

THE HIGH COURT

[2012 No. 291 CA]

BETWEEN

THE WATERSIDE MANAGEMENT COMPANY LIMITED

PLAINTIFF

AND

BRENDAN KELLY AND ASTA KELLY

DEFENDANTS

RULING of Kearns P. delivered on the 11th day of April, 2013**BACKGROUND FACTS**

This matter comes before the court by way of appeal from the order of Linnane J. sitting in Dublin Circuit Court, dated the 13th day of December, 2012.

The respondent is the management company of the apartment complex known as The Waterside, situated at Charlotte Quay, Grand Canal Dock, Ringsend, Dublin 4. The appellants are a married couple and owners of a number of apartments within The Waterside complex. It appears in the pleadings that the appellants may also style their surname as O'Kelly.

These proceedings were commenced by way of Ordinary Civil Bill dated 13th May, 2010, seeking to recover monies purportedly outstanding in respect of management fees incurred between 1st October, 2009 and 30th September, 2010.

On 16th March, 2011, the respondent was granted judgment in the sum of €9,684.05, together with costs, pursuant to the within Civil Bill.

On foot of this judgment, an execution order was extracted as against the goods of the appellants, with their address being cited as 22, Simmonscourt Road, Dublin 4. This execution order was returned to the respondent by the Sheriff of the City of Dublin, on 13th September, 2011, marked nulla bona.

On 29th November, 2012, the respondent lodged an ex parte docket seeking various reliefs, primarily the appointment of a receiver by way of equitable execution over rents purportedly due to the appellants from five apartments in The Waterside complex, but also directions as to service, including service by way of email.

Ms. Ryan, the person being proposed as receiver, is a managing agent of the respondent, charged with duties relating to the maintenance and upkeep of The Waterside complex, including the collection of service charges. Ms. Ryan had sworn an affidavit on 28th November, 2012, setting out various matters relating to the efforts which had been made to effect legal execution of the judgment debt. Also on 28th November, 2012, Mr. David Frost, a director of the respondent swore an affidavit as to Ms. Ryan's suitability to act as receiver.

Of particular note is Ms. Ryan's averment to the effect that she had called to the appellants' address at 22, Simmonscourt Castle on "at least" twelve occasions, each time finding the appellants not to be present, together with her having sent correspondence by post to that address, but without response. Ms. Ryan averred that the appellants no longer resided at this address and were not in contact with her. Mr. Ronan Brennan, solicitor for the respondent, also averred in his affidavit sworn on 29th November, 2012, as to efforts made to notify the first named appellant of the proposed application to appoint Ms. Ryan as receiver, by telephone and by email.

Upon the matters coming before the learned Linnane J. sitting in Dublin Circuit Court, on 29th November, 2012, an order was granted directing that the *ex parte* docket be treated as a notice of motion, being made returnable for 13th December, 2012, and directing that the said notice of motion, together with any other documents requiring to be served, be furnished by hand to the solicitor for the herein appellants (who were defendants in those proceedings): Mr. Cunningham of Suite 212, Capel Building, Mary's Abbey, Dublin 7.

ORDER OF THE CIRCUIT COURT

On 13th December, 2012, having heard the parties and satisfied herself as to the existence of the debt, the learned Circuit Court Judge ordered, insofar as relevant:-

- 1) That Margaret Ryan of Ulverton Road, Dalkey, County Dublin be appointed as receiver by way of equitable execution over so much of the rents payable by the tenants in occupation of Apartment 5, Apartment 56, Apartment 81, Apartment 140 and Apartment 141, all of which apartments are situate at the apartment development known as The Waterside, Charlotte Quay, Ringsend, Dublin 4, as will be required to satisfy the said judgment in the Dublin Circuit Court on the 16th day of March 2011.
- 2) That a copy of this order be served on the defendants by email and that a copy of this order be served on the defendants' solicitor, Mr. Cunningham, of Suite 212, Capel Building, Mary's Abbey, Dublin 7.
- 3) That a copy of this order be served on the tenants in occupation of Apartment 5, Apartment 56, Apartment 81, Apartment 140 and Apartment 141, at the apartment development situate at The Waterside, Charlotte Quay, Ringsend, Dublin 4.

The appellants' notice of appeal was lodged on 20th December, 2012.

MATTERS AT ISSUE

The appellants submit that the learned Circuit Court Judge erred in appointing Ms. Ryan as receiver by way of equitable execution over the rents due from the various properties. They raise this assertion primarily based on the proposition that a remedy of this type is only properly available in circumstances where the judgment debtor was possessed of an equitable interest in the property over which it is sought that a receiver by way of equitable execution be appointed, rather than legal ownership, as is the case in the within matter.

The appellants further submit that the respondent had not exhausted all means of legal execution at their disposal before proceeding to seek equitable relief, in particular that they had failed to seek examination in aid of execution in the District Court, pursuant to Order 53 of the rules of that court.

The appellants assert that the effect of the Order of the Circuit Court, even had it been granted *intra vires*, was such as to render Ms. Ryan a landlord for the purposes of the Residential Tenancies Act, 2004, as defined in s. 5 thereof. It is submitted that this would entail the imposition of certain statutory duties, which it is argued that Ms. Ryan has showed no intention or ability to perform.

Finally, the appellants submit that the appointment of Ms. Ryan as receiver would have the effect of depriving them of a source of income, violating their constitutional right to earn a livelihood.

By way of response, the respondents submit that the core issue to be considered by the court in exercising its discretion to appoint a receiver by way of equitable execution, pursuant to Order 39 of the Circuit Court Rules 2001 is whether it would be "just and convenient" to do so.

This overarching consideration, it is submitted, may be subdivided into the appraisal of the amount of the debt claimed by the creditor, the amount which is likely to be obtained by the receiver, and the probable cost of the appointment of the receiver.

The respondent further submits that it is incumbent upon a party seeking to appoint a receiver by way of equitable execution to exhaust available legal modes of execution only insofar as is reasonable in the circumstances.

The respondent makes submissions as to the inappropriateness of an Instalment Order under Order 53 of the District Court Rules as a remedy in this case, in particular by reference to purported difficulties encountered with locating, serving and contacting the appellants. It does not seem, however, that the appellants' submissions go any further than to suggest that examination in aid of execution should have been pursued before proceeding to seek receivership by way of equitable execution.

The respondent contends that the registration of a judgment mortgage would have been inappropriate and probably futile in this case, in circumstances where the appellants' properties were already heavily encumbered.

The respondent concludes by submitting that it is settled in this jurisdiction that a receiver may validly be appointed over debts due *in futuro*, in particular those arising from ground rents.

FINDINGS OF LAW

The power of the court to appoint a receiver by way of equitable execution is well established, having been developed by the Courts of Chancery from the 18th century as a supplement to the available remedies at law.

Order 39 Rule 1 of the Circuit Court Rules, 2001 provides as follows:

"In every case in which an application is made for the appointment of a receiver by way of equitable execution the Judge, in determining whether it is just or convenient that such appointment should be made, shall have regard to the amount of the judgment held by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs and expenses of and incidental to his appointment, and may direct any inquiries on these or other matters before making the appointment. The order shall be made upon such terms as to costs and otherwise as the Judge may direct, including the entry into security by the receiver in appropriate cases."

The Court was referred to the decision of the High Court in *O'Connell v. An Bord Pleanála* [2007] IEHC 79, wherein Peart J. approved the approach taken by Colman J. in *Soinco S.A.C.I. v. Novokuznetsk Aluminium Plant* [1998] QB 406, in which, in addressing the meaning of the terms "just and convenient", he stated at page 9 that:-

"The appointment of a receiver by way of equitable execution is a remedy by which equity assists a judgment creditor to secure enforcement of a judgment against the judgment debtor. To appoint such a receiver over such sum as may be recovered by the applicant in her claim for damages, and limited of course to the amount of the judgment debt, including interest, does not do any injustice to the judgment debtor, especially in circumstances where judgment has already been obtained. It is not therefore unjust. I am satisfied that it is convenient to do so, given the inability of the ordinary methods of execution to effect a discharge of the amount due ...

I should add of course that simply because it would be 'convenient' in the broad sense of that word that a judgment creditor would have a receiver appointed, would not justify the Court in appointing a receiver. Any judgment creditor must be expected to exhaust any reasonable method of legal execution before equity could be expected to provide assistance. That is clear from the authorities."

This authority is cited, alongside *Ahern v. O'Brien* [1991] 1 I.R. 421, a case concerning the attachment of ground rents by way of receivership, in support of the proposition that sums recoverable *in futuro* may, in certain circumstances, be subject to receivership by way of equitable execution. This may well be a statable proposition in an appropriate case, but I do not think it assists the respondents in this instance.

In the High Court case of *National Irish Bank v. Graham* [1994] 1 I.R. 215 Keane J. (as he then was), having reviewed the venerable authorities of *In Re Shepherd* (1889) 43 Ch. D. 131, per Fry L.J. and *Holmes v. Millage* [1893] 1 Q.B. 551, per Lindley L.J., quite unambiguously held that:-

"It is clear that the jurisdiction to appoint such a receiver [by way of equitable execution] is confined to cases in which a debtor enjoys an equitable interest in property which cannot be reached by legal process."

More recently, in *Honniball v. Cunningham* [2010] 2 I.R. 1, Laffoy J. interpreted the effect and import of this statement as follows:-

"The defendant's argument was that the foregoing passage is authority for the proposition that the appointment of a receiver by way of equitable execution will not be available where reliefs are available at law to the judgment creditor. The argument was developed on the basis that under the settlement the plaintiff was confined to a particular method of execution and that he had commenced that method by registering the judgment as a judgment mortgage over the premises referred to in the settlement but had not pursued that method by instituting proceedings for a well charging order and an order for sale...

I do not agree that the principle stated by Keane J. in *National Irish Bank Ltd. v. Graham* [1994] 1 I.R. 215 operates against the plaintiff in the manner suggested by the defendant. The principle, as I understand it, is that the court will not appoint a receiver by way of equitable execution over property of which the judgment debtor is the legal owner and which can be the subject of legal process. The facts in *National Irish Bank Ltd. v. Graham* illustrate that point very clearly: the defendants were the legal owners of the milking herd and there was nothing to stop the sheriff seizing the milking herd on foot of the *fi. fa.* The principle is that the equitable remedy is only available where the judgment debtor has only an equitable interest in property against which the judgment creditor seeks recourse."

CONCLUSIONS

A fundamental issue arising in the within appeal is the submission that the assistance of the court in appointing a receiver by way of equitable execution may quite specifically be reserved, per the statement of Keane J. in *National Irish Bank v. Graham*, to those circumstances where the debtor holds an equitable interest in property which is not capable of being attached by the ordinary processes of enforcement at law.

To that extent, the question of whether legal remedies have been exhausted becomes largely subsidiary to the question of the nature of the interest in question, whether equitable or legal. Notwithstanding this consideration, it would appear in any event that the respondent has not exhausted all reasonably available avenues at law in seeking to execute the extant judgment in its favour. While the respondent was undoubtedly experiencing severe difficulties in making contact with the appellants, Order 10 of the District Court Rules, 1997 provides for remedies as to service entirely similar to those in fact sought and obtained of the Circuit Court, which ultimately resulted in the appellants coming before the Court to contest the application in question. In any event there are now no remaining problems in serving the appellants as they are represented at this hearing.

Aside from this, it appears the sum in question is a relatively small one, such as to raise a reasonable apprehension that the effect of appointing a receiver by way of equitable execution over the rents payable would be disproportionately prejudicial towards others holding an interest in the properties in question. It seems to me, therefore, that even had the other requirements been satisfied, the appointment of a receiver could not be deemed "just and convenient" in this case.

It must be noted that a *prima facie* divergence is evident between the conceptual approaches taken to the exercise of the court's jurisdiction to appoint a receiver by way of equitable execution in the authorities cited supra. However, I am satisfied that, on any formulation of the relevant criteria, this is not a suitable case in which to appoint a receiver, and it is therefore unnecessary for present purposes to distinguish between them.

For the foregoing reasons, the Order of the learned Circuit Court Judge will be set aside.