

THE HIGH COURT

[2013 No. 121 COS]

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 148(1) NATIONAL ASSET MANAGEMENT AGENCY ACT 2009 AND
SECTION 316 OF THE COMPANIES ACT, 1963**

AND

IN THE MATTER OF JOHN F. RONAN, JOHN FRAHER, RICHARD PRATT AND SEAN WHITE

AND

IN THE MATTER OF DECLAN TAITE, RECEIVER

Judgment of Ms. Justice Laffoy delivered on 15th day of August, 2013.

Background

1. By two separate deeds of appointment of statutory receiver dated 18th September, 2012 made by National Asset Management Agency (NAMA) in favour of Declan Taite (the Receiver), the Receiver was appointed pursuant to the powers contained in s. 147 of National Asset Management Agency Act 2009 (the Act of 2009) to be a statutory receiver over the assets comprised in and charged by two separate security documents, namely:

(a) a mortgage dated 27th February, 2003 made between Richard Pratt, John Fraher and John F. Ronan of the one part and Allied Irish Banks plc (the Bank) of the other part, which was an "all sums" mortgage, and which created a security over the property now known as Poppyfield Retail Park, Clonmel, County Tipperary (Poppyfield); and

(b) a mortgage dated 22nd July, 2005 made between Mr. Ronan, Mr. Fraher, Mr. Pratt and Sean White of the one part and the Bank of the other part, which was also an "all sums" mortgage and which created security over the property now known as West City Retail Park, Ballincollig, County Cork (West City).

Prior to the appointment of the Receiver as statutory receiver in relation to each property, National Asset Loan Management Limited (NALM) had acquired pursuant to the Act of 2009 –

(i) the indebtedness and other obligations owing by Mr. Pratt, Mr. Fraher and Mr. Ronan (the Poppyfield Borrowers) to the Bank and secured by the mortgage dated 27th February, 2003 (the Poppyfield Mortgage), and

(ii) the indebtedness and other obligations owing by Mr. Ronan, Mr. Fraher, Mr. Pratt and Mr. White (the West City Borrowers) to the Bank and secured by the mortgage dated 22nd July, 2005 (the West City Mortgage).

2. The liability of the Poppyfield Borrowers to NALM, as successor in title of the Bank, is governed by the terms of a letter of sanction dated 6th July, 2010 issued by the Bank and accepted by the Poppyfield Borrowers, which sanctioned one facility (the Poppyfield Facility). The amount sanctioned was €24.5m, its purpose being the continuation of the loan facility relating to financing the retail development at Poppyfield. In relation to repayment it was provided:

"Full Net Rental Income to be applied quarterly to meet interest and/or reduce level overall debt. Facility to be repaid in full/re-financed on or before 8th December, 2010."

Recourse was stated to be "Nil". The security stipulated was the Poppyfield Mortgage.

3. The West City Borrowers' liability to NALM, as successor in title of the Bank, is governed by the terms of another letter of sanction dated 6th July, 2010 issued by the Bank and accepted by the West City Borrowers, which sanctioned two facilities, namely:

(a) a facility (Facility 1) in an amount in excess of €16.7m, the purpose of which was expressed to be a continuation of loan facility originally sanctioned to fund the purchase, development and associated costs and equity release on the commercial site developed at West City; and

(b) a facility (Facility 2) in an amount in excess of €1.8m, the purpose of which was expressed to be a continuation of loan facility originally sanctioned "to refund promoters for costs incurred in the development of" West City.

In relation to each facility there was a repayment provision in precisely the same terms as the repayment provision quoted at para. 2 above. As regards recourse, it was provided:

(i) in respect of Facility 1, the Bank would continue to have several recourse to the West City Borrowers in the amounts following:

Mr. Ronan – €1.35m,

Mr. Fraher – €1.35m,

Mr. Pratt – €1.35m,

Mr. White – €0.45m

(ii) in respect of Facility 2, the Bank would continue to have joint and several recourse to each of the West City Borrowers for the amount of the debt.

The security stipulated was the West City Mortgage and also, but in respect of Facility 2, only the Poppyfield Mortgage.

The application

4. The application before the Court, which was initiated by an originating notice of motion issued on 15th March, 2013, is an application by the Receiver for directions pursuant to s. 316(1) of the Companies Act 1963 (the Act of 1963). By virtue of s. 148(1) of the Act of 2009, the Receiver has the powers, rights and obligations that a receiver has under the Companies Acts. He has also the powers, rights and obligations specified in Schedule 1 to the Act of 2009, to which I will return. Mr. Ronan, Mr. Pratt, Mr. Fraher and Mr. White are notice parties on the application.

5. The issues in respect of which the Receiver has sought directions have arisen out of the engagement of the Receiver with the Poppyfield Borrowers and the West City Borrowers and various solicitors acting for members of each class since his appointment.

6. The genesis of the first issue, which, broadly speaking, relates to the appropriation of receivables by the Receiver to the various loan accounts which represent the loan facilities outlined earlier, appears to be a letter dated 8th October, 2012 from P. J. O'Driscoll & Sons, Solicitors, acting for Mr. Ronan and Mr. Pratt to NAMA. The letter addressed the order in which it was contended the Receiver should apply the monies he would receive in the future in discharge of the West City Borrowers' liability. In that letter it was stated that it was clear that, acting on the West City Borrowers' pre-existing request, the Bank had agreed to credit incoming payments against Facility 2 on the basis that, after it had been repaid, the monies would be applied in reduction of Facility 1. It was also asserted that the law as to appropriation of payments as far as it concerns bankers is that "the person paying the money has the primary right to say to what account it shall be appointed" (citing *Deeley v. Lloyds Bank plc* [1912] AC 756; and also *Johnson on Banking and Security Law in Ireland* for the proposition that the principle in the *Deeley* case is confirmed in Irish law). It was stated that the purpose of the letter was to confirm that "the indication already in place that Facility 2 is to be repaid first remains in place for all future monies to be received".

7. In response to the contention in that letter that there was agreement that incoming payments in relation to West City would be credited first against Facility 2, the Receiver has exhibited a letter dated 7th March, 2013 from the Bank to NAMA in which it is stated that in September 2010 the West City Borrowers had made what is described as "an out of course" lodgment of €600,000 in reduction of Facility 2. It was stated that, while the Bank had agreed to a request that the lodgment of €600,000 would be applied in reduction of the West City Borrowers joint and several liability on foot of Facility 2, it was never agreed that the repayment in question would either vary the overall terms of the facility agreement dated 6th July, 2010 or the loan repayment provisions otherwise provided for in that facility agreement. The arrangement was referred to as "a one off arrangement".

8. As regards the first issue, the Receiver has averred in his grounding affidavit on this application that he had discussions with the legal representative of Mr. White, whom I understand to be Daniel Spring & Co., Solicitors, who maintained that the West City Borrowers are entitled to direct the application of all monies receivable after his appointment as statutory receiver to discharging Facility 2 first and that only after Facility 2 had been paid off should any receivables be used to pay down Facility 1.

9. The second issue on which the Receiver seeks directions is his entitlement to receive arrears of rent which had accrued in respect of Units at Poppyfield and West City prior to his appointment. The Receiver has averred that he had discussions with the legal representative of Mr. Ronan, namely, P. J. O'Driscoll & Sons, who asserted that the Poppyfield Borrowers and the West City Borrowers were entitled to all rents arising prior to his appointment.

10. A further aspect of the second issue, which will be treated as the third issue in this judgment, was raised in a letter dated 14th February, 2013 from P. J. O'Driscoll & Sons to the Receiver and it related to arrears of service charge held by a company, West City Estate Managers Limited (the Management Company), which had been formed by the West City Borrowers. P. J. O'Driscoll & Sons stated in that letter that the Management Company had been in existence from the outset and at no time were service charges administered or collected by the West City Borrowers. The Management Company procured and rendered services including contracting with service providers for the delivery of the services. The Management Company billed the tenants for the services so procured and rendered. They then made the following assertion:

"On the basis that the Management Company operated legally as a separate entity providing services for which it was entitled to be paid and on the basis that the Management Company is not a party to any charge entered into with the Bank I am satisfied that the statutory receiver has no entitlement to the funds of the Management Company or the service charges either collected by it or invoiced by it."

Issues

11. The issues on which the Court has been requested by the Receiver to give directions are formulated as follows in the Receiver's grounding affidavit:

(i) whether the application of the income received from and the possible proceeds of sale of the charged assets secured by the Poppyfield Mortgage and the West City Mortgage should be applied as determined by the Poppyfield Borrowers and the West City Borrowers (in which case the receivables in respect of West City would be applied towards the discharge of Facility 2 in the first instance) or whether the Receiver is entitled to apply the same in accordance with the best interests of NALM; and

(ii) the extent to which the Receiver is entitled to or empowered to recover arrears of rent and service charges (and, if applicable, damages for breach of contract) from the tenants of properties in both Poppyfield and West City relating to the periods before and after his appointments and his entitlement to apply such receivables in accordance with the requirements of NALM; and

(iii) as an extension to issue (ii), the extent to which the Receiver is entitled to the funds within the control of the Management Company and his entitlement to apply such funds in accordance with the best interests of NALM.

The evidence before the Court

12. The application is grounded on the affidavit of the Receiver sworn on 14th March, 2013.

13. Only one of the respondents on the application, that is to say, Mr. Fraher, filed an affidavit in response to the application. His first affidavit was sworn on 8th May, 2013 and filed by his Solicitors, AMOSS. Most of that affidavit addresses an issue raised by Mr.

Fraher which is of no relevance whatsoever to the issues the Court has to determine. As regards the issues on which the Receiver has sought directions, Mr. Fraher's position as disclosed in that affidavit and in a subsequent affidavit sworn by him on 23rd July, 2013, is as follows:

- (a) he considers that the Receiver is entitled to, and obliged to, collect the arrears of rent due to the Poppyfield Borrowers and the West City Borrowers at the date of his appointment and thereafter;
- (b) the Receiver "should only/should first use" the income from Poppyfield in respect of the liabilities of the Poppyfield Borrowers and the West City income in respect of the liabilities of the West City Borrowers; and
- (c) as NALM has obtained judgment against him in an amount in excess of €5.5m, and as he has petitioned for bankruptcy in the United Kingdom, it makes no material difference to him how the income and sale proceeds of West City is applied by the Receiver.

The hearing of the application

14. At the commencement of the hearing of the application on 26th July, 2013, counsel for the Receiver informed the Court that he had been made aware by counsel instructed for P. J. O'Driscoll & Sons on behalf of Mr. Ronan and Mr. Pratt that Mr. Ronan and Mr. Pratt, on whose behalf there was no appearance, were not objecting to the application. He also informed the Court that he had also been made aware that Daniel Spring & Co., who had represented Mr. White, were consenting to the orders the Receiver is seeking.

15. Mr. Fraher was represented at the hearing by a solicitor from AMOSS., who made submissions on his behalf, which were somewhat at variance with the position as outlined in Mr. Fraher's affidavit. It was submitted on behalf of Mr. Fraher that the income generated from Poppyfield should first be used to pay down the Poppyfield Borrowers' liability in respect of the Poppyfield Facility and any surplus may be used to pay down the West City Borrowers' liability, as I understand the submission, in respect of Facility 2. As regards the application of the income from West City, it should be used to discharge Facility 2 first and, when Facility 2 has been fully discharged, then in discharge of Facility 1. Alternatively, the income should be split on a fifty/fifty basis between Facility 1 and Facility 2, which would be the fairest approach. It was acknowledged that the Receiver can receive the arrears of rent which accrued before he was appointed. As regards the service charge, it was submitted that, while the Management Company holds about €100,000, not all of the services had been provided to the tenants. There is no evidence of that factual matter before the Court and, in any event, it is difficult to see on what basis the solicitors for Mr. Fraher are entitled to speak for the tenants in West City.

Conclusion on the first issue

16. In my view, the application of the income and possible proceeds of sale from Poppyfield and West City is to a large extent governed by the contractual terms entered into –

- (a) by the Poppyfield Borrowers and the Bank, and
- (b) the West City Borrowers and the Bank,

as evidenced by the two letters of sanction of 6th July, 2010, the contents of which have been outlined above. Acceptance of the terms and conditions endorsed on each letter of sanction was signed by the relevant borrowers on 9th September, 2010. While the chronological order of acceptance of the terms and conditions in each letter of sanction has not been deposed to, I think it is reasonable to infer that it was intended that the contractual terms in relation to Poppyfield would be prior in time to the contractual terms in relation to West City.

17. As I understand it, there is no controversy in relation to the appropriate allocation of the receivables from Poppyfield. In any event, I consider that the income, and in the event of a sale, the proceeds of sale of Poppyfield must be applied first in discharge of the Poppyfield Borrowers' liability to NALM in respect of the Poppyfield Facility. Once that liability is discharged, any surplus income and proceeds may be applied to the discharge of the West City Borrowers' liability on foot of Facility 2, which liability is also secured on Poppyfield.

18. In essence, the controversy giving rise to the first issue centres on whether it is the West City Borrowers or NALM, as the successor in title of the Bank, that has entitlement to appropriate the income from and, in the event of a sale, the proceeds of sale of West City to Facility 1 or Facility 2 in relation to West City. While the relevant letter of sanction makes it clear that the full net rental income from West City is to be applied in discharge of Facility 1 and Facility 2, it does not expressly stipulate how the income is to be appropriated between the two loan accounts, which now represent Facility 1 and Facility 2. Therefore, one must fall back on the general law. The significant factor, in my view, is that NALM is a secured creditor with security over West City for two debts on two loan accounts and the Receiver is a receiver over the secured assets.

19. Historically, the question whether a secured creditor in that position could appropriate income or proceeds of sale to either debt has usually arisen in the context of the bankruptcy or liquidation of the debtor. The historical approach was explained by Plowman J. in *Re William Hall (Contractors), Ltd.* [1967] 2 All ER 1150, where he quoted (at p. 1158) the following passage from the judgment of Sir James Bacon C.J. in *Re Foster, Ex p. Dickin* (1875) L.R. 20 Eq. 767:

"The case is not incumbered with any sort of difficulty. Nothing is more clear than the law upon this subject, that a creditor who has a security which he has a right to apply to one or other of two debts due to him, can exercise that right in any way he thinks fit."

Plowman J. cited that case for that statement of general principle and he put it in context by quoting from the headnote, which was as follows:

"A creditor of two partners was also a creditor of one of the partners separately and the title deeds of separate estate of that partner were deposited with him to secure both the joint and separate debts. The two partners filed a joint liquidation petition, and the partner whose separate estate was mortgaged also filed a separate liquidation petition. The security having been realised: Held, that the creditor was entitled to apportion the produce of the realisation between the joint and separate debts in whatever way was most for his advantage, and that, to enable him to exercise this option, he was entitled to apply to the court, under s. 104 of the Bankruptcy Act, 1869, to have a dividend on the joint estate declared before the declaration of a dividend on the separate estate."

20. As regards the income, and any proceeds of sale, of West City, in my view, the Receiver is entitled to apply the same to the discharge of Facility 1 and Facility 2 in whatever order he considers to be in the best interests of NALM, in respect of which, no doubt, he will be guided by NALM. In particular, the West City Borrowers have no entitlement to require the Receiver to apply the receivables from West City to Facility 2 first, so as to limit their personal exposure for the debts due to NALM.

Conclusion on the second issue

21. It is clear, as a matter of law, that a receiver is entitled to arrears of rent out of the assets over which he is appointed which have accrued prior to his appointment, but which are unpaid. Counsel for the Receiver referred the Court to the following passage from Picarda on *The Law Relating to Receivers, Managers and Administrators* (4th Ed.) at p. 444:

"A receiver of rents is entitled to all arrears of rent unpaid when the order appointing him is made, and the tenant will be ordered to pay those arrears even though the tenant has not attorned to the receiver."

All of the authorities cited by Picarda for the foregoing proposition bear it out. The most recent of the authorities is an Irish authority: *Crawford v. Annaly* (1891) 27 LR Ir. 523. There, Porter M.R. stated (at p. 529):

"... it is a principle of this Court, recognised in the case of *Hollier v. Hedges*, that a receiver is entitled to collect and receive all arrears, subject of course to the limitation, that they are arrears of rent belonging to the estate over which he is appointed."

22. In this case, the arrears of rent do belong to the estate over which the Receiver is appointed: they belong to the Poppyfield Borrowers and the West City Borrowers subject to NALM's mortgages. Therefore, the Receiver is entitled to the arrears of rent. Further, the Receiver is entitled to apply the arrears of rent in the same manner as he is entitled to apply the rents which have accrued since his appointments.

Conclusion on the third issue

23. The Receiver has formulated this issue as an extension of the second issue. However, the arrears of service charge are not necessarily in the same position as the arrears of rent.

24. Under Schedule 1 to the Act of 2009, a Statutory Receiver appointed by NAMA is given very extensive powers. For instance, under paragraph 34 he is given "power to exercise in relation to a secured asset all the rights, powers and authorities that he or she could exercise if he or she were the absolute beneficial owner of the secured asset". In order to determine the status of the arrears of service charge, it is necessary to consider the provisions in relation to service charge in the leases of units in Poppyfield and West City.

25. The Receiver has exhibited a copy of the draft lease annexed to an agreement for lease dated 25th July, 2005 made between the West City Borrowers of the first part, 4 Home Limited of the second part, and Dairygold Co-Operative Society Limited of the third part, from which it is clear that the Management Company was not intended to be a party to a lease of a unit in West City. Therefore, the obligations and rights in relation to the provision of services and the payment of the service charge were intended to arise as between the West City Borrowers, as landlords, and 4 Home Limited, as tenant, directly.

26. In the draft lease, in Clause 3.1, the tenant covenants with the landlord to pay, *inter alia*, the Service Charge, which is defined in the definitions clause as meaning the annual proportion of the Service Costs properly attributable to the demised unit, which proportion is based, in broad terms, on floor area of the demised unit vis-à-vis the aggregate floor areas of all the demised units. The expression Service Costs is defined as meaning the aggregate of all costs, expenditure and outgoings reasonably and properly incurred by the landlord in complying with its obligations under Clause 4.3 of the lease and the items set out in the Fourth Schedule. Clause 4.3 is a covenant by the landlord, subject to the payment by the tenant of the Service Charge, at all times to provide the services, which are outlined in the Fourth Schedule. In other words, the Service Charge paid by the tenant is intended to represent payment by the tenant for its share of the costs of providing the services. Even if the Receiver was the "absolute beneficial owner" of West City and he had collected the service charges now held by the Management Company, his entitlement to deal with the monies representing those service charges would turn on his liability to 4 Home Limited and the other tenants of units in West City.

27. On the basis of the evidence available, it is not possible to express a view on what calls, if any, the tenants of units in West City have in respect of the monies held by the Management Company. Accordingly, while the Receiver stands in the shoes of the West City Borrowers and, as such, should take control of the monies in the name of the Management Company, which represent service charges collected from the tenants in West City, in my view, he is not entitled to treat that money in the same way as he is entitled to treat the arrears of rent or to use it in the best interests of NALM, as he asserts. The money representing the arrears of service charges held by the Management Company should be paid to the Receiver and should be lodged to a separate account pending an inquiry by or on behalf of the Receiver as to what claims the tenants of units in West City have in respect of that money. It is also possible that the Management Company, as a separate corporate entity, may have discharged its obligations to the tenants out of its own funds and that it has a claim to be the beneficial owner of all or part of that money. To the extent that it is so established, the Management Company would be entitled to that money. Until such time as all claims against the money representing the arrears of service charge are dealt with, it must be "ring fenced" by the Receiver and may not be made available to NALM. Indeed, the probability is that NALM will never have an entitlement to it.

Order

28. The Court will make an order giving the following directions:

(a) that the Receiver appropriate –

(i) the receivables from Poppyfield first in discharge of the Poppyfield Borrowers' liability to NALM under the Poppyfield Mortgage in respect of the Poppyfield Facility and thereafter in discharge of the West City Borrowers' liability to NALM in respect of Facility 2,

(ii) the receivables from West City in discharge of the West City Borrowers' liability to NALM under the West City Mortgage in respect of Facility 1 and Facility 2 in such manner as the Receiver considers to be in the best interests of NALM;

(b) that the Receiver is entitled to recover the arrears of rent from the tenants in Poppyfield and in West City and appropriate the same in the manner set out at (a) above; and

(c) the arrears of service charge paid by the tenants of West City, including any arrears of service charge held by the Management Company in respect of West City, must be applied in discharge of the obligations of the West City Borrowers to the tenants of West City or any other existing obligations.

If necessary, when the factual position in relation to the service charges is ascertained, the Court will give further directions in relation to the arrears of service charges and the monies held by the Management Company.