THE HIGH COURT

No. 2014 No. 3057 S

Between:

ALLIED IRISH BANKS PLC

PLAINTIFF

– AND –

PAUL MCGUIGAN, THOMAS MCGUIGAN AND MICHAEL MCGUIGAN

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 14th February, 2018.

I

Background

(i) General.

1. Pursuant to a breach of a loan agreement entered into between AIB plc and the defendants (three brothers), AIB, on 21st December, 2015, obtained a consent judgment against the defendants jointly and severally in the sum of €2.4+m. The order granting judgment stayed its operation for a period of three months from the date thereof. After judgment was entered, negotiations continued between AIB plc and a representative of the defendants in a bid to arrive at an agreed repayment arrangement between the parties, which the defendants naturally hoped would include some 'writing off' of their extant debts. Despite these ongoing negotiations, a feature of which was the proposed sale by two of the defendants of certain apartments in Croatia owned jointly with their spouses, no repayment arrangement satisfactory to AIB was agreed. In fact, even by the time of the hearing of the within application, AIB has received no payment from the defendants since the date of judgment. On 29th May, 2017, following *ex parte* application being made by AIB, a conditional garnishee order nisi was made against the defendants and a named solicitor was appointed receiver by way of equitable execution over certain properties. In the within application, AIB seeks to have the said arrangements made absolute. In the event that the garnishee order absolute was refused by the court (and it must be for the reasons stated hereafter), AIB has made application for the appointment of a receiver by way of equitable execution over certain settlement monies that were previously the subject of the conditional garnishee order.

(ii) Settlement Monies.

2. The defendants and, notably, PTM (Castleblaney) Limited, a company in which each of the three brothers has a one-third shareholding, were engaged in certain litigation against Fowler Construction Limited and CS Pringle Limited. Arising out of that action, settlement monies totalling €850k plus costs was agreed to be paid to the defendants and PTM. So PTM has its own interest in the settlement monies as a plaintiff in the proceedings which settled.

3. Mr David Nolan, an AIB manager, has sworn in affidavit evidence before the court that "[I]*n or around 12th February, 2015, in consideration of the Plaintiff entering into ongoing discussions regarding the Defendants; indebtedness to the Plaintiff, the Defendants' Financial Advisor wrote to the Plaintiff's then Solicitors advising that the net amount of the Settlement Monies had been deposited and that the Defendants undertook not to withdraw these funds until an agreement between the parties had been reached*". As a result of the foregoing, in or around 25th March, 2015, again per Mr Nolan, "*The Defendants, both individually and on behalf of PTM…undertook to transfer €672k* [this, it is accepted by all, ought to have been a reference to €665k] *to their Solicitors' client account and to irrevocably authorise* [the said solicitors]*…to provide an undertaking to hold the balance of the settlement monies. I beg to refer to a copy of the said undertaking*". The letter of undertaking exhibited by Mr Nolan is dated 9th April, 2015, and issued to AIB from Hanley & Lynch, the solicitors for the defendants and PTM. The key portion of the letter of undertaking reads as follows:

> *"As Solicitors for Paul McGuigan, Thomas McGuigan and Michael McGuigan and PTM…we confirm that we have received the sum of €665,000 ('the Settlement Monies') into our client account.*
>
> *We hereby undertake to hold the Settlement Monies to the order of Allied Irish Banks plc ('the Bank') until such time as an agreement is reached by our clients and the Bank in relation to the disposal of the Settlement Monies.*
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> *We confirm that we have our clients' irrevocable authority to provide the above undertaking to the Bank."*

4. There are at least three notable features to the above-quoted undertaking, given on the basis of irrevocable authority:

> (1) any future transfer of the monies by Hanley & Lynch is to be triggered (i) not by a breakdown in the discussions aimed at securing the referenced agreement, but rather (ii) by such agreement being reached;
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> (2) there is no provision as to the contemplated timeframe within which the referenced agreement is to be reached and/or what is to happen in the event that no agreement is reached, the clear intention being that an agreement will be reached (indeed it must be reached if the monies are to be released).
>
> (3) it expressly states Hanley & Lynch to have four clients (the three defendants and PTM), with the undertaking being given on behalf of all of the clients, an irrevocable authority having been reached from each of them.

5. AIB, it is clear from its actions, was satisfied to accept the undertaking, as worded, and to proceed with the mooted discussions. From certain evidence exhibited by Mr Daniel Hanley, a solicitor acting for the defendants, it appears that those discussions (which have now come to an impasse) continued until as recently as September 2016. The impasse arising, Mr Nolan, has averred, *inter alia*, that "*the Plaintiff is concerned that Hanley & Lynch…may be instructed by the Defendants to treat the undertaking as lapsed and to repay the monies to them"*. For the reasons that follow, the court must admit to being rather sceptical as to the reasoning that underpins this averment:

> (1) the letter of undertaking, as quoted above, states that "*We hereby undertake to hold the Settlement Monies to the*

order of Allied Irish Banks plc ('the Bank') until such time as an agreement is reached by our clients and the Bank in relation to the disposal of the Settlement Monies". No agreement has been reached, the undertaking was given on the basis of an irrevocable authority, and the solicitors who gave the undertaking, indicated in an e-mail of 26th May, 2017 (sent just an hour after confirmation was sought) that "*We will of course abide by the terms of our undertaking*", phraseology which makes clear beyond any doubt that 17 months after the judgment of December 2015, the solicitors continued to view their undertaking as extant and not to have lapsed (and as of the date of hearing that remained the position).

(2) on a related note, neither the defendants nor PTM get to tell their solicitor whether and when the undertaking has lapsed. That is fundamentally to misunderstand the nature of a solicitor's undertaking. The undertaking is one given by Hanley & Lynch and it is for them to determine how best to proceed. Yes, they might listen to any views that their clients might offer but it is for Hanley & Lynch alone to determine how best to proceed by reference to their undertaking, and they would of course be subject to disciplinary proceedings if they departed from the undertaking (not that there is the slightest suggestion that they will do so; in fact, the evidence before the court points in completely the opposite direction).

(3) the concern evinced by Mr Nolan for his employer is premised on what seems to the court to be a complete and fundamental misunderstanding by AIB of the agreement into which it entered in the spring of 2015 concerning the settlement monies. Thus AIB's concern is that the impasse between it and the defendants, *i.e*. the failure to reach agreement with the defendants and PTM in relation to the disposal of the settlement monies could lead to a transfer of the settlement monies by Hanley & Lynch. That patently cannot occur. As noted by the court above, any future transfer of the monies by Hanley & Lynch is to be triggered (i) not by a breakdown in the discussions aimed at securing the referenced agreement, but rather (ii) by such agreement being reached.

(4) as to any suggestion that the judgment of December 2015, obtained on consent, ended the agreement as regards the settlement monies, the court does not accept that this is so for the following reasons:

(i) the consent of the defendants to the judgment was a consequence of the ongoing negotiations between the parties, not the end of those negotiations. The court has had correspondence exhibited before it by the defendants showing that as recently as September 2016 ongoing efforts to arrive at a general settlement were continuing. Second, the express terms of the undertaking are entirely clear. The settlement monies are to be held by Hanley & Lynch "*until such time as an agreement is reached by our clients and the Bank in relation to the disposal of the Settlement Monies";*

(ii) an agreement to accept judgment being entered against the defendants does not necessarily equate to "an agreement…in relation to the disposal of the Settlement Monies";

(iii) that the defendants' consent to judgment was not, in the specific circumstances at hand, "*an agreement…in relation to the disposal of the Settlement Monies"* is most clearly evidenced by the fact that on 26th May, 2017, the solicitors for AIB sought (and, on the same day, received) confirmation that the undertaking would be adhered to. That is a request which could not have been made, as a matter of logic, if separate agreement as to the disposal of the settlement monies was understood by AIB as having previously been agreed between the parties (whether in December 2015, when judgment was entered on consent, or otherwise).

(iii) The Apartments in Croatia.

6. Two of the McGuigan brothers own, each jointly with his wife, certain apartments in Croatia which are, it seems, unencumbered. At the time when AIB was drawing up its grounding affidavit for the application now before the court, those apartments were in the process of being sold and the sales proceeds had initially been offered to AIB in partial discharge of its debt. However, Mr Nolan avers, "*In communications with the Defendants' agent…the latter now insists that the Defendants will only release the monies in Hanley & Lynch if the balance of the judgment debt is waived, and I am apprehensive in those circumstances that the Defendants will not pay over the proceeds of sale from the Croatian holiday apartments".*

(iv) Garnishee Order Nisi.

7. A conditional garnishee order in respect of the settlement monies, also known as a 'garnishee order nisi' was obtained by AIB on the usual *ex parte* basis on 29th May, 2017. The application now before the court is, *inter alia*, to make absolute that conditional garnishee order *nisi*. (In passing, the court notes that the word 'garnishee' is no longer part of the English vernacular employed in this jurisdiction, if indeed it ever was. The continuing use of such antiquated terminology undoubtedly renders this aspect of the system of debt enforcement less universally comprehensible than it ought to be. Simply put, a 'garnishee order' is an 'attachment of debts order', somewhat akin to the 'attachment of earnings' order that is a feature of family law).

III

Garnishee Orders

(i) How the Garnishee Process Works.

8. A garnishee order allows a judgment creditor to attach a debt owed by a third party to the judgment debtor. Consequent upon such order, the third party must pay the amount owed to the judgment creditor. A commonly attached debt is the debt owed by the judgment debtor's bank to the judgment debtor under a bank account. Garnishee orders fall to be made under O.45 of the Rules of the Superior Courts (1986), as amended ('RSC'), which in turn appears ultimately to derive its adoption from provision made in the Common Law Procedure Amendment Act (Ireland) 1856. [Order 45, rule 1(1) is the critical rule in this regard and provides, *inter alia*, as follows:

"*The court may, upon the ex parte application of any person who has obtained a judgment or order for the recovery or payment of money…upon affidavit by himself or his solicitor stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order…"*] As touched upon above, applications for a garnishee order fall to be made in two stages:

(i) the *ex parte* stage (done without the judgment debtor present), following which a conditional order (the order *nisi*)

may issue; and

(ii) a second stage, when the court hears from the affected judgment debtor and decides whether or not to make the conditional order absolute.

9. Among the matters to which a judgment creditor must aver in the affidavit evidence supporting its *ex parte* application for a conditional garnishee order are that the debt to be attached does not belong to a third person and that no third person has an interest in it. (Here, notably, PTM has an interest in the debt). The granting of a garnishee order is a discretionary matter. So even where the various necessary averments are made, the judge before whom application is made nonetheless has the power to refuse the relief. Examples of circumstances in which a garnishee order might be refused include but are not limited to where attachment would not leave a judgment debtor enough to support herself and any dependents. (No such hardship has been pleaded here).

10. Following service of a conditional garnishee order on the garnishee, the garnishee may not pay the debt that is the subject of the order to the judgment debtor (or, notably, in discharge of the garnishee's own liability to the judgment creditor), absent further court order. The conditional order neither creates a new debt nor effects an assignment of debt to the judgment creditor; the debt remains the property of the judgment debtor and is subject to such rights as exist in respect of same. Not all debts can be attached. Perhaps the best known limitation presenting in this last regard is that recently noted by Hanna J. in *Ballinrobe Credit Union Ltd v. O'Neill* [2016] IEHC 230 (drawing on the long-standing decision in *Webb v. Stenton* (1883) 11 QBD 518) that the debt which it is sought to garnish "*must be due to the judgment debtor from the third party and the debt needs to be payable at the time of the application for the garnishee order or become payable in future by reason of a present obligation*." In *Webb*, Brett M.R., in the Court of Appeal, put matters as follows, at 522-3:

> "[N]*o order can be made unless some person at the time the order is made is indebted to the judgment debtor. If there be a person so indebted, then the order will be that all debts owing or accruing from such person to the judgment debtor shall be attached. If there is a debt due payable in presenti [at the present time], of course an order may be made to attach that debt. If there is not a debt payable in presenti, but there is a debt in existence, debitum in presenti, but payable in futuro [in the future], it seems to me that such an order could be made with regard to that debt, although it be the only debt and there is no debt payable in presenti, because such third person is indebted to the judgment debtor."*

(ii) Difficulties Presenting for AIB.

11. At least three difficulties present for AIB in terms of having its conditional garnishee order made absolute:

(1) PTM has an interest in the debt which it is sought to garnish. PTM is not a party to the within proceedings and obviously has not been heard as a result. It does not suffice for AIB to contend that PTM is in truth the McGuigan brothers in a different guise. The court has no knowledge of the affairs of PTM but one issue that immediately springs to mind is why should its creditors, without even being heard, see monies in which PTM has an interest garnished to the benefit of AIB?

(2) on a related note, although the solicitor account-holding details have not been provided to the court, assuming Hanley & Lynch are acting in compliance with their legal and regulatory obligations as solicitors, the settlement monies are presently being held in a single account that features the word 'client' in its name. Though this is not a joint account, the same difficulties would appear to present in this context as have traditionally been found to present where garnishment is sought of a joint account and one of the joint-account-holders (here one of the clients) is not a judgment debtor.

(3) even if the court assumes for a moment that PTM does not exist (and it does exist), the potentially perpetual nature of the undertaking coupled with the related irrevocable authority has the effect that the settlement monies currently held by Hanley & Lynch cannot, it seems to the court, properly be described as a debt now payable by them to the judgment debtors or as a debt which will necessarily become payable to the judgment debtors by reason of a present obligation.

12. For the reasons aforesaid, the court declines to make absolute the conditional garnishee order previously obtained by AIB.

IV

Receiver by Way of Equitable Execution

(i) How Receivership by Way of Equitable Execution Works.

13. Equitable execution is an enforcement method granted to a judgment creditor where the ordinary methods of execution are unavailable or likely to be ineffective due to the nature of the assets of the debtor available to satisfy the judgment. It is not a method of execution, but a form of discretionary equitable relief available for the purposes of enforcing a judgment. The power to appoint a receiver by way of equitable execution is a power originating from the Courts of Equity, with the procedural rules applicable to this Court now contained in O.45, r.9, RSC. The power is based ultimately on the equitable maxim that 'equity will not suffer a wrong to be without a remedy', *i.e.* that equity will intervene to protect a recognised right which for some reason is not enforceable at law. All of the foregoing has the consequence that before a judgment creditor may obtain an order for equitable execution, s/he or it is expected to exhaust any reasonable method of legal execution. If a means of execution is available at law through, e.g. the seizure and sale of a debtor's goods, equitable execution will not be permitted.

14. In passing, the court notes that in her contentions before the court, counsel for AIB repeatedly submitted that the test for the appointment of a receiver by way of equitable execution is whether it is 'just or convenient' to make such appointment. That, with respect, is not entirely correct. All of the various requirements for the appointment of a receiver by way of equitable execution must be satisfied; the 'just or equitable' test referred to in O.45, r.9 is a test that falls to be applied *in addition* to the various other requirements which exist as regards the appointment of a receiver by way of equitable execution. Moreover, the court notes that the 'just and equitable' test contained in O.45, r.9, requires the court to have regard ("*the court…shall gave regard*") to "[i] *the amount of the debt claimed by the applicant,* [ii] *to the amount which may probably be obtained by the receiver, and* [iii] *to the probable costs of his appointment, and may, if it shall so think fit, direct any inquiries on these or other matters before making the appointment".* Strikingly, there is no reference in the affidavit evidence put before the court by AIB to either items [ii] or [iii], nor was there any mention of same made in the submissions to the court.

(ii) The Properties in Croatia.

15. When it comes to the properties in Croatia, there is no evidence before the court to suggest that (i) any method of execution has previously sought to be invoked by AIB either here or in Croatia in respect of the Croatian properties, or (ii) the ordinary methods of execution here or in Croatia are likely to be ineffective. All that presents is that in the course of debt resolution negotiations, AIB has learned of some foreign assets that are part-owned by the judgment debtors and, understandably, wants to get its hands on the proceeds of sale of same, to the extent that it can do so at law. Mr Nolan avers as follows in this regard:

> *"16. I further say that Paul McGuigan and his wife…own two apartments…* [in] *Croatia* [property details given]….*Thomas McGuigan and his wife…own one apartment*…[in] *Croatia* [property details given]….*I believe these assets are unencumbered and are currently in the process of being sold. Heretofore the proceeds of sale had been offered to the Plaintiff in partial discharge of the debt.*
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> *17. In communications with the Defendants' agent over recovery the latter now insists that the Defendants will only release the monies in Hanley & Lynch if the balance of the judgment debt is waived, and I am apprehensive in those circumstances that the Defendants will not pass over the proceeds of sale from the Croatian holiday apartments. In the circumstances, I respectfully request the Court to appoint* [a named solicitor]*…as a receiver by way of equitable execution over the proceeds of sale of the properties, in part satisfaction of the judgment debt owed to the Plaintiff."*

16. At least three problems present for AIB in this regard.

> (1) as mentioned, there is no evidence before the court to suggest that any method of execution has previously sought to be invoked by AIB either here or in Croatia.
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> (2) as mentioned, there is no evidence before the court to suggest that the ordinary methods of execution here or in Croatia are likely to be ineffective.
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> (3) these are proceedings against the three McGuigan brothers. Ms Marlene McGuigan (the wife of Mr Paul McGuigan) and Ms Ursula McGuigan (the wife of Mr Thomas McGuigan) are not party to the within proceedings, and are not among the judgment debtors, but are the joint owners of the apartments in Croatia. Clearly, the court in the invocation of its equitable jurisdiction cannot thereby perpetrate a wrong on either of Ms Marlene and Ms Ursula McGuigan; that is an aspect of matters which the court will address in the manner identified later below.

17. Notwithstanding the first and second points above, the court is mindful that (i) since obtaining its judgment in December 2015, AIB has not been paid a cent by the judgment debtors, (ii) if the Croatian properties are sold (it is not clear from the evidence before the court whether they have been sold since Mr Nolan swore his affidavit), the sales proceeds are highly susceptible to dissipation, (iii) in exceptional circumstances, an order may be made appointing a receiver by way of equitable execution *e.g.*, where such order will prevent a judgment debtor from making away with property that is liable to execution. Having regard to item (iii), the court considers item (ii) to be an exceptional circumstance that justifies the appointment of a receiver by way of equitable execution over the proceeds of sale of the Croatian properties, notwithstanding the presence of such other factors as the court has considered above. However, under O.45, r.9, RSC, such order may be made "*upon such terms as the court may direct*". The court will make its order subject to the following terms:

> (A) the continuing effect of the order will be subject to (i) AIB, within two weeks of this judgment providing the court with affidavit evidence as to (a) the amount/s which will probably be obtained by the receiver, and (b) the probable costs of the receiver's appointment, (ii) the court being satisfied (and it may or may not be satisfied) to continue the order following receipt of the evidence referred to at (i);
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> (B) the granting of the order is conditional upon AIB undertaking to pay 50% of any proceeds of sale of any of the Croatian properties to each of Ms Marlene and Ms Ursula McGuigan, as appropriate, depending on which woman has or had the joint interest in such Croatian property as is or has been sold.

18. As an alternative to (A), AIB may elect, should it prefer, simply to absorb the costs of the receivership onto itself.

(iii) Receiver by Way of Equitable Execution over the Settlement Monies.

19. Though it was not an order specifically sought at the *ex parte* stage, counsel for AIB submitted to the court that in the event that the garnishee order absolute was refused by the court (as it will be for the reasons stated previously above), AIB wished to apply for a receiver by way of equitable execution over the settlement monies held by Hanley & Lynch, Solicitors, subject to their undertaking. At least five difficulties present as regards making this order:

> (1) in March 2015, AIB bound itself into a situation where the settlement monies would be held by Hanley & Lynch "*to the order of Allied Irish Banks plc ('the Bank') until such time as an agreement is reached by our clients and the Bank in relation to the disposal of the Settlement Monies*." As the court noted previously above, a notable feature of the undertaking, given on the basis of irrevocable authority, is the absence of any provision as to the contemplated timeframe within which the referenced agreement is to be reached and/or what is to happen in the event that no agreement is reached, the clear intention being that an agreement will be reached (indeed it must be reached if the monies are to be released). But that is the arrangement to which AIB, a well-resourced entity with access to the best legal advice, freely and fully agreed. The parties have proceeded in accordance with the agreement reached in March 2015; and the court does not, for the reasons stated previously above, accept that the judgment of December 2015 or anything else that has occurred either ended that agreement or resulted in the undertaking, given by Hanley & Lynch in April 2015, terminating or otherwise lapsing.
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> (2) on a related note and as mentioned previously above, the power to appoint a receiver by means of equitable execution is based ultimately on the equitable maxim that 'equity will not suffer a wrong to be without a remedy'. But there is no 'wrong' here to be remedied: AIB freely bound itself into the arrangement as regards the settlement monies. Equity is not a tool for the frustration of continuing agreements with which a party thereto has freely bound itself, but since wearied, and now wishes otherwise to proceed.
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> (3) the nature of the undertaking has the result that there is nothing for the receiver to receive. By virtue of the undertaking, the monies will continue to sit in the Hanley & Lynch account until agreement is reached between AIB and the defendants. It may be that the defendants have AIB, to borrow a colloquialism, somewhat 'over the barrel' in this regard, but that is the arrangement to which AIB has freely bound itself.

(4) exceptional circumstances in the form of a risk of the settlement monies being dissipated do not present. Hanley & Lynch are a regulated firm of solicitors, their undertaking was given on the basis of an irrevocable authority, and they have confirmed that they will comply with that undertaking.

(5) PTM has an interest in the settlement monies. AIB, through Mr Nolan, complains that Mr Hanley, in the affidavit sworn by him in the context of the within application "*does not in any way address…what the extent of that interest is*". But this is not an application by Hanley & Lynch or the defendants. It is an application by AIB that the court should exercise its equitable jurisdiction in a manner which would appear ostensibly to be to the detriment of PTM, yet in all of its averments and submissions, AIB never once addresses how this difficulty ought properly to be addressed, if it can properly be addressed, without hearing from PTM (in proceedings to which PTM is not party).

V

'Clean Hands'

20. Counsel for the defendants contended at hearing, by reference to the equitable maxim that 'He who comes to equity must come with clean hands', that AIB has rendered itself ineligible for any equitable relief by virtue of the manner in which it has conducted itself *vis-à-vis* the defendants. As Professor Biehler notes in Equity and the Law of Trusts in Ireland, 6th ed., 21, the just-mentioned equitable maxim "*reflects the discretionary nature of equity and requires that a person seeking equitable relief must refrain from fraud, misrepresentation or any other form of dishonest or disreputable conduct if he wishes to be granted a remedy*". There is no evidence before the court to suggest that AIB has engaged in any conduct that is, or is akin to, the type of conduct referenced by Professor Biehler. AIB has undoubtedly sought robustly to advance and protect its interests in accordance with applicable law, but there is nothing dishonest, disreputable or otherwise improper in that.

VI

Conclusion

21. For the reasons stated above:

(1) the court will not make absolute the conditional garnishee order granted on 29th May, 2017;

(2) subject to the terms identified above, the court will make an order pursuant to O.45, r.9, RSC, appointing the solicitor named in the *ex parte* docket as a receiver by way of equitable execution over the proceeds of sale of the Croatian properties;

(3) the court will not make an order appointing a receiver by way of equitable execution of the settlement monies held by Hanley & Lynch, Solicitors, pursuant to their undertaking of 9th April, 2015.