sparse reasoning, the Court of Appeal has virtually swept away the settled practice of over 30 years whereby the Enforcement of Judgments Office granted an order charging land subject to the condition that the power of sale accompanying it was not to be exercised without the prior leave of the Master (Enforcement of Judgments).

The circumstances of the case were that the appellants (Kelly) had obtained a money judgment against the respondents (Pollock) in January 1999. After application to the Enforcement of Judgments Office for enforcement, the Office imposed an order charging the respondents’ interest in their dwelling house, as the most appropriate enforcement order. The order was made pursuant to article 46 of the Judgments (Enforcement) (Northern Ireland) Order 1981 and was expressly subject to the condition that the power of sale of the land conferred by article 52(1) of the 1981 Order was not to be exercised without the leave of the Master.<sup>2</sup> When application was eventually made to the Master for leave to exercise that power, the Master refused leave because of what he saw as an imbalance of equities between the appellants as a commercial entity and the respondent wife. He held that the appellants had not demonstrated any need to recover the judgment debt and that the respondent wife had a greater right to remain in the property for the meantime. However the Master also indicated that circumstances would likely change over time so the appellants could make a further application later.

On the hearing of the appeal against this decision the respondents were not represented and the court invited the Attorney General to appoint counsel to act as *amicus curiae*. Very eminent counsel was appointed but the parties reached a settlement before argument was addressed to the court. In spite of the issue being of academic interest to the parties only the court accepted counsel for the appellants’ invitation to consider whether the Enforcement of Judgments Office had this power to impose the leave condition because the court’s guidance would be of general assistance. It is doubtful whether a matter of such importance should have been decided this way. If, as Sir Robert Megarry has put it, “argued law is tough law” there may be the appearance that the relevant arguments were not presented with all the vigour one would hope for with questions of such importance.

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<sup>1</sup> [2002] NIJB 249, (CA 8<sup>th</sup> May 2002).

<sup>2</sup> Article 46(2) confers a power to impose conditions – “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.”

### The Court's Reasoning

The court's decision largely turned on perceived differences between the system for enforcing judgments in England and Wales and the system in Northern Ireland. In England an order charging land, like other charging orders, may be made by the court under section 1 of the Charging Orders Act 1979. By section 3(1) of the same Act, which is in virtually identical terms to article 46(2) of the 1981 Order, the court may impose conditions on the order. The leading authority on section 3(1), *Harman v Glencross*,<sup>3</sup> supports the proposition that the court may impose conditions to the effect that the creditor should not seek to enforce the security for a specified period. That period could be for so long as a child of the debtor's marriage remains under the age of 17 and in full time education. All this was despite the fact that the courts had recognised that when an order for sale was sought under section 30 of the Law of Property Act 1925 sale could be postponed for similar reasons.<sup>4</sup> This is similar to the situation in Northern Ireland, where the court would have power under articles 48-49 of the Property (Northern Ireland) Order 1997 to consider these matters.

Campbell LJ, who delivered the judgment of the court, first observed that the order of the Master was not limited to any specified period of time. This was so far consistent with the English approach because it implied that if the Master had done what was indicated in *Harman v Glencross* his decision would have been unimpeachable. But this was not the holding of the Court of Appeal because Campbell LJ went on to say that the Master's order was incompatible with articles 18-19 of the 1981 Order, provisions having no parallel in England and Wales. These provisions require the Office to issue a certificate of unenforceability where it appears that a judgment cannot be enforced within a reasonable time. A potentially indefinite postponement because of the possibility that the Master will not grant leave was regarded as inconsistent with this obligation and an indication that the Office had no jurisdiction to impose the leave condition. The absence of a leave condition would not leave respondents without protection because the court could consider questions of hardship under articles 48-49 of the 1997 Order. There is, however, a very modest power to impose conditions under article 46(2) of the 1981 Order, for a specific reason and for a finite period of limited duration.

### Commentary

The whole question of what discretion there exists, and in what bodies it resides, to block or postpone the eviction of a family from its home because of a judgment debt, is clearly a difficult one. There has been an unfortunate failure by the legislature to make clear whether the Master (Enforcement of Judgments) should exercise any such power or whether it should be the court.<sup>5</sup> If the power is to be shared then it has not been made clear what

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<sup>3</sup> [1986] Fam 81.

<sup>4</sup> See, e.g. *Re Holliday* [1981] Ch 405; *Thomas Guaranty Co v Campbell* [1985] QB 210.

<sup>5</sup> This failure is not unlike the similar failure in relation to judgments for the possession of land under article 53 of the 1981 Order; see D. Capper, "Enforcement of Judgments for Possession of Land" (2002) 53 *NILQ* 90.

questions are for the Master to decide and what questions for the court. It is also unsatisfactory that so little detail has been provided as to the grounds on which a creditor may be denied the right to enforce its security. Reform of the law along the lines suggested by the Scottish Law Commission,<sup>6</sup> although not a paradigm of welfarism, at least has the merit of clarity. There would be a two-stage process. First the order charging land would be registered and the second stage (application for sale) would be postponed for six months. Sale could be refused where the debt did not exceed £1,500 or where the proceeds of sale were not likely to realise more than the costs of the sale plus 10% of the debt. So it is perhaps understandable why the Court of Appeal came to the conclusion it did, and this conclusion does possess the merit of greater integration between the Office and court stages of the process. Despite that it is suggested that this is a decision more to be regretted than welcomed.

On the footing that *Harman v Glencross* should be followed it is not immediately apparent what difference really exists between the approach adopted there and the approach followed by the Office for over 30 years. Postponement of leave to exercise the power of sale until a child of the family reaches the age of 17 is not in substance different from an indefinite postponement with power to seek leave at any time. In this connection it is worth pointing out that by article 47 of the 1981 Order orders charging land automatically expire after 12 years from the date of judgment. Neither should articles 18-19 of the 1981 Order make the difference contended for. These provisions are part of Northern Ireland's more "joined-up" system of enforcement than the one operating in England and Wales. The clearer demarcation between Office functions and court functions drawn by *Kelly v Pollock* is more "joined-up" but so also would be a clearer prescribed power for the Master and one for the court. In any event why should it be assumed that the kind of postponements contemplated in *Harman v Glencross* are necessarily unreasonable in the sense intended by articles 18-19?

The judgment in *Kelly v Pollock* was also unfortunate in that it took no account of the recommendations of the *Hunter* Report on the enforcement system.<sup>7</sup> The view was there expressed that the debtor's personal and family circumstances should not be left to the court because court proceedings would be very expensive for the debtor and the Office would be more aware of all relevant circumstances. It was suggested that the Master could defer sale subject to payment of the debt by instalments, default to result in a sale. Where the amount of the debt is small in relation to the value of the property the Master could postpone sale to enable the debtor to obtain finance to discharge the debt, perhaps via a charge granted to another creditor. It would be desirable to specify the grounds on which sale could be postponed in the legislation. These examples bring to mind one situation where the *Kelly v Pollock* judgment could have unfortunate consequences. Large judgment debts are frequently enforced by a combination of instalment orders and orders charging land. If there is no power to require the creditor to seek

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<sup>6</sup> Scottish Law Commission, *Report on Diligence* (2001, Scot Law Com No 183), part 3.

<sup>7</sup> Northern Ireland Court Service, *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (Belfast, HMSO, 1987), paras 16.47-16.49.

leave to exercise the power of sale there would be nothing to stop a creditor seeking to sell the charged property even where the debtor had not fallen behind with instalments. It is, perhaps, less likely that these enforcement methods will be used in tandem in future.

### Conclusion

There was another way of deciding *Kelly v Pollock* without abrogating a discretion which has been a settled feature of the Northern Ireland enforcement of judgments system since it commenced operations on 15<sup>th</sup> February 1971. That would have been to decline the invitation to examine a moot point between the parties but to consider whether the Master may have exercised his discretion on a wrong basis. The judgment of Campbell LJ did not indicate the size of the judgment being enforced, but correspondence with the Master indicated that it was for £31,928.67 plus £284 costs in default of appearance.<sup>8</sup> If it appeared that the debtor could have raised finance elsewhere to pay it off and secured that loan on the property then postponement of the kind suggested by the Hunter Committee may have been a more satisfactory disposition. If not, then granting leave may have been the preferred approach. It was surely possible to do justice between the parties without “throwing out the baby with the bath water.” Alternatively the Court of Appeal could have decided that the approach in *Harman v Glencross* was misconceived as a matter of discretion because it was too favourable to the debtor. If there is anything in the article 18-19 point this could have supported this more moderate disposal.

As well as the right decision there is also the right time and the right way to be making that decision. It is not clear that the academic exercise undertaken in *Kelly v Pollock* considered all the relevant arguments as rigorously as they should have been in relation to a matter of such complexity and importance.

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<sup>8</sup> A custody warrant was issued by the Office for £33,291.07 (being the judgment debt, costs of judgment, costs and enforcement outlays, and interest).